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NOT TO BE PUBLISHED OPINION

THIS OPINION IS DESIGNATED "NOT TO BE PUBLISHED." PURSUANT TO THE RULES OF CIVIL PROCEDURE PROMULGATED BY THE SUPREME COURT, CR 76.28 (4) (c), THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE CITED OR USED AS AUTHORITY IN ANY OTHER CASE IN ANY COURT OF THIS STATE.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: OCTOBER 23, 2003
NOT TO BE PUBLISHED

Supreme Court of Kentucky

FINAL

DATE 1-22-04 ELA Grow HPC

2001-SC-0570-MR

EDDIE MADDING — APPELLANT

V.

APPEAL FROM FULTON CIRCUIT COURT
HONORABLE WILLIAM LEWIS SHADOAN, JUDGE
01-CR-35

COMMONWEALTH OF KENTUCKY — APPELLEE

MEMORANDUM OPINION OF THE COURT

AFFIRMING IN PART AND VACATING IN PART

Appellant, Eddie Madding, was convicted by a Fulton Circuit Court jury of possession of anhydrous ammonia in an unapproved container, manufacturing methamphetamine, wanton endangerment in the first degree, and of being a persistent felony offender in the first degree. He was sentenced to a total of twenty-two years in prison and appeals to this Court as a matter of right. Ky. Const. § 110(2)(b). Appellant contends that the trial court erred by: (1) refusing to suppress his written confession; (2) admitting evidence that his blood sample tested positive for controlled substances; (3) failing to grant his motion for a directed verdict due to insufficiency of the evidence; (4) failing to dismiss his anhydrous ammonia conviction on double jeopardy grounds; (5) failing to instruct the jury to recommend whether his sentences should run concurrently or consecutively; and (6) refusing to declare KRS 218A.1432(1)(b)

unconstitutionally void for vagueness. We now vacate the conviction and sentence for manufacturing methamphetamine and affirm the other convictions and sentences.

I. FACTS.

On November 22, 2000, Jimmy Henderson, a plumber, was hired to fix a stopped-up commode at Appellant's mother's residence in Fulton, Kentucky, where Appellant also resided. Henderson testified that the job required him to dig up the outside line to the commode. He went to a nearby shed in search of a bucket. Inside the shed, Henderson found a portable water cooler that he thought might serve his needs. However, when he opened the lid to the cooler, he encountered an odor of anhydrous ammonia so strong that it drove him to his knees. Henderson knew that it was illegal to store anhydrous ammonia in a water cooler and immediately called the police.

Three officers from the Fulton County Police Department arrived soon thereafter. One officer testified that, as he arrived, he saw Appellant walking away from the house. He called out to Appellant who then fled the scene. Unsure of the situation, the officers did not give chase.

With the consent of Appellant's mother, the officers searched the shed and found the cooler containing anhydrous ammonia. They also found a length of plastic tubing and a mayonnaise jar containing liquid and a white powdery substance. A forensic chemist testified that the cooler did, in fact, contain anhydrous ammonia and that the jar contained ether (or starting fluid), ephedrine, and pseudoephedrine. The chemist testified that the ephedrine mixture was a precursor used in the manufacture of methamphetamine.

Officer John Ward was one of the investigating officers and had received training in methamphetamine and other illegal substances from the Drug Enforcement Agency in Quantico, Virginia. Ward testified that the tubing found in the shed typically was used to remove gases from anhydrous ammonia in order to manufacture methamphetamine. He also opined that keeping those materials in the shed was extremely dangerous. According to Ward, anhydrous ammonia is highly toxic, and ether may potentially act as an explosive. Thus, the combined substances constituted a functional "bomb." Another officer testified that at least two children under the age of ten lived and played in the area.

Later that day, at approximately 11:30 a.m., Fulton County Police Chief Terry Powell received a telephone call at his office. Powell had known Appellant for "a long time" and recognized his voice. According to Powell, Appellant confessed to him over the telephone that the materials found in his mother's shed belonged to him.

> He told me that the methamphetamine was his -- what we had found at the shed. And then, of course, I talked to Eddie, I told Eddie, I said, "you need to turn yourself in." I said, "it will look good for you if you did this." And then he made a comment, "well maybe it wasn't my meth." And now then also, and we talked a little more, and then he would comment that "it was mine," and he didn't want to get his mother into trouble. And then he stated that he "might turn himself in." And then of course the conversation ended, and then he hung up.

