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NOT TO BE PUBLISHED OPINION

THIS OPINION IS DESIGNATED "NOT TO BE PUBLISHED." PURSUANT TO THE RULES OF CIVIL PROCEDURE PROMULGATED BY THE SUPREME COURT, CR 76.28 (4) (c), THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE CITED OR USED AS AUTHORITY IN ANY OTHER CASE IN ANY COURT OF THIS STATE.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NOT TO BE PUBLISHED

FINAL DATE 4-24-03 ELIZ GRUNARD, D.C.

Supreme Court of Kentucky

2000-SC-0689-MR

SCOTTIE D. MORGAN — APPELLANT

V.

APPEAL FROM MUHLENBERG CIRCUIT COURT
HONORABLE DAVID H. JERNIGAN, JUDGE
00-CR-34

COMMONWEALTH OF KENTUCKY — APPELLEE

MEMORANDUM OPINION OF THE COURT

AFFIRMING

In July of 2000, Appellant, Scottie Morgan, was tried by a jury and convicted of manufacturing methamphetamine, KRS 218A.1432 (a class B felony), operating a motor vehicle with license suspended, KRS 186.620(2) (a class B misdemeanor), and being a persistent felony offender in the second degree, KRS 532.080(2). He was sentenced to twenty-five years imprisonment. Pursuant to Ky. Const. §110(2)(b), Morgan appeals to this Court as a matter of right arguing that: (1) there was insufficient evidence to convict him of manufacturing methamphetamine; (2) evidence of other crimes, wrongs or acts was improperly admitted against him; and (3) the result of a scientific test confirming the presence of methamphetamine was improperly admitted. For the reasons discussed herein, we reject Appellant's assertions and affirm the decisions of the trial court.

SUFFICIENCY OF THE EVIDENCE

Appellant first contends that there was insufficient evidence to convict him of manufacturing methamphetamine. We believe that the extensive testimony given at trial, coupled with circumstantial evidence, supports his conviction.

On the afternoon of Sunday, February 13, 2000, Muhlenberg County Sheriff Jerry Mayhugh was investigating a complaint unrelated to the charges against Appellant. Mayhugh drove west on Gordon Bradley Road, passing Appellant's residence, and parked his cruiser in a private driveway about one-half mile away from Appellant's home. Shortly thereafter, Sheriff Mayhugh saw a blue Chevy S-10 pickup drive by, heading east on Gordon Bradley Road. Mayhugh recognized the driver as Appellant, and the passenger as Tim Fleming.

Correctly believing that Appellant's operator's license had been suspended, Mayhugh pursued the blue pickup toward Appellant's residence, winding through the hilly road. Although the two cars were close together, Mayhugh was unable to maintain visual contact throughout the pursuit because of the terrain. Mayhugh did notice, however, some debris along both sides of the road, debris that had not been there just a short time earlier when Mayhugh first drove through the area. He also detected a strong odor of ether as he passed the debris, which he knew from experience to be associated with methamphetamine.

Mayhugh regained visual contact just as Appellant was turning into his own driveway. Appellant stopped his vehicle and passenger Tim Fleming exited quickly with a red duffel bag in hand. Fleming fled toward a nearby wooded area, where he was eventually caught by Sheriff Mayhugh. Mayhugh thereafter detained Appellant as well.

At trial, the contents of the red duffel bag, as well as all of the items found

alongside of the road were introduced as evidence. According to police testimony, the duffel bag contained a broken coffee pot, a large plastic container with a strong odor of ether, two glass Mason jars, numerous coffee filters, a plastic breathing mask with tube ring attached, several pieces of plastic tubing, a quart of liquid drain cleaner, and two plastic bottle tops. The debris found on the passenger's side of the road included a clear pitcher with a bluish green top which emitted a strong odor of ether (Exhibit No. 9), a Mr. Pibb carton containing lithium batteries, multiple empty pill bottles marked as containing nasal decongestant tablets, a used battery, and some burned aluminum foil. On the driver's side of the road, police found a clear plastic bag containing coffee filters, battery packages, and cold tablet packages.

Cheyenne Albro, the director the Pennyrile Narcotics Task Force, testified that all of the items collected by police are commonly used in the manufacture of methamphetamine. Albro further testified that methamphetamine production requires three key precursors-pseudoephedrine (which can be extracted from cold tablets and nasal decongestants), lithium metal (which can be extracted from lithium batteries), and anhydrous ammonia (which is found in fertilizer). Two of these three precursors were found among the items introduced as evidence. Albro was also permitted to testify about the results of a test he had run on Exhibit No. 9, the clear pitcher found at the scene. He found that the pitcher tested positive for the presence of ether amphetamine or methamphetamine residue. Since all of the precursors required for methamphetamine production were found near the pitcher, Albro concluded that he had "no doubt [the residue] would be methamphetamine."

