RENDERED: APRIL 5, 2019; 10:00 A.M.
NOT TO BE PUBLISHED

# Commonwealth of Kentucky

# Court of Appeals

NO. 2017-CA-000630-MR

ALLEN NEIL BLANKENSHIP — APPELLANT

v.

APPEAL FROM RUSSELL CIRCUIT COURT
HONORABLE VERNON MINIARD, JR., JUDGE
ACTION NO. 14-CR-00064

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING IN PART, REVERSING IN PART, AND REMADNING

** ** ** ** **

BEFORE: ACREE, JONES, AND K. THOMPSON, JUDGES.

JONES, JUDGE: Allen Neil Blankenship brings this appeal from an order of the Russell Circuit Court finding him guilty of manufacturing methamphetamine and sentencing him to ten years' imprisonment. Following review of the record and applicable law, we affirm in part, reverse in part, and remand for a new trial.

## I. BACKGROUND

On the early evening of March 19, 2014, retired Russell County Sheriff Larry Bennett observed Blankenship, one of Bennett's neighbors, engaging in erratic behavior in his yard. Concerned by Blankenship's behavior, Bennett called Deputy Nick Bertram on his cellphone and requested that Bertram stop by Blankenship's home to conduct a wellness check. Upon arriving at Blankenship's home, Bertram spoke with Blankenship and concluded that he was not in need of any medical assistance. During their conversation, however, Bertram noted a strong chemical odor inside Blankenship's home, which he recognized as characteristic of a methamphetamine lab, and observed that Blankenship's behavior was consistent with what he recognized as signs of being under the influence of methamphetamine. After receiving Blankenship's written consent to search the premises, Bertram searched Blankenship's home, and a one-step methamphetamine lab was discovered. Blankenship was arrested, and, on July 16, 2014, a Russell County Grand Jury issued an indictment charging Blankenship with one count of manufacturing methamphetamine. Blankenship pleaded not guilty to the charge.

Following numerous continuances and changes in Blankenship's trial counsel, a jury trial commenced on February 15, 2017. Following presentation of all evidence, the jury returned a verdict finding Blankenship guilty of

manufacturing methamphetamine and recommended a sentence of ten years' imprisonment. On March 28, 2017, the trial court entered a final judgment on trial verdict, which adopted the recommendations of the jury. Blankenship then appealed his conviction to this Court. Additional facts will be developed as necessary.

## II. ANALYSIS

On appeal, Blankenship asserts the following counts of error: that the trial court erred in permitting Bertram to testify by deposition, rather than by live testimony; that the way in which the cross-examination portion of Bertram's videotaped deposition was played to the jury violated his right to confrontation; that the trial court erred in allowing a computer aided dispatch ("CAD") report to be introduced as a business record; that the trial court erred in excluding evidence of Bertram's prior mishandling of evidence; that the trial court erred in failing to strike two jurors for cause; and that the trial court erred in failing to instruct the jury on possession of drug paraphernalia, which Blankenship contends is a lesser-included offense of manufacturing methamphetamine. We address each argument in turn.

### A. Use of Deposition Testimony at Trial

In the interim between Blankenship's arrest and the jury trial, Bertram left his job with the Russell County Sheriff's Department. In November of 2016,

the Commonwealth moved the trial court for an order allowing it to take Bertram's deposition for use at trial. In support of that motion, the Commonwealth stated that Bertram was currently undergoing mandatory training in North Carolina for his new job. The Commonwealth believed that Bertram, who was a material witness for the Commonwealth's case, would be unavailable to testify at trial as he was unable to leave his training and, once all training was complete, would be deployed to Baghdad, Iraq. Over Blankenship's objections, the trial court permitted the Commonwealth to take a videotaped deposition of Bertram.

Bertram was deposed on January 6, 2017. The deposition was taken in the courtroom before the trial judge, and Blankenship and his counsel were present and fully cross-examined Bertram. In addition to testifying about his search of Blankenship's home, a portion of Bertram's deposition testimony related to his unavailability to testify in person at Blankenship's trial. Bertram acknowledged that he had been served with a subpoena; however, he testified that it was highly unlikely that he would be able to appear at trial. Bertram testified that he was currently in training to handle bomb-detecting dogs. He stated that he was currently on a break from training. But, prior to beginning that break, he had not been permitted to leave training. Bertram testified that he had signed a contract acknowledging that if he left his training at any point before it was completed, he would be required to reimburse his employer for approximately $42,000—the

amount his employer had incurred in training expenses. Bertram testified that he had to return to training for thirty-five more days; then, assuming he obtained certification, he would be deployed to Iraq. Based on this testimony, the trial court determined that it was proper for the Commonwealth to use Bertram's videotaped deposition at trial.

On appeal, Blankenship contends that use of the videotaped deposition at trial constitutes reversible error. While Blankenship acknowledges that RCr[1] 7.20(1) permits the introduction of deposition testimony at a criminal trial in limited circumstances, he contends that the Commonwealth could not rely on RCr 7.20(1) because it failed to make a good-faith effort to secure Bertram's presence at trial. Accordingly, Blankenship contends that use of Bertram's deposition at trial violated his Sixth Amendment right to confront a witness against him. We review a trial court's determination that a witness is unavailable to give live testimony for an abuse of discretion. *Brooks v. Commonwealth*, 114 S.W.3d 818, 821 (Ky. 2003).