Powell did not believe Appellant was intoxicated during this conversation.

At approximately 7:00 p.m. that evening, Officer Benny Duncan, also of the Fulton County Police Department, encountered Appellant on the porch of Appellant's mother's residence. Duncan noted a strong odor of alcohol on Appellant's person and that his eyes were bloodshot, his speech slurred, and his balance unsteady. Duncan concluded that Appellant was so severely intoxicated as to be "a danger to himself" and

arrested him for "public intoxication." At the police station, Appellant signed a written statement that waived his rights and stated:

> The items found in next doors [sic] neighbors shed belongs to Edward Madding.

Duncan transcribed the statement, but testified that Appellant told him exactly which words to use.

After questioning, Appellant demanded that Duncan take him to the hospital to treat a "puffed-up" area on his forearm. Duncan took Appellant to the Parkway Regional Hospital in Fulton, Kentucky. Appellant's demand had the unexpected consequence that a blood sample taken from him at the hospital tested positive for benzodiazepine, amphetamine, and THC.

Appellant was subsequently indicted for possession of anhydrous ammonia in an unapproved container in violation of KRS 250.489 (Count I);[1] wanton endangerment in the first degree in violation of KRS 508.060 (Count II); manufacturing methamphetamine in violation of KRS 218A.1432(1)(b) (Count III); being a persistent felony offender in violation of KRS 532.080 (Count IV); and alcohol intoxication (as opposed to "public intoxication") in violation of KRS 222.202(1) (Count V).

After a one-day trial, Appellant was convicted of the first four counts of the indictment. The jury recommended that Appellant serve one year in prison for possession of anhydrous ammonia in an unapproved container, three years for wanton endangerment, and twelve years for manufacturing methamphetamine.[2] It also found

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[1] The indictment was for the Class D felony version of the offense rather than for possession of anhydrous ammonia in an unapproved container with the intent to manufacture methamphetamine, a Class B felony. KRS 250.991(2).

[2] The alcohol intoxication charge was never submitted to the jury. We thus treat it as

Appellant guilty of being a persistent felony offender in the first degree but recommended only that either the sentence for the anhydrous ammonia conviction or the sentence for the wanton endangerment conviction be enhanced to ten years imprisonment. The final judgment erroneously treated the persistent felony offender conviction as a separate offense, reciting sentences of one year for the anhydrous ammonia conviction, three years for the wanton endangerment conviction, twelve years for the manufacturing methamphetamine conviction, and ten years for the persistent felony offender conviction. The judgment then imposed a total sentence of twenty-two years without specifying which sentences were to run concurrently and which consecutively (though we assume that the ten and twelve year sentences were to run consecutively and the other sentences concurrently with the consecutive sentences). The trial court denied Appellant's motions for a judgment of acquittal, RCr 10.24, and for a new trial, RCr 10.02.

II. CONFESSION.

Appellant contends that the trial court erred by failing to suppress his written confession given to Officer Duncan at the police station. As noted supra, Duncan arrested Appellant for public intoxication just prior to obtaining his written confession and testified that Appellant appeared to be so intoxicated as to be a danger to himself. Appellant echoed this observation at the suppression hearing, testifying that he had been drinking whisky continually since the day before, consuming approximately two bottles. Appellant claimed to remember running from the police that morning and calling Powell, but little else. Appellant now contends that his written confession was

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having been the subject of a directed verdict of acquittal. Kotila v. Commonwealth, Ky.,

admitted in violation of his constitutional rights under the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution and Sections Two and Eleven of the Kentucky Constitution because he was too intoxicated to give a voluntary confession.

Generally speaking, no constitutional provision protects a drunken defendant from confessing his crimes. "The fact that a person is intoxicated does not necessarily disable him from comprehending the intent of his admissions or from giving a true account of the occurrences to which they have reference." Peters v. Commonwealth, Ky., 403 S.W.2d 686, 689 (1966). Justice Palmore wrote in Britt v. Commonwealth, Ky., 512 S.W.2d 496 (1974), that "[i]f we accept the confessions of the stupid, there is no good reason not to accept those of the drunk." Id. at 500. "We are not at all persuaded that it would make sound law to hold that the combination of intoxication and police custody must add up to a violation of due process." Id. at 501.