Other witness testimony further supports Appellant's conviction. Rodney Peveler, whose vehicle was parked in Appellant's driveway when Mayhugh arrived in

pursuit, testified that he had gone there for the purpose of obtaining some methamphetamine from Appellant. Peveler testified that he had been at Appellant's home the previous night, February 12th, and that Appellant had left, telling Peveler he was to "get the liquid out of the seed jug and bring it back to smoke it off." (There was testimony that one method of ingesting methamphetamine is to sprinkle it on aluminum foil, heat it, and inhale the fumes.)

Angela Barber also testified about Appellant's methamphetamine production. Barber stated that she had smoked methamphetamine with Appellant, Tim Fleming, and Angela Byars at Appellant's residence in the early morning hours of February 13th. Barber also testified that Appellant had left his house that morning, saying he was gong to Tom Shepherd's residence "to make some more." According to Barber, Appellant offered to trade her some methamphetamine for starter fluid, which is commonly used in methamphetamine production.

Finally, Tim Fleming, who had been in the truck with Appellant during the chase with Sheriff Mayhugh, gave eyewitness testimony incriminating Appellant. Fleming testified that late on the night of February 12th, he and Appellant "cooked" and used methamphetamine at Tom Shepherd's residence in Muhlenberg County. They thereafter went back to Appellant's home where they smoked more methamphetamine, later returning again to Shepherd's residence to finish the manufacturing process they had begun earlier. Fleming testified that Appellant had used Exhibit No. 9 (the clear pitcher) to mix the precursors before cooking them into powder form.

In his testimony, Fleming explained that he and Appellant had stayed at Shepherd's residence until the afternoon of February 13th, at which point they left to go back to Appellant's home. En route to Appellants' house, however, Sheriff Mayhugh

saw them and chased them. Fleming testified that while in pursuit, he had thrown various items, including Exhibit No. 9, out of his passenger's-side window. He admitted that he was too busy to notice whether Appellant was also throwing items out of the driver's-side window.

At trial, the Commonwealth presented circumstantial evidence, expert testimony, and eyewitness testimony. We believe that a reasonable jury could conclude from this evidence that Appellant either manufactured methamphetamine, KRS 218A.1432(1)(1), possessed the chemicals or equipment for the manufacture of methamphetamine with the intent to manufacture methamphetamine, KRS 218A.1432(1)(b), or both. In this case, both theories were covered by the statute and supported by evidence, and a conviction on either theory fulfills the unanimous verdict requirement. Wells v. Commonwealth, Ky., 561 S.W.2d 85, 88 (1978). The evidence was therefore sufficient to sustain the conviction. Commonwealth v. Benham, Ky., 816 S.W.2d 186, 187 (1991).

EVIDENCE OF OTHER CRIMES, WRONGS OR ACTS

Appellant argues that the trial court erred in permitting the testimony of witnesses regarding Appellant's behavior immediately preceding his arrest. Appellant filed a motion in limine, KRE 103(d), to suppress the testimony of Peveler, Barber, and Fleming that Appellant ingested methamphetamine on February 12th and 13th, and that he offered to sell or trade methamphetamine to Peveler and Barber. We agree with the trial court that this evidence was admissible. KRE 404(b) provides:

> 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. It may, however, be admissible:
>
> (1) If offered for some other purpose, such as proof of

> motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident....

Although Appellant was not charged with methamphetamine use, the testimony of witnesses Peveler, Barber, and Fleming was admissible to prove a motive for manufacturing methamphetamine. Evidence of Appellant's prior use and offers to sell or trade the substance demonstrate that he manufactured methamphetamine for his own consumption and/or profit. Cf. Young v. Commonwealth, Ky., 25 S.W.3d 66, 70-71 (2000) (evidence that defendant had manufactured methamphetamine in the past was admissible to show knowledge of the process.)

In admitting the testimony concerning prior acts, the trial court explicitly admonished jurors only to consider such testimony "insofar as it may tend to show a motive, if it does, on the part of the defendant with respect to the offense for which the defendant is being tried." We find that admission of this testimony was not unduly prejudicial, and as such, was not error.

SCIENTIFIC EVIDENCE

On March 15, 2000, several months before trial, Appellant filed a discovery motion under RCr 7.24(1) and (2), seeking discovery and "inspection of all tangible evidence, photographs and police reports, including any substance analysis examination." Rather than enter an order requiring discovery of the requested information and materials, the trial court entered an order recognizing that the Commonwealth attorney had an open file policy and that "defendant shall have the right to re-file a discovery motion if necessary." Appellant did not re-file a motion.

