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NOT TO BE PUBLISHED OPINION

THIS OPINION IS DESIGNATED "NOT TO BE PUBLISHED." PURSUANT TO THE RULES OF CIVIL PROCEDURE PROMULGATED BY THE SUPREME COURT, CR 76.28 (4) (c), THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE CITED OR USED AS AUTHORITY IN ANY OTHER CASE IN ANY COURT OF THIS STATE.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: APRIL 20, 2006
NOT TO BE PUBLISHED

Supreme Court of Kentucky

FINAL

2004-SC-0644-MR DATE 5-11-06 ELIA Secretary, DC.

MARUEL HOLBROOK — APPELLANT

V.

APPEAL FROM MADISON CIRCUIT COURT
HONORABLE JULIA HYLTON ADAMS, JUDGE
NO. 02-CR-00053

COMMONWEALTH OF KENTUCKY — APPELLEE

MEMORANDUM OPINION OF THE COURT

AFFIRMING

Appellant, Maruel Holbrook, was convicted in the Madison Circuit Court of murder and of violating a domestic violence order. He was sentenced to a total of 27 ½ years imprisonment and appeals to this Court as a matter of right. Ky. Const. § 110(2)(b).

Appellant and Stacy Holbrook, the victim, were a married couple. On March 12, 2002, Stacy filed a Domestic Violence Petition alleging that Appellant abused her and threatened to kill her. Appellant was served with a Domestic Violence Order later that day.

According to Appellant, he received a phone call from Stacy on March 30th. That same day, he went to the marital residence to visit Stacy, and they agreed to visit her parents in Corbin on Easter. They went to Stacy's parents' home on

March 31st. There, Appellant and Stacy got into an argument. Appellant left Corbin and went to his mother's house with the couple's two children. Later that evening, Stacy arrived at the home, and the two engaged in another argument. Stacy left the house with one of their children. Appellant followed her outside, allegedly to move a car seat from his vehicle into hers. The couple began to argue again, and according to Appellant, Stacy began to hit him with an unidentifiable object. Appellant reached into his pocket to remove a knife and stabbed her. Appellant called for his mother, who went outside, along with Appellant's nephew. Appellant's nephew remained outside with Appellant, while his mother called 911. Appellant's nephew noticed Appellant throw an object from his pocket into a field behind the house. He also noticed Appellant take off his shirt, which was covered in blood. When EMS workers arrived, they were unable to revive Stacy. Additional facts will be set forth as necessary.

Appellant alleges various errors pertaining to the testimonies of three expert witnesses. First, Appellant claims that Detective Nelson O'Donnell gave impermissible opinion testimony. Officer Scott Anderson, who was a police officer dispatched to the scene of the crime, testified that Appellant said that he had returned to his vehicle to get his knife after his altercation with Stacy had started. Appellant claims that this testimony surprised both the defense and the prosecution. This statement was not included in Anderson's police report of the incident. Anderson testified that he told Detective O'Donnell of this fact.

Detective O'Donnell testified that he did not recall Anderson telling him about Appellant's comment regarding the knife. During redirect, Detective O'Donnell testified that he observed a knife box at the crime scene with the lid removed and the sheath sticking out of the box on the console inside Appellant's vehicle. Detective O'Donnell

found this fact to indicate that Appellant returned to the vehicle at some point and removed the knife from the box.

Appellant characterizes Detective O'Donnell's testimony as expert testimony, and claims that it is inadmissible under KRE 702. We disagree. In this instance, Detective O'Donnell testified as a lay witness in merely describing his observations and personal knowledge of the crime scene. KRE 701 allows lay witnesses to testify to opinions that are "(a) [r]ationally based on the perception of the witness; and (b) [h]elpful to a clear understanding of the witness' testimony or the determination of a fact in issue." See also Clifford v. Commonwealth, 7 S.W.3d 371, 374 (Ky. 2000) ("A nonexpert witness may express an opinion which is rationally based on the perception of the witness and helpful to a determination of a fact in issue."). The detective applied his knowledge and observations and made a reasonable conclusion that assisted the jury in understanding the facts. There was no error.

Next, Appellant argues that Dr. Gregory Davis was improperly allowed to testify that Appellant's wounds were self-inflicted. Appellant complains that there was a lack of adequate factual foundation for this opinion. See Wells v. Conley, 384 S.W.2d 496 (Ky. 1964) (an expert's testimony must be supported by physical evidence observed by him). Appellant complains that Dr. Davis only relied upon two factors, the location and superficiality of the wounds, to form his opinion. Furthermore, he complains that Dr. Davis only examined photographs of the wounds, and did not perform a physical examination.