However, there are two circumstances in which a defendant's level of intoxication might play a role in the suppression decision. First, intoxication may become relevant because a "lesser quantum" of police coercion is needed to overcome the will of an intoxicated defendant. Hill v. Anderson, 300 F.3d 679, 682 (6th Cir. 2002) ("When a suspect suffers from some mental incapacity, such as intoxication or retardation, and the incapacity is known to interrogating officers, a lesser quantum of coercion is necessary to call a confession into question.") (quotation omitted); United States v. Haddon, 927 F.2d 942, 946 (7th Cir. 1991) ("[W]hen the interrogating officers reasonably should have known that a suspect is under the influence of drugs or alcohol, a lesser quantum of coercion may be sufficient to call into question the voluntariness of the confession."); see also Jones v. Commonwealth, Ky., 560 S.W.2d 810, 814 (1977)

___ S.W.3d __, __ (slip op. at 14) (June 12, 2003).

(intoxication may be a factor "under certain circumstances" that could cause confession to be suppressed for lack of voluntariness). Thus, trial courts should consider a defendant's level of intoxication when considering whether police coercion has overborne the defendant's will such as to render the confession involuntary for purposes of the Due Process Clause.

Second, a confession may be suppressed when the defendant was so intoxicated as to be hallucinating, functionally insane, or otherwise in a state of mania. Halvorsen v. Commonwealth, Ky., 730 S.W.2d 921, 927 (1986); Peters, supra, at 688-89. In this circumstance, suppression may be warranted – not because the confession was "coerced" – but because it is unreliable. Britt, supra, at 500 ("[W]hen intoxication reaches the state in which one has hallucinations or 'begins to confabulate to compensate for his loss of memory for recent events' . . . the truth of what he says becomes strongly suspect.") (quotation omitted).

Neither of these scenarios occurred here. First, there was no evidence of any police coercion. All the evidence tended to show that Appellant's confession sprang from his own desire to confess and to protect his mother from possible criminal charges. In fact, Duncan testified that he had to stop Appellant from spontaneously confessing in order to read him his rights at the beginning of the station interview. Likewise, Powell testified that Appellant took the initiative to call him at his office in order to confess. Appellant did not contend otherwise at the suppression hearing. Rather than arguing that police coercion overbore his will, he argued that he was so intoxicated as to render his will effectively impotent. Unfortunately for Appellant, no constitutional violation may occur in the absence of state-sponsored coercion. Colorado v. Connelly, 479 U.S. 157, 167, 107 S.Ct. 515, 522, 93 L.Ed.2d 473 (1986)

("[C]oercive police activity is a necessary predicate to the finding that a confession is not 'voluntary' within the meaning of the Due Process Clause of the Fourteenth Amendment."); Watson v. DeTella, 122 F.3d 450, 453 (7th Cir. 1997) ("Absent a showing of some type of official coercion, however, a defendant's personal characteristics alone are insufficient to render a confession involuntary.").

Second, Appellant does not suggest that he was so intoxicated as to be hallucinating or otherwise out of his mind. Appellant was sober enough the morning of the day in question to run from the police when they arrived at his residence. During the suppression hearing, Appellant remembered calling Powell at the station to confess. Most importantly, the trial judge found as a matter of fact that Appellant was sufficiently sober to freely and voluntarily waive his rights.

> IT IS FURTHER THE FINDING OF THIS COURT that while the Defendant may have been under the influence of alcohol according to his own statement and the statement of the arresting officer, Officer Duncan, the Defendant's level of intoxication was not such as to negate his ability to freely and voluntarily waive his rights as explained to him by Officer Duncan and as evidenced by the written waiver form.

The trial court's findings of fact following a suppression hearing are conclusive if supported by substantial evidence. RCr. 9.78; Commonwealth v. Whitmore, Ky., 92 S.W.3d 76, 79 (2002); Springer v. Commonwealth, Ky., 998 S.W.2d 439, 446 (1999). The trial court's findings here were supported by substantial evidence; the suppression hearing lasted several hours and the trial court had the opportunity to view the videotape of Appellant being "booked" by Officer Duncan.