The "open file" did not include any results from tests taken of Exhibit No. 9, the clear pitcher. Based upon the absence of any such test results, Appellant's counsel

stated during voir dire: "In this case, I think the evidence is going to be presented to you that there is no quantity of methamphetamine whatsoever that was found." On the morning of trial, however, expert witness Cheyenne Albro conducted a last-minute field "swab" test of the glass pitcher. The pitcher tested positive for the presence of either amphetamine or methamphetamine. During a subsequent off-the-record, in-chambers discussion, the trial court sustained an objection from Appellant as to the introduction of those test results at trial. The record makes no mention of any specified grounds for Appellant's objection. Neither a narrative statement, CR 75.13, nor a bystanders bill, CR 75.14, was filed to supplement the record with this information.

During Appellant's cross-examination of Albro, the following exchange took place:

> Q. Did you - you say that normally, I think actually ninety-nine percent of the time methamphetamine is found in a powder form, is that correct?
>
> A. Yes Sir.
>
> Q. Did you actually see anything when you were looking at that pitcher to indicate a powder residue?
>
> A. No, sir, I didn't detect anything with my eyes.

The trial court ruled that this testimony "opened the door" to the introduction by the Commonwealth of the Exhibit No. 9 test results. The record indicates the same in the following passage:

> THE COURT: Well, I'm going to allow. I think the door was opened. Now, in chambers there was a discussion off the record, I believe, by the attorneys and the court in which the Commonwealth's Attorney advised all that there had been a field test just performed and the court said it would not allow the introduction of that because there had been no prior discovery made and it was too late in the game to get into that, but I think the question that was asked of this witness by the defense counsel does give the foundation to allow the Commonwealth to ask about the presence

of any residue, so that's my ruling.

DEFENSE COUNSEL: Renew my objection.

THE COURT: Yes. Your objection is noted and overruled.

Albro was subsequently permitted to divulge the results of the test he had performed earlier that same day. He testified that the "swabbing" test had revealed amphetamine or methamphetamine residue on the interior of the pitcher.

On appeal, Appellant argues that this testimony was improper because "swabbing" is not a scientifically admissible manner of testing evidence. Appellant further argues that this issue was preserved by an objection to its admission into evidence at trial. The Commonwealth contends that, because Appellant did not object to Albro's testimony specifically on the basis of scientific unreliability, Appellant cannot raise that issue for the first time on appeal. We agree with the Commonwealth and hold that the issue of scientific unreliability has not been properly preserved for this Court's consideration.

KRE 103 (a)(1) permits an appeal on admission of evidence only if a timely objection was made at trial, and only when such objection "state[s] the specific ground for objection, *if the specific ground was not apparent from the context.*" (Emphasis added.) Although Appellant timely objected to the admission of the test results, the record is void of any specific ground for objection. Thus, the question before us is whether the ground for objection was apparent from the context. In the absence of any indication whatsoever that Appellant's objection was concerned with scientific unreliability, we find that this ground was not "apparent from the context" and Appellant therefore cannot raise this issue on appeal. Harris v. Commonwealth, Ky., 342 S.W.2d 535, 539 (1961) (a party is confined to specific grounds of objection to the admission of

evidence and is deemed to waive any other grounds.)

Appellant's argument is further undermined by the fact that a different ground for objection-failure by the Commonwealth to provide notice-is apparent from the context. In admitting the evidence over Appellant's objection, the trial court referred back to statements apparently made during the in-chambers discussion: "the court said it would not allow the introduction of that because there had been no prior discovery made and it was too late in the game to get into that...." The trial court's comments reveal that in the original discussion, Appellant had in fact specified a ground for objection, and it is clear that such was the Commonwealth's failure to give notice of the test, not its scientific reliability.

Where, as here, the trial court states the reason for its ruling, the objecting party then has a duty to state specifically the ground or grounds for the objection if different from or in addition to the grounds stated by the trial court; otherwise, the objecting party adopts the ground stated by the trial court. Ramsey v. Commonwealth, Ky., 267 S.W.2d 730 (1954) (errors not brought to the attention of the trial judge and not preserved by exceptions to his rulings are not available on appeal to this Court). If Appellant had contemplated other grounds for objection, he had the opportunity to so specify and preserve those issues. Instead, Appellant's only response to the trial court's explanation was a renewed objection.

Although the basis of Appellant's objection was apparent from the context, it was different from the issue raised by Appellant here on appeal. Appellant did not object to Albro's testimony on the basis of scientific unreliability at trial, and has thus forfeited his opportunity to argue the issue before this Court.

Accordingly, we affirm Appellant's convictions and sentence.

Lambert, C.J., Graves, and Wintersheimer, J.J.,concur. Keller, J., concurs in result only.

Cooper, J., concurs, in part, and dissents, in part, by separate opinion in which Stumbo, J. joins.

Johnstone, J., dissents without separate opinion.

COUNSEL FOR APPELLANT
Dennis M. Ritchie
Dillingham & Ritchie
P.O. Box 129
Elkton, KY 42220-0129

COUNSEL FOR APPELLEE
A.B. Chandler III
Attorney General

Matthew D. Nelson
Assistant Attorney General
Office of Attorney General
Criminal Appellate Division
1024 Capital Center Drive
Frankfort, KY 40601

RENDERED: JANUARY 23, 2003
NOT TO BE PUBLISHED

Supreme Court of Kentucky

2000-SC-0689-MR

SCOTTIE D. MORGAN — APPELLANT

V.