RCr 7.20(1) permits the introduction of deposition testimony at a criminal trial under limited circumstances:

> At the trial or upon any hearing, a part or all of a deposition, so far as otherwise admissible under the rules of evidence, may be used if it appears: that the witness is dead; or that the witness is out of the Commonwealth of

[1] Kentucky Rules of Criminal Procedure.

> Kentucky, unless it appears that the absence of the witness was procured by the party offering the deposition; or that the witness is unable to attend or testify because of sickness or infirmity; or that the party offering the deposition had been unable to procure the attendance of the witness by subpoena.

It was clearly established that Bertram would be out of the Commonwealth of Kentucky at the time that Blankenship's trial was to take place. However, while RCr 7.20(1) allows for introduction of deposition testimony "if it appears . . . that the witness is out of the Commonwealth of Kentucky," the United States Supreme Court has held "that a witness's mere absence from the jurisdiction does not make that witness 'unavailable' for trial." *St. Clair v. Commonwealth*, 140 S.W.3d 510, 539 (Ky. 2004) (citing *Barber v. Page*, 390 U.S. 719, 88 S.Ct. 1318, 20 L.Ed.2d 255 (1968)). "Consequently, '[r]eliance upon [RCr 7.20(1)] . . . is not conclusive when a defendant claims a denial of his Sixth Amendment right of confrontation.'" *Id*. (quoting *Lovett v. Commonwealth*, 103 S.W.3d 72, 82 (Ky. 2003)). "In short, a witness is not 'unavailable' for purposes of . . . the confrontation requirement unless the prosecutorial authorities have made a good-faith effort to obtain his presence at trial." *Barber*, 390 U.S. at 724-25, 88 S.Ct. at 1321-22, 20 L.Ed.2d at 260. "This constitutional dimension of witness unavailability is reflected in the Kentucky Rules of Evidence." *St. Clair*, 140 S.W.3d at 539 (citing Robert G. Lawson, *The Kentucky Evidence Law Handbook*, § 8.45(IV) at 433 (3d ed. Michie 1993) ("A showing that would meet the

requirements of [KRE[2] 804] would simultaneously satisfy the constitutional dictates of the Confrontation Clause.")).

In the instant case, the Commonwealth elicited testimony from Bertram that he would be unable to comply with the subpoena issued to him because, at the time of trial, he would either be residing outside of the country or would be out of the state completing training for his job. Bertram testified that his employer would not permit him to leave that training to testify without being subjected to extreme pecuniary penalty. In sum, Bertram's testimony made it clear that the Commonwealth had made efforts to procure his presence for trial by issuing a subpoena, but that he would not comply with that subpoena. *See* KRE 804(a)(5). The trial court was within its discretion in relying on Bertram's statements, made under oath, to determine that the Commonwealth hade made a good-faith effort to secure Bertram's presence for trial.

**B. Cross-Examination Portion of Bertram's Testimony**

At the trial, the Commonwealth utilized the courtroom's audio and video equipment to play Bertram's videotaped deposition on a large screen, with the audio playing through the courtroom speakers. This method worked effectively for the portion of the video depicting the direct-examination of Bertram. When the cross-examination portion of Bertram's deposition began to

[2] Kentucky Rules of Evidence.

play for the jury, however, it became immediately apparent that it was extremely difficult—if not impossible—to hear the questions Blankenship's counsel posed to Bertram. To remedy this issue, the trial court allowed the Commonwealth to play the remainder of the deposition from a laptop, which was situated right next to the jury box. Audio was played through external speakers attached to the laptop. Before beginning the video, the trial court informed the jury about the technical issues and asked if every juror was able to clearly see the laptop screen. One juror requested that the screen be adjusted slightly, and a bailiff complied with that request. The trial court then allowed the video to play for approximately one minute before pausing the recording to ask whether the jury could clearly hear the testimony. None of the jurors indicated an inability to understand the testimony, or the questions posed by Blankenship's trial counsel. The trial court then admonished the jury to focus on the laptop screen and additionally admonished them that, despite the fact that the cross-examination was being played on a smaller screen, they were to give the testimony given during cross-examination the same weight as they gave the testimony given during direct-examination.

Blankenship contends that playing the cross-examination portion of Bertram's deposition in this manner denied him his Sixth Amendment right to confrontation. He argues that the jurors were likely to give more weight to the portion of the video depicting the direct-examination of Bertram because it was

played on a larger screen, rather than a laptop screen. Additionally, Blankenship notes that use of the external speakers created "a large amount of feedback to distort the audio." Appellant Br. at 6. Blankenship contends that the amount of feedback was so severe as to make portions of the cross-examination of Bertram undecipherable.

"In our jurisdiction it is within the discretion of the trial court to determine whether tapes should be excluded due to the quality of the sound." *Norton v. Commonwealth*, 890 S.W.2d 632, 636 (Ky. 1994) (citing *Sanborn v. Commonwealth*, 754 S.W.2d 534 (1988)). In reviewing Blankenship's conviction, we have watched the entire video record of the jury trial, including the portion where Bertram's deposition is played to the jury. While we agree with Blankenship that use of the external speakers did create *some* feedback, it was not so severe as to render any part of the cross-examination of Bertram incomprehensible. All questions asked by counsel, and all of Bertram's answers, were audible and coherent. In sum, we cannot find that the feedback that occurred during the cross-examination portion of Bertram's deposition hindered Blankenship's right to present an effective cross-examination.