III. KRE 404(b).

Susan Walls, the custodian of medical records at Parkway Regional Hospital, was permitted to testify, over Appellant's objection, that a sample of Appellant's blood

taken on the day of his arrest tested positive for benzodiazepine, amphetamine, and THC. The admission of this evidence was premised on the trial court's belief that the presence of these agents tended to prove the charge of public intoxication. However, as Appellant correctly points out, he was not indicted for "public intoxication," KRS 525.100, but for "alcohol intoxication," KRS 222.202(1). The latter statute provides:

> A person is guilty of alcohol intoxication when he appears in a public place manifestly under the influence of alcohol to the degree that he may endanger himself or other persons or property, or unreasonably annoy persons in his vicinity.

Kentucky has long adhered to the rule expressio unius est exclusio alterius ("the expression of one thing is the exclusion of another") in interpreting both statutes and contracts. See Burgin v. Forbes, 293 Ky. 456, 169 S.W.2d 321, 325 (1943); see also Fiscal Court v. Brady, Ky., 885 S.W.2d 681, 685 (1994); Wade v. Commonwealth, Ky., 303 S.W.2d 905, 907 (1957). Thus, our alcohol intoxication statute, by expressly referring to "alcohol intoxication" and "alcohol" rather than "intoxication" or "drug or alcohol intoxication," excludes intoxication by nonalcoholic substances. Cf. Healthwise of Kentucky, Ltd. v. Anglin, Ky., 956 S.W.2d 213, 217-18 (1997) (noting the distinction between KRS 222.202, which applies exclusively to alcohol intoxication, and the definition of "intoxication" in KRS 222.005(6), which refers to both "alcohol" and "other drugs"). Furthermore, KRS 525.100, supra, specifically criminalizes "public intoxication" caused by the ingestion of controlled substances other than alcohol. Thus, evidence of other controlled substances in Appellant's blood was not probative of the indicted offense of alcohol intoxication.

Because the trial court incorrectly admitted Walls's testimony as probative of the intoxication charge, Appellant claims its admission violated KRE 404(b). However, we

have long held that a trial judge's decision will be upheld if that decision was right, even if 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).

In the instant case, Walls's testimony was probative of Appellant's motive to manufacture methamphetamine. Motive is, of course, an exception under KRE 404(b)(1):

> KRE 404 Character Evidence and Evidence of Other Crimes
>
> (b) Other crimes, wrongs, or acts. 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 . . . . (Emphasis added.)

The jury could fairly conclude from Walls's testimony regarding the amphetamine in Appellant's blood that Appellant had used methamphetamine prior to being admitted to the hospital and, therefore, that he had used methamphetamine on the same day that he was arrested for manufacturing methamphetamine.

In addition, it was reasonable for the jury to conclude that whoever placed the materials in the shed did so with the intent to manufacture methamphetamine. Of course, the range of possible motives for manufacturing methamphetamine is narrow. A jury could assume that the perpetrator intended to manufacture methamphetamine for (1) his own use; (2) sale to others; or (3) both. It is unlikely that methamphetamine would be manufactured in a backyard shed to, e.g., satisfy a scientific curiosity. Thus, evidence that Appellant was a methamphetamine user was highly probative of his

motive to manufacture methamphetamine. See Adkins v. Commonwealth, Ky., 96 S.W.3d 779, 793 (2003) ("Evidence of a drug habit, along with evidence of insufficient funds to support that habit, is relevant to show a motive to commit a crime in order to gain money to buy drugs."); United States v. Cunningham, 103 F.3d 553, 557 (7th Cir. 1996) (evidence of nurse's Demerol addiction admissible to show motive to tamper with Demerol-filled syringes); State v. Kealoha, 22 P.3d 1012, 1027 (Haw. Ct. App. 2000) ("Evidence that Defendant sold methamphetamine to finance her cocaine use is probative of whether Defendant had a motive to manufacture methamphetamine and her intent to do so."). KRE 404(b), therefore, did not bar the admission of Walls's testimony.[3]

Nor was Walls's testimony barred by KRE 403. Although the evidence was obviously prejudicial to Appellant, the real question is whether it was unduly so. Price v. Commonwealth, Ky., 31 S.W.3d 885, 888 (2000) ("the real issue is whether [the defendant] was unduly prejudiced, i.e., whether the prejudice to him was unnecessary and unreasonable"). In light of Appellant's two confessions to the police that the materials in the shed belonged to him, we cannot find that this evidence caused any undue prejudice. This evidence merely helped the jury understand why he possessed those materials, i.e., he was a methamphetamine user.