APPEAL FROM MUHLENBERG CIRCUIT COURT
HONORABLE DAVID H. JERNIGAN, JUDGE
00-CR-34

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION BY JUSTICE COOPER

CONCURRING IN PART AND DISSENTING IN PART

The plurality opinion does not even suggest that a Daubert error did not occur in this case, or that it was not prejudicial, but only that it was somehow not preserved for appellate review. To reach this conclusion, it (1) substitutes by misquotation a federal rule, FRE 103(a)(1), for the applicable Kentucky rule, KRE 103(a)(1), despite the fact that the federal rule was specifically rejected by this Court when the Kentucky Rules of Evidence were adopted; and either (2) reinstates the long-discarded requirement that a party must formally except to a trial court's ruling in order to preserve an evidentiary error for appellate review, or (3) creates a new rule of evidence out of thin air. It would be better to simply admit that Appellant's conviction is being affirmed because he is

guilty than to muddle the rules of evidence in order to manufacture a legal justification for affirmance that does not exist.

I. THE DAUBERT ERROR.

Shortly after his indictment, Appellant filed a discovery motion under RCr 7.24(1) and (2), seeking discovery and "inspection of all tangible evidence, photographs and police reports, including any substance analysis examination." (Emphasis added.) The trial judge declined to enter the requested discovery order but instead, on March 27, 2000, entered an order providing, inter alia:

> As for the motion of discovery, the Commonwealth's Attorney advises that he has an "open file policy." After inspecting the Commonwealth's file, the defendant shall have the right to re-file a discovery motion if necessary.

The motion was not refiled. The plurality opinion's quotation of this order leaves out the language, "After inspecting the Commonwealth's file," and thus creates the false impression that defense counsel could have discovered the evidence in question had he but refiled his discovery motion. As will be seen, a pretrial inspection of the Commonwealth's file would not have revealed the "substance analysis examination" at issue in this case because that examination did not occur until the morning of trial. Regardless, the upshot of the March 27, 2000, order was that no discovery order was entered, thus no discovery violation could have occurred (which, of course, exemplifies why an "open file policy" is no substitute for a discovery order).

During voir dire and without objection, Appellant's counsel made the following statement to the jury:

> Now, there are certain cases that relate to methamphetamine where a large quantity of methamphetamine might be found and confiscated by the police. That's not uncommon.

In this case, I think the evidence is going to be presented to you that there is no quantity of methamphetamine whatsoever that was found.

Cheyenne Albro, director of the Pennyrile Narcotics Task Force, was not involved in the investigation of this case but was scheduled to testify as an expert witness about the general nature of methamphetamine, its precursors, and the method of its manufacture. As noted in the plurality opinion, slip op. at 3, numerous items of evidence were gathered from or near the scene of Appellant's arrest, including two glass Mason jars, introduced along with other items as Commonwealth's Exhibit No. 2, and a clear plastic pitcher with a bluish-green top, introduced as Commonwealth's Exhibit No. 9. On the morning of trial (presumably after learning of defense counsel's voir dire claim that "no quantity of methamphetamine whatsoever was found"), Albro conducted his own field "swab" test of Exhibit No. 9. He would later testify on redirect examination that Exhibit No. 9 tested positive for the presence of either amphetamine or methamphetamine. He would also later testify that he field tested only Exhibit No. 9. Specifically, he did not testify that he field tested either of the two Mason jars. During an off-the-record, in-chambers hearing, the trial judge sustained defense counsel's initial objection to the admission of the evidence of Albro's field test of Exhibit No. 9. If any grounds were specified for that in-chambers objection, such is not apparent from the record.

The following colloquy occurred during defense counsel's cross-examination of Albro:

Q. Did you -- you say that normally, I think actually ninety-nine percent of the time methamphetamine is found in a powder form, is that correct?

A. Yes, sir.

Q. Did you see anything when you were looking at those jars to indicate a powder residue? [Emphasis added.]

A. No, sir, I didn't detect anything with my eyes.

The prosecutor argued and the trial judge agreed that this line of questioning "opened the door" for the admission of the results of Albro's morning-of-trial field test of Exhibit No. 9, the plastic pitcher. The following then occurred on-the-record with respect to this ruling:

> THE COURT: Well, I'm going to allow. I think the door was opened. Now, in chambers, there was a discussion off the record, I believe, by the attorneys and the court in which the Commonwealth's Attorney advised all that there had been a field test just performed and the court said it would not allow the introduction of that because there had been no prior discovery made and it was too late in the game to get into that, but I think the question that was asked of this witness by the defense counsel does give the foundation to allow the Commonwealth to ask about the presence of any residue, so that's my ruling. [Emphasis added. Note that the court did not state that defense counsel had stated that his objection to the admission of this evidence was grounded on a "discovery violation."]
>
> DEFENSE COUNSEL: Renew my objection.
>
> THE COURT: Yes. Your objection is noted and overruled.