Similarly, we do not find that playing the cross-examination on a laptop, as opposed to on a larger screen, violated Blankenship's right to confrontation. As noted by the Commonwealth, while the screen on which the

cross-examination portion of the deposition was played was smaller than the one used for the direct-examination portion, the laptop screen was much closer to the jury than the larger screen was. All jurors affirmed that they had a clear view of the screen. Further, the jury was informed that the only reason the cross-examination portion of the deposition was being played on the laptop screen was because of technical difficulties. The video portrayed Bertram being examined in the courtroom, with the trial judge present. The fact that a smaller screen was used did not make the video any less credible or suggest to the jury that they should give the cross-examination portion of the deposition any less weight than it gave the direct-examination portion. "[T[he Confrontation Clause guarantees an *opportunity* for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish." *Delaware v. Van Arsdall*, 475 U.S. 673, 679, 106 S.Ct. 1431, 1435, 89 L.Ed.2d 674, 683 (1986) (emphasis in original).

### C. Admission of CAD Report

As part of its case-in-chief, the Commonwealth called Leann Roy, the supervisor at the Russel County 911 Center, to authenticate the CAD report created in conjunction with the search of Blankenship's home. Before admitting the CAD report, Roy testified that all calls to the dispatch center are logged into a computer system, as part of the regular course of business. CAD reports are then generated

from the information logged into the computer, and those reports are kept in the ordinary course of business. Roy acknowledged that she was not the creator of this particular CAD report. After the CAD report had been tendered to Roy to authenticate, Roy testified that the CAD report showed that the initial call to dispatch was made at 5:42 pm on March 19, 2014. She stated that the report indicated that Bertram and another deputy from the Russell County Sheriff's Department, Mark Cromwell, had been present at the scene that night. Roy additionally testified that the report showed that the Kentucky State Police had been notified for cleanup of a methamphetamine lab, and that the timestamp for that entry in the report was 6:47 pm. That was the extent of Roy's testimony.

On appeal, Blankenship contends that allowing Roy to testify as to the information contained in the CAD report violated his Sixth Amendment right to confront the witness against him. In his brief to this Court, Blankenship does not take issue with any specific entry in the CAD report that Roy testified to. Rather, Blankenship contends that Roy's testifying to the fact that a CAD report existed for the night of his arrest was testimonial, in that there was no reason for the deputies to communicate with dispatch other than to connect him to a crime.

We note that Blankenship did object to Commonwealth's calling of Roy to introduce the CAD report at trial. Blankenship's objection, however, was that Roy was not the proper person to authenticate the report. There was never an

objection on the grounds that introduction of the CAD report would violate Blankenship's right under the Sixth Amendment. Accordingly, this error is unpreserved. "[A]n appellant preserves for appellate review only those issues fairly brought to the attention of the trial court." *Elery v. Commonwealth*, 368 S.W.3d 78, 97 (Ky. 2012) (citing *Richardson v. Commonwealth*, 483 S.W.2d 105, 106 (Ky. 1972)). Therefore, we can review this claimed error only for palpable error under RCr 10.26. *Id.* Palpable error is that which is so egregious as to result in manifest injustice. RCr 10.26.

"[T]he Sixth Amendment prohibits the admission of the testimonial statement of a declarant who does not appear at trial, unless the declarant is unavailable to testify and the defendant had a prior opportunity for cross-examination." *Peters v. Commonwealth*, 345 S.W.3d 838, 842 (Ky. 2011) (citing *Crawford v. Washington*, 541 U.S. 36, 68, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004)). A statement contained in a report "is testimonial 'if the circumstances objectively indicate that there is no . . . ongoing emergency, and that the primary purposes . . . is to establish or prove past events potentially relevant to later criminal prosecution.'" *Manery v. Commonwealth*, 492 S.W.3d 140, 145 (Ky. 2016) (quoting *Davis v. Washington*, 547 U.S. 813, 822, 126 S.Ct. 2266, 165 L.Ed.2d 224 (2006)).

We need not undergo an analysis of whether any testimony given concerning the CAD report violated the Confrontation Clause, however, to determine that the error claimed by Blankenship does not rise to the level of manifest injustice. Blankenship has not, at any point after his arrest, denied that a methamphetamine lab was found in his residence. At trial, Blankenship acknowledged that the methamphetamine lab was found in his home, but he contended that another perpetrator had manufactured methamphetamine with it while he was sleeping. Accordingly, we cannot perceive any error that arose from the jury hearing the statement that Kentucky State Police had been notified to come to Blankenship's residence to clean up and dispose of a methamphetamine lab. Further, at the time that Roy testified, Cromwell had already testified to the fact that he and Bertram found a methamphetamine lab in Blankenship's home and notified the Kentucky State Police to dispose of it. Any error in having Roy testify to the contents of the CAD report was harmless.