In the alternative, Appellant contends that the evidence should have been excluded by the prosecutor's failure to give notice of it pursuant to KRE 404(c). Professor Lawson explains that "[t]he intent of the provision is to provide the accused with an opportunity to challenge the admissibility of this evidence through a motion in

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[3] It is immaterial to the admissibility analysis here that there was insufficient evidence that Appellant possessed all of the chemicals or all of the equipment necessary to

limine and to deal with reliability and prejudice problems at trial." Robert G. Lawson, The Kentucky Evidence Law Handbook § 2.25, at 106 (3d. ed. Michie 1993). The medical records of which Appellant complains were his own records, and he makes no claim that they were unreliable. Nor does he explain how he was prejudiced by the failure to receive the KRE 404(c) notice. The rule allows the trial judge to excuse a failure to give the required notice when "good cause" is shown. Here, the prosecutor explained that he only learned of the hospital visit on the morning of trial and decided to subpoena the records to see what treatment Appellant had received and why. The subpoena, which is in the record, is dated May 30, 2001 (the date of trial), and was served on Walls that same day. On these facts, we cannot conclude that the trial court abused its discretion in finding "good cause" for admitting this evidence despite the KRE 404(c) violation.

IV. SUFFICIENCY OF THE EVIDENCE.

Appellant attacks the sufficiency of the evidence underlying his conviction of manufacturing methamphetamine, contending that KRS 218A.1432(1)(b) requires that a defendant possess all of the chemicals or equipment necessary to manufacture methamphetamine, whereas Appellant possessed only a subset of the chemicals and equipment necessary to do so. Appellant's contention anticipated our decision in Kotila, supra, note 2, in which we held that "KRS 218A.1432(1)(b) applies only when a defendant possesses all of the chemicals or all of the equipment necessary to manufacture methamphetamine." Id. at ___ (slip op., at 23-24).

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manufacture methamphetamine, as discussed infra.

The trial court's instruction was inadequate because it required no such finding:[4]

> You, the jury, will find the defendant, Eddie Madding, guilty of Manufacturing Methamphetamine under this Instruction if, and only if, you believe from the evidence beyond a reasonable doubt all of the following:
>
> A. That in this county on or about 22nd day of November, 2000 and before the finding of the Indictment herein, the Defendant had in his possession chemicals or equipment used in the manufacture of methamphetamine;
>
> AND
>
> B. That he possessed said chemicals or equipment with the intent to manufacture methamphetamine.

On the basis of that instruction alone, reversal and remand for a new trial would be required.[5] However, remand will be unnecessary because the Commonwealth does not claim that methamphetamine can be manufactured solely with the chemicals (anhydrous ammonia, ether, ephedrine, and pseudoephedrine) or equipment (a length of plastic tubing and a mayonnaise jar) that were found in the shed. There was no evidence that Appellant possessed any of the other chemicals or equipment necessary to manufacture methamphetamine. Thus, the conviction under KRS 218A.1432(1)(b) must be vacated. Appellant does not claim that there was insufficient evidence to sustain his other convictions.

V. DOUBLE JEOPARDY.

Our holding that Appellant's conviction of manufacturing methamphetamine must be vacated moots his claim that his dual convictions for possession of anhydrous ammonia in an improper container and manufacturing methamphetamine constitutes double jeopardy.

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[4] The instruction was given before Kotila was issued.

[5] The instruction was also erroneous in its failure to include the mens rea element of

Note that Appellant was not indicted for the Class B version of possession of anhydrous ammonia in an unapproved container, i.e., possession with intent to manufacture methamphetamine. KRS 250.991(2). Since the grand jury believed that Appellant could be convicted of manufacturing methamphetamine by possessing less than all of the chemicals or equipment necessary to do so, it probably concluded that it would be double jeopardy to convict him of both Class B felonies; thus, the indictment for manufacturing methamphetamine was premised upon Appellant's possession of the ether, the precursors, the tubing and the mayonnaise jar, and the charge of possession of anhydrous ammonia in an unapproved container stood alone as a separate offense unrelated to the methamphetamine charge.