At the beginning of the Commonwealth's redirect examination of Albro, defense counsel again renewed his nonspecific objection:

> DEFENSE COUNSEL: Your Honor, I renew my objection for the record.
>
> THE COURT: Alright. So noted. Overruled.

Albro then testified as follows:

Q. Would you tell us what container that you performed the test on?

A. The plastic pitcher, exhibit -- I can't see the exhibit number on it.

. . .

Q. Commonwealth's Exhibit 9?

A. Yes, sir.

Q. And . . .

A. There was some question as to any residue that may have been tested for or on that. At that time I did what we call a swabbing, which basically we take a dampened cloth or a piece of paper, we'll wipe the material, let that dry and then perform a field test on it for methamphetamine, which I did so and the results was that it was a positive test.

Q. You swabbed the interior of this plastic jug [sic], let it dry and then performed a field test on it -- chemical test on it?

A. Yes, sir.

Q. And that field test revealed what?

A. It was a positive test. It showed that there was residue there.

Q. And that residue was?

A. Methamphetamine or amphetamine.

Albro never described how he tested the swab or how the result of that test was manifested, e.g., by odor, change of color, disintegration of the swab, or otherwise. Nor did he testify in any respect to the scientific reliability of the test that he performed. In fact, he admitted on additional cross-examination that the test was only a preliminary test and that a full test to prove whether the swab contained amphetamine or methamphetamine could only be performed at a forensic laboratory. Nevertheless, on additional redirect examination, he avowed that he had "no doubt" that the swab contained methamphetamine because, when Exhibit No. 9 was discovered on the side of Gordon Bradley Road on February 13, 2000, pseudoephedrine tablets were also found nearby. (Pseudoephedrine is an over-the-counter cold medicine that is also a precursor of methamphetamine.) Albro's testimony as to the result of his field test was

the only direct evidence corroborating the testimony of Tim Fleming that Appellant had actually manufactured methamphetamine on the night of February 12-13, 2000. (Fleming, a former codefendant, testified against Appellant pursuant to a plea agreement.) The coup de grace was administered during the prosecutor's closing argument:

> Now, Timmy Fleming testified that this very pitcher that came from the Shepherd residence was thrown out by him. But what else did he tell you? That this very pitcher contained the dope that was cooking, contained the meth that they were making.
>
> Well, now, how do we know that this contains meth? We know that this contains meth by the very testimony of Director Cheyenne Albro. He tested this substance, scraped -- did a moisture -- he told you how he got a paper towel and wetted it, wrapped it around there, dried it out and did a field test, and tested positive for methamphetamine.

When faced with a proffer of scientific evidence, the trial judge must determine that the evidence is both relevant and reliable. Daubert v. Merrell Dow Pharm., Inc., 509 U.S. 579, 589, 113 S.Ct. 2786, 2795, 125 L.Ed.2d 469 (1993). Albro's testimony as to the result of his field test of Exhibit No. 9 was clearly relevant. The issue was whether the test, itself, was sufficiently reliable to warrant the admission of the result of the test under KRE 702. In Daubert, the United States Supreme Court held that upon the adoption of Federal Rule of Evidence (FRE) 702 (identical to KRE 702), the so-called "Frye test" of general acceptance in the scientific community, Frye v. United States, 293 F. 1013 (D.C. Cir. 1923), became but one factor to consider in determining the reliability of evidence of a scientific, technical, or other specialized nature. 509 U.S. at 594, 113 S.Ct. at 2797. Other factors include whether the method or theory can be tested, whether it has been subjected to peer review and publication, the known or potential rate of error, and the existence and maintenance of standards controlling the technique's operation. Id. at 592-95, 113 S.Ct. at 2796-97. Daubert was adopted in

Kentucky as to scientific evidence in Mitchell v. Commonwealth, Ky., 908 S.W.2d 100 (1995), overruled on other grounds, Fugate v. Commonwealth, Ky., 993 S.W.2d 931 (1999), and as to evidence of a technical or other specialized nature in Goodyear Tire & Rubber Co. v. Thompson, Ky., 11 S.W.3d 575 (2000).

Daubert and Mitchell require a preliminary assessment of whether the reasoning or methodology underlying the proposed testimony is scientifically valid and whether that reasoning or methodology can be applied to the facts in issue. Daubert, 509 U.S. at 592-93, 113 S.Ct. at 2796; Mitchell, 908 S.W.2d at 101. No such assessment was made here. Not only is there no evidence that the field test performed by Albro is scientifically reliable, there is also no evidence as to how the test was performed or how the result was manifested. It was error to admit this evidence without a preliminary determination of its scientific reliability. As stated, the plurality opinion does not dispute that the Daubert error occurred and that it was prejudicial but, nevertheless, jumps through hoops to conclude that the error was not preserved for review.