**D. Exclusion of Specific Instances of Bertram's Misconduct**

As part of Blankenship's defense, his counsel attempted to introduce evidence of Bertram's prior misconduct. Blankenship's counsel alluded to this misconduct in his opening statement, and he attempted to elicit testimony about this misconduct from Cromwell. Because of the Commonwealth's objections, however, counsel was refrained from doing so. Additionally, Blankenship had

subpoenaed Kentucky State Police detective Ricky Brooks to testify about his investigation into Bertram's past misconduct. When Blankenship notified the trial court that Brooks was present and available to testify, the Commonwealth objected to Brooks giving testimony. A conference was then held in chambers to determine whether Brooks should be permitted to testify.

During that conference, Blankenship stated that Brooks would testify to the fact that, in January of 2013, Bertram had been charged with tampering with physical evidence when Kentucky State Police discovered that Bertram was improperly storing methamphetamine overpack buckets[3] in his home. Additionally, Blankenship believed that Brooks would testify that Bertram had lied during an investigation concerning a laptop that Bertram had allegedly stolen from his former business partner. Blankenship contended that the purpose of Brooks's testimony was two-fold: it would support his alternative perpetrator defense, and it would go towards Bertram's propensity for truthfulness. The Commonwealth objected to having Brooks testify. It contended that Brooks's testimony would be irrelevant, especially considering the fact that Bertram had been found to have not committed any wrongdoing.[4] Additionally, the Commonwealth argued that it was

[3] Overpack buckets are buckets used by police agencies to seal and carry hazardous waste left over from methamphetamine labs.

[4] Both the tampering with physical evidence charge and a theft by unlawful taking charge concerning the laptop, among other charges against Bertram, were presented to a Russell County Grand Jury, which returned a no true bill.

impermissible to attack a witness's credibility by introducing evidence of specific instances of bad acts. The trial court sustained the Commonwealth's objection, concluding that, under KRE 608, extrinsic evidence is not permissible to attack a witness's credibility.

On appeal, Blankenship contends that the trial court erred in relying on KRE 608 to conclude that Brooks's testimony was inadmissible. While Blankenship did seek to introduce evidence of Bertram's mishandling of evidence to attack Bertram's credibility, he additionally sought to introduce it for substantive purposes—to show that Bertram either tainted the evidence against Blankenship or that Bertram was the alternative perpetrator. Accordingly, Blankenship contends that Brooks should have been permitted to testify for that purpose. We review a trial court's decision to exclude evidence under the abuse of discretion standard. *Slone v. Commonwealth*, 382 S.W.3d 851, 857 (Ky. 2012) (citing *Brewer v. Commonwealth*, 206 S.W.3d 313, 320 (Ky. 2006)).

The trial court excluded Brooks's testimony for impeachment purposes and, in that regard, it committed no error. Under KRE 608, specific instances of conduct of a witness may not be proven by extrinsic evidence. If specific instances of conduct are probative of a witness's character for truthfulness or untruthfulness, specific instances of conduct may be inquired into, but only on cross-examination. Accordingly, the trial court was correct that it was improper to

allow Brooks to testify about specific instances of Bertram's misconduct in order to impeach Bertram's credibility.

During the conference in chambers on whether to permit Brooks's testimony, however, Blankenship stated that he also sought to elicit the testimony at issue from Brooks to support his alternative perpetrator theory. "The Due Process Clause of the Fourteenth Amendment guarantees a criminal defendant the opportunity to present a full defense, and that guarantee includes the right to introduce evidence that an alternate perpetrator committed the offense." *Gray v. Commonwealth*, 480 S.W.3d 253, 267 (Ky. 2016) (citing *Beaty v. Commonwealth*, 125 S.W.3d 196 (Ky. 2003)). "At its heart, the critical question for [alleged alternative perpetrator] evidence is one of relevance: whether the defendant's proffered evidence has any tendency to make the existence of any consequential fact more or less probable." *Id.* "Essentially, the balancing test found in KRE 403 is the true threshold for admitting [alleged alternative perpetrator] evidence . . . ." *Id.*

During his testimony, Bertram acknowledged that he had been alone with Blankenship for at least forty-five minutes prior to Cromwell arriving to assist him with the search. Undoubtably, Bertram had the opportunity to tamper with or plant evidence in Blankenship's home. On cross-examination, Bertram acknowledged that, despite the fact that he had gone to Blankenship's home to

conduct a wellness check, he had not brought any first-aid equipment with him or other items to aid him in the case that he found that Blankenship was unwell. Blankenship's counsel had elicited testimony from Roy that Kentucky State Police had been notified to assist in cleanup of the methamphetamine lab before Blankenship signed the form giving Bertram consent to search his residence. Additionally, Bertram acknowledged that during the grand jury proceedings, he had testified that he had a videotaped confession from Blankenship when he did not.[5] Bertram then contradicted himself when asked at what point in time he discovered that there was no videotaped confession.