The Commonwealth disputes whether this alleged error was properly preserved. Preservation issue aside, we can simply state that there was no error with regard to Dr. Davis' testimony. Dr. Davis' examination of the photograph provided a sufficient factual

basis for his opinion. Appellant could have investigated any weaknesses in this factual basis during his cross-examination of the expert.

Lastly, Appellant claims that the prosecution was improperly allowed to introduce evidence that a DNA test of Appellant's shirt did not reveal traces of Appellant's blood. This evidence casts doubt upon Appellant's claim that the victim had scratched him. This error is unpreserved, and Appellant requests review as a possible palpable error. RCr 10.26. Without evaluating the error itself, we conclude that the admission of this evidence could not rise to the level of palpable error in light of the totality of the evidence, which includes evidence of the victim's fingernail clippings which tended to prove the same point as the DNA evidence: that she did not scratch anything during the incident.

For the foregoing reasons, the judgment and sentence of the trial court are affirmed.

All concur.

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Supreme Court of Kentucky

2005-SC-0344-MR

MICHAEL JOE HENSLEY — APPELLANT

V.

APPEAL FROM WHITLEY CIRCUIT COURT
HONORABLE JERRY D. WINCHESTER, JUDGE
04-CR-133

COMMONWEALTH OF KENTUCKY — APPELLEE

MEMORANDUM OPINION OF THE COURT

AFFIRMING

A Whitley Circuit Court jury convicted Appellant, Michael Joe Hensley, of manufacturing methamphetamine, KRS 218A.1432, enhanced by his contemporaneous possession of a firearm, KRS 218A.992. He was sentenced to twenty years in prison and appeals to this Court as a matter of right, Ky. Const. § 110(2)(b), asserting four claims of reversible error: (1) the evidence was insufficient to support the firearm enhancement; (2) there was insufficient proof of chain of custody to admit the laboratory test results of the evidence used to convict him of manufacturing methamphetamine; (3) members of the jury observed Appellant in handcuffs; and (4) a state police detective testified as both a fact witness and an expert witness. Finding no error, we affirm.

On October 24, 2003, the Kentucky State Police ("KSP") received an anonymous tip that methamphetamine was being manufactured at a house owned by Appellant at

35 Texas Avenue, Corbin, Kentucky. Two police officers, state troopers Bowling and Martin, proceeded to that address and knocked on the door. When Appellant answered, the troopers requested permission to enter the house. Appellant first refused, advising the troopers to obtain a search warrant. However, when the troopers advised Appellant that he would not be permitted to re-enter the house until after the warrant was obtained, he reluctantly consented to the search. Appellant admitted to the troopers that he owned the house but claimed that he actually lived at his girlfriend's residence. He also claimed that his house consisted of two apartments, one on the first floor and another on the second floor, and that Robert Smallwood had previously rented the first floor apartment. Although he had evicted Smallwood, the former tenant continually returned to the house without permission when Appellant was absent. Appellant stated that he was present at the house that evening because a neighbor had telephoned him and reported that Smallwood was in the house again. However, when the troopers arrived, Appellant was the only person in the house. He claimed that he was in the process of cleaning up a mess left by Smallwood.

The troopers discovered an extensive methamphetamine laboratory throughout the second floor of the house. They then left the premises because of the presence of dangerous chemicals and sought the assistance of the Laurel County methamphetamine task force containment unit. Two police detectives, Roger Cooper and Tom Underwood, subsequently arrived and searched the house wearing protective chemical suits.

Cooper and Underwood found and confiscated numerous chemicals and items of equipment used in the manufacture of methamphetamine, including salt, alcohol, HCL gas generators, funnels, lithium, and pseudoephedrine. On the stove they found

several containers full of methamphetamine ingredients in the separation phase of manufacture as well as containers of methamphetamine oil. Additionally, there were pots on the stove containing red phosphorus, another chemical used in the manufacture of methamphetamine. Appellant claimed the pots contained only boiling water to be used for cleaning purposes, as the house had no hot water. Five one-gallon buckets containing methamphetamine in various stages of manufacture were also discovered. Other items found during the search included digital scales, coffee filters used to strain methamphetamine mixtures, Coleman camping fuel, and drain cleaner. Detective Cooper testified at trial that he had investigated over one hundred methamphetamine laboratories and that the laboratory found in Appellant's house was one of the largest he had ever seen. During the search, the detectives also found a loaded revolver inside a closet. The police gathered samples of various liquids found in the house, later determined by the KSP laboratory to contain methamphetamine.