II. PRESERVATION OF ERROR.

Defense counsel thrice objected to the admission of evidence of Albro's field test. As stated supra, the record does not reflect whether any grounds were specified for his initial, in-chambers objection. However, that objection was sustained, thus obviating any need to further clarify the record on that point. If an objection is sustained, the burden is on the offering party (here, the Commonwealth) to preserve the error by an avowal. KRE 103(a)(2); Commonwealth v. Ferrell, Ky., 17 S.W.3d 520, 523 (2000). The objecting party is not required to complain that the objection was sustained for the wrong reason. The "grounds for objection" issue did not arise until the

trial judge reversed his ruling and erroneously held (as discussed infra) that defense counsel's cross-examination of Albro had "opened the door" to the admission of the field test evidence in rebuttal. In response to this ruling, defense counsel registered two more general objections and the trial court did not request that grounds be stated for either of those objections. Thus, the outcome of this case should be governed by the language of KRE 103(a)(1).

However, the plurality opinion misquotes KRE 103(a)(1) by stating:

> KRE 103(a)(1) permits an appeal on admission of evidence only if a timely objection was made at trial, and only when such objection "state[s] the specific ground for objection, if the specific ground was not apparent from the context."

Slip op. at 8 (alteration and emphasis added by plurality opinion). KRE 103(a)(1) actually provides:

> [KRE] 103(a). Effect of erroneous ruling. Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected; and
>
> (1) Objection. In case the ruling is one admitting evidence, a timely objection or motion to strike appears of record, and upon request of the court stating the specific ground of objection, if the specific ground was not apparent from the context; . . . [Emphasis added.]

The plurality opinion shamelessly deletes the emphasized language from KRE 103(a)(1) and thereby substitutes for the Kentucky rule the language of the corresponding federal rule, FRE 103(a)(1), which, indeed, provides:

> [FRE] 103(a). Effect of erroneous ruling. Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected; and
>
> (1) Objection. In case the ruling is one admitting evidence, a timely objection or motion to strike appears of record, stating the specific ground of objection, if the specific ground was not apparent from the context; . . .

Under the federal rule, a general objection that is overruled does not preserve error for appellate review on any grounds, United States v. Wilson, 690 F.2d 1267, 1273-74 (9th Cir. 1982), United States v. Hutcher, 622 F.2d 1083, 1087 (2d Cir. 1980), unless the specific grounds were apparent from the context. (More on this latter aspect of the rule infra.) The drafters of the Kentucky Rules of Evidence recommended adoption of the federal rule in Kentucky. The Commentary to the final draft explained how that rule would have differed from existing Kentucky law:

> Prior to the adoption of this Rule (as a consequence of a provision contained in Rule 46 of the Kentucky Rules of Civil Procedure), counsel could object to the admissibility of evidence without giving grounds; only upon request of the judge was it necessary for an objecting party to state the reasons for an objection. This so called "general objection" has long been regarded in most jurisdictions as inadequate to preserve errors for review. In requiring the statement of a specific ground of objection, subdivision (a)(1) better serves the objectives set out in the preceding paragraph. It makes Kentucky law consistent with the Federal Rules and the law of most other jurisdictions.

Commentary to proposed KRE 103, Evidence Rules Study Committee, Final Draft (1989).

Nevertheless, the recommendation to adopt the federal rule was rejected BY THIS COURT in favor of the language contained in two preexisting rules to the effect that grounds for objection need be stated only "on request of the court." CR 46; RCr 9.22. See Robert G. Lawson, The Kentucky Evidence Law Handbook § 1.10, at 27 (3d ed. Michie 1993) ("[T]he drafters' recommendation was rejected (at the initiative of the Kentucky Supreme Court) in favor of the rule that grounds for objection need be given only when requested by the court."). Under CR 46, RCr 9.22 and, now, KRE 103(a)(1), unless specific grounds are requested by the court, a general objection preserves error on any ground upon which the objection could have been sustained. Price v. Bates,

Ky., 320 S.W.2d 786, 789 (1959). Of course, that is the direct opposite of the result mandated by the federal rule which the majority has applied ad hoc in this case.

Worse, however, than the ad hoc application of FRE 103(a)(1) instead of KRE 103(a)(1) to this case is the plurality opinion's additional holding that:

> Where, as here, the trial court states the reason for its ruling, the objecting party then has a duty to state specifically the ground or grounds for the objection if different from or in addition to the ground stated by the trial court; otherwise, the objecting party adopts the ground stated by the trial court.