Considering all of this, the fact that Bertram had previously been investigated for mishandling evidence—evidence related to a methamphetamine lab—was relevant to Blankenship's alternative perpetrator theory. *See Blair v. Commonwealth*, 144 S.W.3d 801 (Ky. 2004) (finding that evidence that a detective had been charged with official misconduct for failing to prevent a supervisor from selling a VCR out of the evidence room was admissible to support a theory that the detective, not the defendant, stole money from the victim). We note that the information we have on Bertram's criminal charges indicates that his alleged

[5] Blankenship moved to dismiss the indictment against him when it was discovered that there was not, in fact, any video recording of a confession as Bertram had testified that there was in the grand jury proceedings. The trial court denied that motion, finding that Blankenship had failed to produce evidence that the Commonwealth knowingly or intentionally presented false testimony to the grand jury. Additionally, the trial court noted that Bertram had testified that his misstatement to the grand jury had been a mistake.

mishandling of evidence concerned improperly storing methamphetamine overpack buckets in his home, not planting evidence or otherwise tainting evidence. However, "a lower standard of similarity should govern 'reverse 404(b)' evidence because prejudice to the defendant is not a factor." *Id.* at 810 (quoting *United States v. Stevens*, 935 F.2d 1380 (3d Cir. 1991)).

Blankenship should have been permitted to introduce evidence of Bertram's prior misconduct to support his alternative perpetrator theory. Accordingly, we find that the trial court abused its discretion in denying him the opportunity to do so. "Because this error implicated Appellant's constitutional right to Due Process, reversal is required absent evidence rendering the exclusion 'harmless beyond a reasonable doubt.'" *Beaty*, 125 S.W.3d at 209-10 (quoting *Chapman v. California*, 368 U.S. 18, 24, 87 S.Ct. 824, 828, 17 L.Ed.2d 705 (1967)). We cannot find that this error meets the "harmless beyond a reasonable doubt" standard. "No matter how credible [the alleged alternative perpetrator] defense, our system of justice guarantees the right to present it and be judged by it." *Id.* at 210 (quoting *Pettijohn v. Hall*, 599 F.2d 476, 483 (1st Cir. 1979)).

**E. Failure to Strike Jurors for Cause**

During jury selection, Blankenship moved to strike two jurors for cause: Juror Burton and Juror Richardson. Burton stated that he had trained Bennett when Bennett was a cadet trooper with the Kentucky State Police, but that

he had not spoken to Bennett in several years. Burton stated that he did not believe that his past working-relationship with Bennett would affect his ability to fairly consider the evidence in Blankenship's case. Richardson informed the trial court that he had gone to high school with both Blankenship and the Commonwealth's Attorney, and had played baseball with Blankenship. When asked if those past relationships would affect his decision in Blankenship's case, Richardson acknowledged that he would "hate it either way." However, Richardson stated that he would "most certainly" be able to render a verdict against Blankenship if he believed that the Commonwealth proved its case beyond a reasonable doubt, and would be able to render a not guilty verdict if he believed the Commonwealth failed to do so. Blankenship contends that the trial court erred in denying his motions to strike Burton and Richardson for cause.

"A determination whether to excuse a juror for cause lies within the sound discretion of the trial court and is reviewed only for a clear abuse of discretion." *Soto v. Commonwealth*, 139 S.W.3d 827, 848 (Ky. 2004) (citing *Foley v. Commonwealth*, 953 S.W.2d 924, 931 (Ky. 1997)). "A juror must only be struck for cause if there is a probability he will be biased in favor of one party over the other." *Whittle v. Commonwealth*, 352 S.W.3d 898, 901 (Ky. 2011) (citing *Pennington v. Commonwealth*, 316 S.W.2d 221, 224 (Ky. 1958)). "To determine

bias, the court is required to look at the totality of the circumstances." *Id.* (citing *Montgomery v. Commonwealth*, 819 S.W.2d 713, 718 (Ky. 1991)).

Neither Burton nor Richardson indicated a probability of bias during the *voir dire* process. The only reason for which Blankenship sought to remove Burton was Burton's prior working relationship with Bennett, one of the Commonwealth's witnesses. "[A] mere work relationship [with a witness] is insufficient to establish bias on a challenge for cause." *Sholler v. Commonwealth*, 969 S.W.2d 706, 709 (Ky. 1998) (citing *Copley v. Commonwealth*, 854 S.W.2d 748 (Ky. 1993); *Dunbar v. Commonwealth*, 809 S.W.2d 852 (Ky. 1991)).

Similarly, the fact that Richardson had gone to high school with Blankenship and the Commonwealth's Attorney was insufficient to establish bias. "Bias is implied from any close relationship, familial, financial or situational, with any party, counsel, victim, or witness . . . ." *Id.* (citing *Ward v. Commonwealth*, 695 S.W.2d 404 (Ky. 1985)). "This definition does not encompass a mere social acquaintanceship in the absence of other indicia of a relationship so close as to indicate the probability of partiality." *Id.* Richardson did not state that he had a close social relationship with either Blankenship or the Commonwealth's Attorney currently, or when they attended high school together. Further, he indicated that any past relationship would not impact his ability to fairly consider the evidence.

Accordingly, the trial court did not abuse its discretion in denying Blankenship's motions to strike Burton and Richardson for cause.

**F. Jury Instructions**

For his final contention or error, Blankenship contends that the trial court erred by failing to instruct the jury on possession of drug paraphernalia as a lesser-included offense of manufacturing methamphetamine. Blankenship tendered an instruction on possession of drug paraphernalia to the trial court. Blankenship argued that a possession of drug paraphernalia instruction was proper, as the testimony presented at trial concerning the search of his home had revealed that deputies had uncovered several items that could be used to manufacture or ingest methamphetamine, but they had not uncovered any finished product. The Commonwealth objected to Blankenship's tendered instruction, as it contended that possession of drug paraphernalia was not a lesser-included offense, but rather a separate offense for which Blankenship could have been additionally charged. The trial court ultimately agreed with the Commonwealth's position, and it instructed the jury only on manufacturing methamphetamine and facilitation of manufacturing methamphetamine.