I. FIREARM ENHANCEMENT.

Appellant asserts the trial court erred by overruling his motion for a directed verdict of acquittal with respect to the firearm enhancement. "On appellate review, the test of a directed verdict is, if under the evidence as a whole, it would be clearly unreasonable for a jury to find guilt, only then the defendant is entitled to a directed verdict of acquittal." Commonwealth v. Benham, 816 S.W.2d 186, 187 (Ky. 1991); see also Beaty v. Commonwealth, 125 S.W.3d 196, 203 (Ky. 2003); Commonwealth v. Sawhill, 660 S.W.2d 3, 5 (Ky. 1983). On a motion for a directed verdict, a trial court must draw all fair and reasonable inferences in the Commonwealth's favor. Benham, 816 S.W.2d at 187. However, the Commonwealth must establish each element of the charged offense. Williams v. Commonwealth, 721 S.W.2d 710, 712 (Ky. 1986).

At the time of this offense, KRS 218A.992 provided in pertinent part:

> (1) Other provisions of law notwithstanding, any person who is convicted of any violation of this chapter who was at the time of the commission of the offense in possession of a firearm, shall:
>
> (a) Be penalized one (1) class more severely than provided in the penalty provision pertaining to that offense if it is a felony; . . .

We have held that this statute applies whether the defendant's possession of the firearm was actual or constructive. Commonwealth v. Montague, 23 S.W.3d 629, 632 (Ky. 2000); Houston v. Commonwealth, 975 S.W.2d 925, 927 (Ky. 1998). "Constructive possession exists when a person does not have actual possession but instead knowingly has the power and intention at a given time to exercise dominion and control of an object, either directly or through others." Johnson v. Commonwealth, 90 S.W.3d 39, 42 (Ky. 2002) (quotation omitted). "Constructive possession can be established by a showing that the firearm was seized at the defendant's residence." Id. at 43 (citation and quotation omitted). However, if the defendant was not in actual possession or immediate control of the firearm, the Commonwealth must show a "nexus" between the crime committed and the possession of the firearm.

> [M]ere contemporaneous possession of a firearm is not sufficient to satisfy the nexus requirement. . . .
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> . . . .
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> . . . [W]hen it cannot be established that the defendant was in actual possession of a firearm or that a firearm was within his or her immediate control upon arrest, the Commonwealth must prove more than mere possession. It must prove some connection between the firearm possession and the crime.

Montague, 23 S.W.3d at 632-33. In so construing KRS 218A.992, (which has since been amended to codify that construction, 2005 Ky. Acts, ch. 150, § 12), we looked for guidance to the federal sentencing guidelines, which included a similar enhancement provision. Id. at 632.

> "The enhancement for weapon possession reflects the increased danger of violence when drug traffickers possess weapons. The adjustment should be applied if the weapon was present, unless it is clearly improbable that the weapon was connected with the offense. For example, the enhancement would not be applied if the defendant, arrested at his residence, had an unloaded hunting rifle in the closet." United States v. Sanchez, 928 F.2d 1450, 1459 (6th Cir. 1991) (quoting application note 3).

Id.

In Montague, the police arrested the defendant in her apartment for drug trafficking and seized nine ounces of cocaine. They subsequently found an unloaded handgun in the trunk of an automobile parked in the apartment's parking lot. The automobile belonged to the defendant's mother. We held that there was an insufficient nexus between the gun and the drug trafficking to support a firearm enhancement under KRS 218A.992, stating that, "in this case, there is nothing to connect the gun or the Cadillac to the possession or the trafficking of drugs." Id. at 633. However, the Court explained that, "if drugs had been found in the Cadillac along with the gun, then a sufficient connection would have been established to create a question of fact for the jury." Id.

In the case sub judice, the police found a loaded gun in a closet of a house which also contained a large methamphetamine laboratory. The gun was not in Appellant's actual possession or in his immediate control upon his arrest, thus triggering Montague's nexus requirement. No proof was adduced as to the location of the closet in the house[1] or to the ownership of the gun. Appellant argues that because of the absence of such proof, the Commonwealth failed to show a sufficient nexus between

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[1] The Commonwealth asserts in its brief that "[w]hile observing the meth lab upstairs, a weapon was found in a hall closet." Brief for Commonwealth, at 3. The brief does not cite to where this evidence can be found on the videotape of the trial. A review of the entire videotape reveals that this statement is without evidentiary foundation.

the gun and the manufacturing of methamphetamine to warrant the enhancement. However, unlike in Montague, the gun was neither unloaded nor found outside the residence where the controlled substance offense was committed. If, as Appellant claimed, no one lived in the house, then its only function at the time of the search was that of a laboratory for the manufacture of methamphetamine. As argued by the prosecutor at trial, "the whole house was a [methamphetamine] lab." That being the case, especially in view of the fact that the gun was loaded, it was not "clearly improbable that the weapon was connected with the offense." Montague, 23 S.W.3d at 632. There was a sufficient nexus between the gun found in the house and the controlled substance offense to submit the enhancement issue to the jury.