Slip op. at 9. There is no authority for this remarkable proposition -- anywhere. The case cited by the majority, Ramsey v. Commonwealth, Ky., 267 S.W.2d 730 (1954), was tried under the regime of the former Civil and Criminal Codes of Practice that were superseded long ago by the present Civil and Criminal Rules of Procedure. Under former Civil Code § 334 and former Criminal Code § 280, an objection was insufficient to preserve error unless the objecting party specifically excepted to the court's subsequent adverse ruling. Blanton v. Commonwealth, 247 Ky. 812, 146 S.W. 10, 11 (1912). When our predecessor Court noted in Ramsey, supra, that "[i]t is an elementary rule of procedure that errors not brought to the attention of the trial judge and not preserved by exceptions to his rulings are not available on an appeal to this Court," 267 S.W.2d at 732, it was referring to the fact that the appellant in that case had neither objected nor excepted to the admission of the evidence that he claimed was improperly introduced at trial. Id. at 733.

Has the majority opinion in this case reincarnated the ancient requirement that formal and specific exceptions must be registered to an adverse evidentiary ruling in order to preserve the error for appellate review? Even this rapidly aging writer is too young to remember when exceptions were required to preserve evidentiary errors. Civil

Rule 46 was adopted in 1953; RCr 9.22 was adopted in 1962 (1962 Ky. Acts, ch. 234, p. 812). Both provide that "[f]ormal exceptions to rulings or orders of the court are unnecessary . . . ." In adopting these rules, our predecessors wisely decided that exceptions were redundant and unnecessary to preserve error where a proper objection had been made. Nor does KRE 103(a)(1) contain any requirement that an exception be registered to the overruling of an objection.

The majority's decision in this case has either abrogated those rules or has created from thin air a new preservation rule never before seen in Anglo-American jurisprudence, i.e., if, in response to a general objection, the trial court sustains the objection but gratuitously states an erroneous ground for its ruling, the party whose objection was sustained must object to the erroneous ground and state the correct ground, whether or not requested by the court, or be bound on appeal by the erroneous ground stated by the trial court. (Most lawyers regard the act of continuing to argue with a judge after the judge has made a ruling as both an exercise in futility and an invitation for a stern rebuke -- especially if the ruling was in that lawyer's favor.) We have long held that a trial judge's decision will be upheld even if that decision was right for the wrong reason. Noel v. Commonwealth, Ky., 76 S.W.3d 923, 929 (2002); Tamme v. Commonwealth, Ky., 973 S.W.2d 13, 31 (1998); Jarvis v. Commonwealth, Ky., 960 S.W.2d 466, 469 (1998); Smith v. Commonwealth, Ky., 788 S.W.2d 266, 268 (1990). Now we say that a party in whose favor a right decision was made for the wrong reason cannot on appeal rely on the right reason for that right decision unless that party informed the trial judge of the right reason at the time the judge made the right decision for the wrong reason. In the context of this case, that means that Appellant cannot rely on the Daubert violation as the right reason for the trial judge's ruling sustaining his

objection because he failed to tell the trial judge that he was sustaining the objection for the wrong reason, i.e., "discovery violation." That, of course, means that unless the appellate court sua sponte discerns the right reason for the trial judge's decision, that decision will be reversed because of the trial judge's faulty reasoning.

The plurality opinion's next conclusion that it is "apparent from the context" that the basis for defense counsel's initial objection was "failure by the Commonwealth to provide notice," slip op. at 8-9, is equally absurd. That was not even the ground stated by the trial judge as the basis for his ruling. Nevertheless, in applying this same "apparent from the context" language that is found in both KRE 103(a)(1) and FRE 103(a)(1), federal courts look primarily at the nature of the evidence to which the objection pertained and statements made by objecting counsel. E.g., United States v. Boyd, 55 F.3d 667, 671 n.3 (D.C. Cir. 1995); United States v. Gilmore, 730 F.2d 550, 554 n.1 (8th Cir. 1984); Werner v. Upjohn Co., 628 F.2d 848, 853 (4th Cir. 1980) (the objecting party had also filed a pretrial motion stating grounds for suppression of the same evidence). In United States v. Schrock, 855 F.2d 327 (6th Cir. 1988), the grounds for the objection were found "apparent" from both the nature of the testimony to which the objection was made and from statements made by objecting counsel during the ensuing bench conference. Id. at 332 n.8.

Where, as here, however, the objection was made and sustained during an off-the-record, in-chambers conference, there is simply no "context" within which the objection can be viewed. In fact, in the absence of a record to the contrary, especially in a criminal case, any doubt as to whether defense counsel stated the correct grounds, or no grounds, for his objection should be resolved against the Commonwealth, not the defendant. In Gilmore, supra, defense counsel made a general objection, following

which a bench conference occurred that, for some unexplained reason, was not recorded. 730 F.2d at 554. The United States Court of Appeals for the Eighth Circuit held under those circumstances that it would "assume" that the ground for the objection was apparent from the context, thereby giving the objecting party the benefit of the doubt. Id. at 554 n.1. The logical assumption here is that defense counsel did not state "lack of notice" or "discovery violation" as grounds for his objection since he obviously knew that no discovery order had been entered. (Absent a discovery order, there is no "notice" requirement with respect to KRE 702 evidence.)