Lesser included offenses are governed by KRS[6] 505.020, which provides, in pertinent part, that:

[6] Kentucky Revised Statutes.

> (2) A defendant may be convicted of an offense that is included in any offense with which he is formally charged. An offense is so included when:
>
> (a) It is established by proof of the same or less than all of the facts required to establish the commission of the offense charged; or
>
> (b) It consists of an attempt to commit the offense charged or to commit an offense otherwise included therein; or
>
> (c) It differs from the offense charged only in the respect that a lesser kind of culpability suffices to establish its commission; or
>
> (d) It differs from the offense charged only in the respect that a less serious injury or risk of injury to the same person, property or public interest suffices to establish its commission.

KRS 218A.1432 provides for two ways in which a defendant can be convicted for manufacturing methamphetamine. Under the first theory, a defendant can be found guilty of manufacturing methamphetamine if he knowingly and unlawfully manufactures methamphetamine. KRS 218A.1432(1)(a). Under the second, a defendant can be found guilty of manufacturing methamphetamine if he knowingly and unlawfully, with the intent to manufacture methamphetamine, possess two or more chemicals or two or more items of equipment for the manufacture of methamphetamine. KRS 218A.1432(1)(b). The instructions tendered to the jury permitted it to find Blankenship guilty of manufacturing methamphetamine under either of the two theories.

KRS 218A.500(2) provides that "[i]t is unlawful for any person to use, or to possess with the intent to use, drug paraphernalia for the purpose of . . . manufacturing . . . a controlled substance . . . ." Drug paraphernalia is defined as: "all equipment, products and materials of any kind which are used, intended for use, or designed for use in . . . manufacturing . . . a controlled substance . . . ." KRS 218A.510(1). It is undisputed that methamphetamine is considered a controlled substance. Accordingly, based on a plain reading of the above-quoted statutes, one could establish the offense of possession of drug paraphernalia with the same, or less than all, of the facts required to establish manufacturing methamphetamine under KRS 218A.1432(1)(b). *See Varble v. Commonwealth*, 125 S.W.3d 246, 255 (Ky. 2004), *superseded on other grounds by statute*, KRE 103 (Court found reversal necessary when the instruction given for manufacturing methamphetamine was actually the instruction for the "lesser offense" of possession of drug paraphernalia. The Court noted that the defendant had not requested an instruction of possession of drug paraphernalia as a lesser included offense); *Marshall v. Commonwealth*, No. 2016-SC-000302-MR, 2017 WL 3634482 (Ky. Aug. 24, 2017) (finding that conviction for manufacturing methamphetamine and conviction for possession of drug paraphernalia violated defendant's right to be free from double jeopardy based on the facts of the case).

"An instruction on a lesser included offense is required if the evidence would permit the jury to rationally find the defendant not guilty of the primary offense, but guilty of the lesser offense." *Thomas v. Commonwealth*, 170 S.W.3d 343, 349 (Ky. 2005) (citing *Commonwealth v. Wolford*, 4 S.W.3d 534, 539 (Ky. 1999)). The evidence presented by the Commonwealth at trial demonstrated that the following items were found in Blankenship's home: empty pseudoephedrine packages, coffee filters, plastic tubing connected to two-liter bottles, stripped lithium batteries, instant cold packs, peroxide, liquid drain cleaner, burned aluminum foil, and needles. Additionally, several witnesses testified that they recognized an odor characteristic of a methamphetamine lab when they were inside of Blankenship's home. Chris Ramsey, a forensic chemist with the Kentucky State Police, testified that he inspected several pieces of plastic tubing that had been found in Blankenship's home, and that one of those pieces of tubing contained residue of methamphetamine. Several witnesses testified that, based on their experience and their observation of the methamphetamine lab found in Blankenship's home, they believed that the methamphetamine lab had recently been active.

In short, the Commonwealth presented evidence that Blankenship possessed *all* the items necessary to manufacture methamphetamine and presented circumstantial evidence that he had, in fact, recently used those items to

manufacture methamphetamine. In light of this evidence, it would not be rational for a jury to return a verdict finding Blankenship guilty of possession of drug paraphernalia, but not guilty of manufacturing methamphetamine. Based on the evidence presented by the Commonwealth, the trial court did not err in declining to instruct the jury on possession of drug paraphernalia.

## III. CONCLUSION

Based on the foregoing, we affirm in part, reverse in part, and remand for a new trial. On retrial, Blankenship should be permitted to introduce evidence of Bertram's prior misconduct for substantive purposes.

THOMPSON, K., JUDGE, CONCURS.

ACREE, JUDGE, DISSENTS BY SEPARATE OPINION.

ACREE, JUDGE, DISSENTING: I respectfully dissent because, in my view, the trial court properly excluded evidence of Bertram's alleged prior bad acts. I would affirm the conviction.

