

IMPORTANT NOTICE
NOT TO BE PUBLISHED OPINION

THIS OPINION IS DESIGNATED "NOT TO BE PUBLISHED." PURSUANT TO THE RULES OF CIVIL PROCEDURE PROMULGATED BY THE SUPREME COURT, CR 76.28 (4) (c), THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE CITED OR USED AS AUTHORITY IN ANY OTHER CASE IN ANY COURT OF THIS STATE.

RENDERED: JANUARY 23, 2003
NOT TO BE PUBLISHED

Supreme Court of Kentucky

2002-SC-0030-MR

FINAL

DATE 2-13-03 ZJA/Grow/tdg
APPELLANT

JOHNNY HUMFLEET

V. APPEAL FROM LAUREL CIRCUIT COURT
HONORABLE LEWIS B. HOPPER, JUDGE
01-CR-00131-01

COMMONWEALTH OF KENTUCKY

APPELLEE

AND

2002-SC-0069-MR

CLIFFORD HUMFLEET

APPELLANT

V. APPEAL FROM LAUREL CIRCUIT COURT
HONORABLE LEWIS B. HOPPER, JUDGE
01-CR-00131-02

COMMONWEALTH OF KENTUCKY

APPELLEE

MEMORANDUM OPINION OF THE COURT

AFFIRMING

Johnny Humfleet and his brother Clifford Humfleet were tried together before a jury on charges of manufacturing methamphetamine in violation of KRS 218A.1432. Both men were convicted of that charge and sentenced to twenty years in prison. The arguments raised by the defendants in their separate appeals are substantially the same and for that reason we have combined the two cases in order to render one opinion.

The questions presented are whether the defendants were entitled to directed verdicts on the manufacturing methamphetamine charge; whether the trial judge erred in failing to instruct the jury on lesser included offenses; and whether the trial judge exceeded the scope of KRE 614 in his questioning a witnesses. Clifford Humfleet also presents the question of whether the trial judge erred in failing to sever the trials.

Two deputy sheriffs went to Clifford Humfleet's residence looking for a runaway juvenile. When they arrived, they observed three individuals running from an open-sided shed located behind Clifford's trailer. The two deputies gave chase and as they passed the shed, one of the deputies smelled a chemical odor which he associated with the manufacturing of methamphetamine. A short pursuit resulted in the apprehension of Rosalee Humfleet, Johnny Humfleet's former wife. Although divorced for about eight years the couple were still living together in a trailer next to Clifford.

Returning to the shed, the deputies observed a working methamphetamine lab. Rosalee was advised of her Miranda rights and she proceeded to identify the other two individuals who fled as the juvenile the deputies were seeking and Johnny Humfleet. She indicated that Clifford Humfleet had been helping at the shed but that he had gone back to his trailer just before the deputies arrived. He was found there by the deputies and arrested. The deputies also discovered that an electric extension cord running from the living room of Clifford's home supplied the power for the shed. Rosalee consented to a search of her residence and the deputies found the components of a second methamphetamine lab.

After pleading guilty to facilitation to manufacture methamphetamine, Rosalee testified against Clifford and Johnny at their trial. She stated that just before the

deputies arrived, she had walked down to the shed with Johnny and that Clifford was already there with the juvenile. According to Rosalee, Clifford told Johnny that they had some methamphetamine to be gassed off - the final step in the manufacturing process. Clifford returned to his trailer while Johnny worked in the lab. Shortly thereafter, Clifford opened his back door and yelled "sheriff" and she, Johnny and the juvenile ran.

A detective with the Kentucky State Police who was called in to dismantle the labs testified that the lab in the shed was operational. He also testified that finding the finished product at a lab was uncommon because it is usually consumed or sold.

Both Johnny and Clifford Humfleet testified in their own defense and denied any knowledge of the labs. Contrary to the testimony of Rosalee, Johnny claimed he had not lived at the trailer for approximately ten months. Clifford also claimed that he had been living elsewhere and only returned home four days before his arrest. The jury convicted both men of manufacturing methamphetamine and they were each sentenced to twenty years in prison. These appeals followed.

After careful review of the record, it is clear that none of the issues raised by either defendant are properly preserved for appellate review. We must also observe that in each instance where the defendants seek review for palpable error they incorrectly cite to RCr 10.24 instead of RCr 10.26.

I. Directed Verdict

Neither Clifford nor Johnny Humfleet properly preserved for appellate review the issue of sufficiency of the evidence in regard to the charge of manufacturing methamphetamine. At the close of the Commonwealth's case, both defendants moved for a directed verdict on the grounds that there was no link between them and the labs

other than the testimony from Rosalee. On appeal, the defendants contend that because none of the samples taken from the lab tested positive for a controlled substance, the most they could be found guilty of was criminal attempt to manufacture methamphetamine. Such an argument cannot be raised for the first time on appellate review. Anastasi v. Commonwealth, Ky., 754 S.W.2d 860 (1988).

In any event, there was sufficient evidence for the trial judge to submit the case to the jury, and it was not clearly unreasonable for the jury to find both Clifford and Johnny Humfleet guilty of manufacturing methamphetamine. Commonwealth v. Benham, Ky., 816 S.W.2d 186 (1991); Commonwealth v. Sawhill, Ky., 660 S.W.2d 3 (1983). The testimony from Rosalee Humfleet and the police officers was sufficient to prove that the brothers intended to manufacture methamphetamine and possessed the chemicals or equipment to do so. KRS 218A.1432(1)(b) does not require that methamphetamine actually be produced. The trial judge properly denied the motions for a directed verdict.

II. Instructions

The claim by Clifford and Johnny Humfleet that the trial judge erred by failing to instruct the jury on the lesser included offenses of facilitation, attempt and manufacture of a simulated controlled substance, is not properly preserved for appellate review. RCr 9.54(2) provides:

No party may assign as error the giving or the failure to give an instruction unless he has fairly and adequately presented his position by an offered instruction or by motion, or unless he makes objection before the court instructs the jury, stating specifically the matter to which he objects and the ground or grounds of his objection.

Both defendants concede that they did not object to the jury instructions given by the trial judge. The failure to comply with RCr 9.54(2) has consistently been interpreted to prevent review of claimed error in the instructions because of the failure to preserve the alleged error for review. Commonwealth v. Thurman, Ky., 691 S.W.2d 213 (1985). We have reviewed this issue for palpable error and have found none.

III. Questioning of Witness

The allegation of error by Clifford and Johnny Humfleet that the trial judge exceeded the scope of KRE 613 in his questioning Rosalee Humfleet was also not properly preserved for appellate review. This claimed error does not rise to the level of manifest injustice which is required for review under RCr 10.26.

IV. Severance

Finally, Clifford Humfleet did not request a separate trial from his brother, thus any alleged error is unpreserved for appellate review. In any event, trying the brothers together was completely proper. RCr 9.16 provides for separate trials only upon a showing of prejudice to the complaining party. In applying this rule, the trial court has broad discretion and an exercise of that discretion will not be overturned absent a clear showing of abuse. Epperson v. Commonwealth, Ky., 809 S.W.2d 835 (1990). It is abundantly clear from the record that neither Clifford nor Johnny Humfleet was in any way prejudiced.

Both defendants received due process of law under the federal and state constitutions.

The judgments of conviction of both Clifford Humfleet and Johnny Humfleet are affirmed.

All concur.

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