In that respect, the grand jury was correct. As explained in Kotila, supra, if a conviction of manufacturing methamphetamine could be premised upon mere possession of anhydrous ammonia in an unapproved container with the requisite intent, conviction under both the anhydrous ammonia and manufacturing methamphetamine statutes would constitute double jeopardy. Id. at ___ (slip op., at 20-21). Kotila holds, however, that a conviction of manufacturing methamphetamine under KRS 218A.1432(1)(b) requires possession of all of the chemicals or equipment with the requisite intent; and, therefore, conviction under both statutes would not constitute double jeopardy because each statute requires proof of an element that the other does not:

> KRS 218A.1432(1)(b) requires proof of possession of all of the other chemicals necessary to manufacture methamphetamine while KRS 250.489(1) and KRS 250.991(2) do not, and the latter statutes require proof that the anhydrous ammonia was possessed in an unapproved container, while KRS 218A.1432(1)(b) does not.

"knowingly." Kotila, at ___ n.2 (slip op., at 26 n.2).

Id. at ___ (slip op., at 22).

VI. CONSECUTIVE SENTENCING.

It was error for the trial judge to fail to instruct the jury to recommend whether Appellant's sentences should run concurrently or consecutively. KRS 532.055(2) provides:

> Upon return of a verdict of guilty or guilty but mentally ill against a defendant, the court shall conduct a sentencing hearing before the jury, if such case was tried before a jury. In the hearing the jury will determine the punishment to be imposed within the range provided elsewhere by law. The jury shall recommend whether the sentences shall be served concurrently or consecutively. (Emphasis added.)

Failure to submit this question to the jury may result in a reversal of the sentence if the error is preserved. See Lawson v. Commonwealth, Ky., 85 S.W.3d 571, 582 (2002); Stoker v. Commonwealth, Ky., 828 S.W.2d 619, 627 (1992).

Here, however the error was not preserved and we discern no "manifest injustice." RCr 10.26. A jury recommendation as to whether a sentence will run concurrently or consecutively is simply that – a recommendation. Murphy v. Commonwealth, Ky., 50 S.W.3d 173, 178 (2001); Nichols v. Commonwealth, Ky., 839 S.W.2d 263, 265 (1992). It is "not binding on the trial court." Commonwealth v. Pelfrey, Ky., 998 S.W.2d 460, 463 (1999). Thus, no "manifest injustice" resulted from the trial court's failure to comply with KRS 532.055(2). Furthermore, since we are vacating Appellant's conviction and sentence for manufacturing methamphetamine and since the judgment does not recite whether the sentences for the original Class D felonies were to run concurrently or consecutively, the error is rendered harmless beyond a reasonable doubt. If a judgment does not specify whether sentences for multiple offenses are to run concurrently or consecutively, they are to run concurrently.

KRS 532.110(2). That fact also moots the issue of which Class D felony was enhanced to ten years as a Class C felony by the jury's PFO verdict. Either way, the concurrent sentence is ten years.

VII. VOID FOR VAGUENESS.

Finally, Appellant contends that KRS 218A.1432 is unconstitutionally void for vagueness. We held otherwise in Kotila, supra, at ___ (slip op., at 38-41), and this appeal presents no argument not addressed therein.

Accordingly, the judgment of conviction and the sentence imposed by the Fulton Circuit Court for manufacturing methamphetamine are vacated; and the judgment of convictions and the aggregate sentence of ten years imposed for wanton endangerment in the first degree, possession of anhydrous ammonia in an unapproved container, and being a persistent felony offender in the first degree are affirmed.

Cooper, Graves, Johnstone, Keller, and Stumbo, JJ., concur. Lambert, C.J., and Wintersheimer, J., dissent from Part IV for the same reasons expressed in Lambert, C.J.'s dissent in Kotila v. Commonwealth, Ky., ___ S.W.3d ___ (2003).

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