Blankenship argues that allegations and evidence of Bertram's misconduct "were relevant to his propensity to tell the truth and handling of meth labs, and to support an alleged alternative perpetrator (altperp) defense . . . ." (Appellant's brief, p. 14). *Propensity* evidence cannot do that. To that point, KRE 404(b) prohibits the admissibility of propensity evidence. KRE 404(b) ("Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person

in order to show action in conformity therewith."). The mere invoking of the idea of reverse 404(b) evidence is not enough to justify bypassing that rule's prohibitions against propensity evidence.

We can ignore the Commonwealth's argument that this evidence is irrelevant, even though the Supreme Court admits of the possibility. *Gray v. Commonwealth*, 480 S.W.3d 253, 267 (Ky. 2016) ("[U]nder the powerfully inclusionary thrust of relevance under these rules, it would appear *almost* any aaltperp theory would be admissible at trial." (emphasis added)). But *Gray* says, "The proponent of the [alternate perpetrator] theory must establish something more than simple relevance or the threat of confusion or deception can indeed substantially outweigh the evidentiary value of the theory." *Id.* at 268. In *Gray*, that "something more" existed in the fact that the alleged alternate perpetrator "had motive to commit the crime and that this motive was established at trial." *Id.* at 267; *see Blair v. Commonwealth*, 144 S.W.3d 801, 810 (Ky. 2004) ("Exclusion of *evidence that an 'aaltperp' had both the motive and the opportunity* to commit the act for which the accused is charged deprives the accused of the Due Process right to present a defense." (emphasis added)).

The majority and Blankenship make the analytical mistake of jumping directly from a finding of simple relevance under KRE 401 to the probative-prejudice balancing of KRE 403, disregarding the requirement of KRE 402 that we

consider whether any rule, such as KRE 404(b), makes otherwise relevant evidence inadmissible. That is the flaw in the majority's analysis.

As our Supreme Court often has done, the majority cites the Third Circuit case of *United States v. Stevens*, 935 F.2d 1380 (3rd Cir. 1991). *See, e.g.*, *Blair v. Commonwealth*, 144 S.W.3d 801, 810 (Ky. 2004) (referring to *Stevens* as "the leading case" regarding reverse 404(b) evidence). Other jurisdictions did the same and their varying interpretations soon led to confusion. After fifteen years of conflicting readings of *Stevens*, the Third Circuit finally clarified *Stevens* in *United States v. Williams*, 458 F.3d 312 (3rd Cir. 2006).

The appellant in *Williams* was prosecuted for possession of a firearm by a felon. *Id.* at 313. He wanted to "introduce evidence that another individual [arrested at the same time] . . . had previously been convicted of possessing a firearm . . . to show that the weapon found . . . belonged to [that third party] rather than Williams." *Id.* Just as the trial court in Blankenship's case excluded evidence of Bertram's prior bad acts, the trial court in *Williams* excluded evidence of the third party's conviction. Like Blankenship, Williams "contend[ed] that the [trial c]ourt erred and that, pursuant to . . . *United States v. Stevens*, 935 F.2d 1380 (3d Cir. 1991), evidence of crimes or bad acts committed by persons other than the defendant ('reverse Rule 404(b) evidence') is admissible so long as its probative

value is not substantially outweighed by the risk of unfair prejudice, undue delay or confusion of the issues." *Id.* at 313-14.

This is a misreading of *Stevens* but the one urged by Blankenship and embraced by the majority. The Third Circuit said:

> As explained herein, Williams misreads *Stevens*, and we write to clarify that Rule 404(b)'s proscription against propensity evidence applies regardless of by whom, and against whom, it is offered. Under *Stevens*, we grant defendants more leeway in introducing "bad acts" evidence *under one of the Rule 404(b) exceptions*—requiring only that its probative value is not substantially outweighed by Rule 403 considerations such as unfair prejudice, undue delay or confusion of the issues. But *Stevens* did not afford defendants more leeway in admitting *propensity evidence* in violation of the prohibition of Rule 404(b). Because the only purpose for which Williams sought to introduce [the third party's] prior conviction was to show that he has a propensity to carry firearms, the District Court correctly excluded the evidence.

*Id.* at 314 (emphasis added).

The majority here suggests a sufficient degree of similarity between Bertram's alleged bad acts for which a no true bill was returned – tampering with "evidence related to a methamphetamine lab" – and the crime with which Blankenship was charged – operating a meth lab. I cannot believe our jurisprudence would say that is enough similarity to support an alternative perpetrator theory that Bertram, and not Blankenship, committed the crime with

which Blankenship was charged. Is the theory that the meth lab in Blankenship's home was actually being operated by Bertram?

The degree of similarity here is far too tenuous. And even though there was more similarity in *Williams*, the Third Circuit said it was not enough.

> At issue in *Stevens* was what degree of similarity should be required when a defendant offers evidence of bad acts committed by a third party. . . . We . . . conclude[ed] that Rule 404(b) was primarily intended to protect defendants and that 'a lower standard of similarity should govern "reverse Rule 404(b)" evidence because prejudice to the defendant is not a factor.' " [*Stevens*, 935 F.2d at 1404]. Recasting our conclusion in terms of the Federal Rules of Evidence, we stated that "a defendant may introduce 'reverse 404(b)' evidence so long as its probative value under Rule 401 is not substantially outweighed by Rule 403 considerations." *Id.* at 1405.
>
> [As do Blankenship and the majority here,] Williams reads this language in *Stevens* to mean that evidence of bad acts involving someone other than the defendant is admissible whenever its probative value is not substantially outweighed by Rule 403 considerations, regardless of the purpose for which it is admitted: propensity, identity, motive or otherwise.