Nevertheless, this appeal is not about the fact that the trial judge initially sustained defense counsel's off-the-record objection but that he ultimately overruled defense counsel's two on-the-record objections. Those objections clearly were general, not specific, and the trial judge did not request that specific grounds be stated for those objections. The trial judge's stated reason for overruling those objections ("opened the door") was just as erroneous as his stated reason ("discovery violation") for sustaining the initial off-the-record objection. As noted supra, Exhibit No. 9 was a plastic pitcher with a bluish-green top. The question asked of Albro that supposedly "opened the door" to the admission of evidence of the field test performed on that exhibit pertained not to the "plastic pitcher" but to the "jars," an obvious reference to the two glass Mason jars, Exhibit No. 2, which had not been field tested.[1] But even if that were not so, the

---

[1] Webster's II New College Dictionary defines a "pitcher" as "[a] vessel for liquids with a handle and a lip or spout for pouring," and a "jar" as "[a] cylindrical glass or earthenware vessel with a wide mouth and usually having no handles." The same source defines a "Mason jar" as "[a] wide-mouthed glass jar with a screw top, used for home canning and preserving." Albro testified that, during the process of manufacturing methamphetamine, glass jars are used as receptacles for both the mixture of precursors and the ether (starting fluid) used to "cook" them. "Very seldom do we see it in plastic, generally always glass . . . ."

trial judge's "opened the door" ruling presumably referred to the rule of "curative admissibility." That rule applies when one party introduces an inadmissible fact and thereby "opens the door" for the other party to introduce another inadmissible fact that negatives, explains, or counterbalances the first inadmissible fact. Lawson, supra, § 1.10 IV, at 30-33. The evidence elicited from Albro that he did not see any powder residue on the glass Mason jars was not inadmissible, and thus did not "open the door" to curative admission of the inadmissible evidence of the field test performed on the plastic pitcher.

The Commonwealth's brief also cites in support of the "opened the door" theory two federal cases admitting evidence previously suppressed because illegally obtained to rebut defense tactics seeking to use the fact of suppression as a shield. Walder v. United States, 347 U.S. 62, 65, 74 S.Ct. 354, 356, 98 L.Ed. 503 (1954) (previously suppressed evidence of illegally seized narcotics properly admitted to impeach the defendant's perjurious testimony denying possession of those narcotics); United States ex rel. Castillo v. Fay, 350 F.2d 400, 402-03 (2d Cir. 1965) (admission of previously suppressed evidence of illegally seized drug paraphernalia to rebut evidence elicited on cross-examination of the investigating officer that narcotics were not found during the search in question was of insufficient constitutional significance to support the issuance of a writ of habeas corpus). Albro's field test evidence was not inadmissible because it had been illegally obtained, but because it was not shown to be scientifically reliable. Thus, it was inadmissible for any purpose, including rebuttal.

* * *

"Judges must guard against the temptation, whether personal or of others, to abandon settled rules of evidence to accommodate their sense of justice in a particular

case." Sharp v. Commonwealth, Ky., 849 S.W.2d 542, 546 (1993) (Lambert, J., writing for the majority).

> [The rules of evidence] bring to the law its objectivity. Their purpose would be subverted if courts were permitted to disregard them at will because of an intuitive perception that to do so will produce a better result in the case at hand. We accept the premise that obeying these rules is the best way to produce evidence of a quality likely to produce a just result. We reject the notion of different rules for different cases because one or the other of the litigants insists that a different ruling will produce a better result in his particular case.

Fisher v. Duckworth, Ky., 738 S.W.2d 810, 813 (1987) (Leibson, J., writing for the majority).

To invoke Justice Holmes's oft-quoted aphorism, "hard cases[] make bad law." Northern Secs. Co. v. United States, 193 U.S. 197, 400, 24 S.Ct. 436, 468, 48 L.Ed. 679 (1904) (Holmes, J., dissenting). Facially, this is a hard case, one in which proper application of the rules of evidence lead inexorably to the conclusion that this conviction must be reversed for a new trial. Nevertheless, our duty is not to reach a perceived "better" result by ignoring or distorting sound legal principles, but to apply the facts and the law as they actually exist and thereby ascertain the "rule of law" that applies to this case. Unfortunately, the majority of this Court has ignored this basic principle of judicial method and has, thereby, made some exceedingly "bad law."

Accordingly, I concur in the affirmance of Appellant's conviction and sentence for operating a motor vehicle on a suspended license, but dissent from the affirmance of his conviction and sentence for manufacturing methamphetamine, and would remand this case to the Muhlenberg Circuit Court for a new trial on the latter charge.

Stumbo, J., joins this opinion, concurring in part and dissenting in part.