*Id.* at 316. Williams argued that the third party's prior bad act of committing a similar firearms violation "'rationally tends to disprove his [own] guilt[.]'" *Id.* Similarly, Blankenship argues that "Bertram's prior charges were sufficiently similar under the reverse 404(b) standard . . . to present a defense" in exculpation of his own guilt. Again, what the Third Circuit said regarding the appellant in *Williams* applies here.

Williams misreads *Stevens.* This Court has never held that Rule 404(b)'s prohibition against propensity evidence is inapplicable where the evidence is offered by the defendant. In *Stevens*, it was indisputable that the evidence was being offered to show identity, *i.e.*, that the perpetrator of the second robbery [with which Stevens was charged] was the same as the perpetrator of the first [robbery committed by an unknown third party] because of the similarity of the crimes. Rule 404(b) expressly permits such evidence of other similar crimes to prove identity. *See* Rule 404(b), Federal Rules of Evidence (bad acts evidence may be admitted to prove "motive, opportunity, intent, preparation, plan, knowledge, *identity*, or absence of mistake") (emphasis added); *see, e.g., United States v. Powers*, 978 F.2d 354, 361 (7th Cir.1992) (holding that other bank robberies and attempted robbery of which defendant had been convicted were sufficiently similar to the charged offense to render identity evidence admissible). The evidence was not being used to show that the perpetrator of the first robbery committed the second robbery simply because he had a general propensity to commit robberies.

It was implicit in *Stevens* that we do not begin to balance the evidence's probative value under Rule 401 against Rule 403 considerations unless the evidence is offered under one of the Rule 404(b) exceptions. That the prohibition against propensity evidence applies regardless of by whom—and against whom—it is offered is evident from Rule 404(b)'s plain language, which states that "[e]vidence of other crimes, wrongs, or acts is not admissible to prove the character of *a person* in order to show action in conformity therewith." Rule 404(b), Federal Rules of Evidence (emphasis added). Rather than restricting itself to barring evidence that tends to prove "the character of the accused" to show conformity therewith, Rule 404(b) bars evidence that tends to prove the character of any *"person"* to show conformity therewith. Although, under *Stevens*, a defendant is allowed more leeway in introducing *non-propensity*

> *evidence* under Rule 404(b), he or she is not allowed more leeway in admitting *propensity evidence* in violation of Rule 404(b). [citation omitted]. We therefore reject Williams' argument, and affirm that the prohibition against the introduction of bad acts evidence to show propensity applies regardless of whether the evidence is offered against the defendant or a third party. [citation omitted].

*Id*. at 316-17. Blankenship's argument for the admissibility of propensity evidence is meritless and the evidence was properly excluded under KRE 404(b).

Our jurisprudence shows that since *Blair* we have always followed the sequence of determining whether a KRE 404(b) exception for non-propensity evidence applies before engaging in the balancing act of KRE 403. For example, in *St. Clair v. Commonwealth* the Supreme Court said, "Though the bar is set lower for admissibility of reverse-404(b) evidence, that evidence is not automatically admissible" but must be "sufficiently similar to the charged act so as to indicate a reasonable probability that the acts were committed by the same person." 455 S.W.3d 869, 894 (Ky. 2015) (citations and internal quotation marks omitted). That is, the evidence must first fit an exception to the prohibition against propensity evidence and the exception in *St. Clair* was "identity" just as it is in the instant case.

The KRE 404(b) analysis in *St. Clair* described the prior crime of the third party and compared it to the crime with which the defendant was charged; the Court then noted "the differences were substantial." *Id.* at 895. It was "[i]n light of

these differences" that the Supreme Court affirmed "the trial court . . . in excluding evidence of [a third party]'s prior crime as reverse-404(b) evidence." *Id.* The Court never reached, nor did it need to reach, the weighing of probative value against prejudice under KRE 403. *Id. passim*; *see also Allen v. Commonwealth,* 395 S.W.3d 451, 468 (Ky. 2013) (third party's "prior convictions were not similar enough to show *modus operandi*").

What was offered here was nothing more than inadmissible propensity evidence. If Bertram were charged with the crimes Blankenship faces, we would not hesitate to affirm a trial court that prohibited such evidence when offered by the Commonwealth to convict him. Whether it is the Commonwealth offering the evidence against a defendant, or a defendant offering the evidence against an alleged alternative perpetrator, that same analysis applies before we ever get to any probative-prejudice balancing under KRE 403. As the Third Circuit repeated, "a proponent's incantation of the proper uses of such evidence under the rule does not magically transform inadmissible evidence into admissible evidence. He or she must clearly articulate how that evidence fits into a chain of logical inferences, no link of which may be the inference that the defendant has the propensity to commit the crime charged." *Id.* at 319 (citations and internal quotation marks omitted). That was not done in this case and I do not see how it could have been.

Respectfully, I dissent and would affirm the conviction.

BRIEFS FOR APPELLANT:

Erin Hoffman Yang
Frankfort, Kentucky

BRIEF FOR APPELLEE:

Andy Beshear
Attorney General of Kentucky

William Robert Long, Jr.
Assistant Attorney General
Frankfort, Kentucky