II. HANDCUFFS.

Appellant asserts that he was substantially prejudiced by the fact that members of the jury saw him in handcuffs. Upon reviewing the record, we find that this assertion substantially overstates the facts. Only one juror, Juror No. 50, saw Appellant in the lobby of the courthouse while he was in handcuffs, and Appellant's only requested remedy was to excuse that juror for cause. When questioned by the trial court, the juror stated that he saw nothing that would prejudice him against Appellant, and the trial court denied Appellant's motion to excuse him for cause. The trial judge then asked the entire venire panel if any of them had seen Appellant outside the courtroom. Only Juror No. 50 responded. Appellant requested no further relief, much less a mistrial, and did not ask any further pertinent questions during voir dire. Therefore, "as Appellant failed to request any further relief, error was not preserved for appeal." Derossett v. Commonwealth, 867 S.W.2d 195, 198 (Ky. 1993); see also West v. Commonwealth, 780 S.W.2d 600, 602 (Ky. 1989).

Even if preserved, Appellant's claim would fail. First, this Court has "repeatedly held that the inadvertent viewing of the defendant in either handcuffs or another restraint for the sole purpose of being taken to or from the courtroom is not automatically reversible error." Moss v. Commonwealth, 949 S.W.2d 579, 582-83 (Ky. 1997); see also Shegog v. Commonwealth, 142 S.W.3d 101, 109 (Ky. 2004); Williams v. Commonwealth, 474 S.W.2d 381, 383 (Ky. 1971). Second, whether a juror should be excused for cause is a matter within the discretion of the trial court and will be disturbed only upon a showing of an abuse of that discretion. Maxie v. Commonwealth, 82 S.W.3d 860, 863 (Ky. 2002); Caldwell v. Commonwealth, 634 S.W.2d 405, 407 (Ky. 1982). Prospective jurors are qualified to sit on a case provided reasonable grounds exist to believe they can render a fair and impartial verdict based solely on the evidence presented at trial. Maxie, 82 S.W.3d at 863; Sanders v. Commonwealth, 801 S.W.2d 665, 670 (Ky. 1990). Juror No. 50 assured the trial court that he saw nothing that would prejudice him against the Appellant. The trial court had no reason to believe otherwise and, therefore, did not abuse its discretion in failing to excuse Juror No. 50 for cause. We note in passing that Juror No. 50 was not one of the twelve jurors who rendered the verdicts in this case.

III. CHAIN OF CUSTODY.

Appellant asserts that the trial court erred in admitting the laboratory testing results of the samples of chemicals found at his house because of the Commonwealth's failure to prove a proper chain of custody. We note at the outset that the decision with respect to the adequacy of proof of the chain of custody is within the discretion of the trial court. Thomas v. Commonwealth, 153 S.W.3d 772, 781 (Ky. 2004); Grundy v. Commonwealth, 25 S.W.3d 76, 79-80 (Ky. 2000).

Detective Cooper, who collected the evidence, testified that he gave the samples to Trooper Bowling, who delivered them to the KSP post in London, Kentucky. Trooper Bowling testified and confirmed this account. He also testified that Administrative Sergeant Cambron transported the evidence to the KSP crime laboratory. Mary Malone, the chemist who testified at trial to the laboratory test results, stated that she received the samples and placed them in the evidence locker at the laboratory; and that they were still sealed when she took them from the evidence locker for testing.

"All possibility of tampering does not have to be negated. It is sufficient in these cases that the actions taken to preserve the integrity of the evidence are reasonable under the circumstances." Pendland v. Commonwealth, 463 S.W.2d 130, 133 (Ky. 1971); see also Rabovsky v. Commonwealth, 973 S.W.2d 6, 8 (Ky. 1998). "Any gaps [in the chain of custody] go to the weight, rather than the admissibility of the evidence, and the proponent need only demonstrate a reasonable probability that it has not been altered in any material respect." Thomas, 153 S.W.3d at 781; Rabovsky, 973 S.W.2d at 8. The testimony of Malone, Cooper, and Bowling was sufficient to demonstrate a reasonable probability that the samples were not altered in any material respect prior to testing. Therefore, the trial court did not abuse its discretion in admitting the results of the laboratory tests of the samples found in Appellant's house.

Appellant points out that a second laboratory report with differing results[2] was provided to him in response to the trial court's discovery order. However, this report was not introduced at trial, thus will not be considered on appeal. West, 780 S.W.2d at 602; Caslin v. Gen. Elec. Co., 608 S.W.2d 69, 70 (Ky. App. 1980) ("It is elementary that

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[2] Both tests of the samples found in Appellant's house revealed methamphetamine. However, Malone found methamphetamine, phosphorus, and isopropyl alcohol, while the other laboratory report prepared by a different chemist found only methamphetamine and isopropyl alcohol.

a reviewing court will not consider for the first time an issue not raised in the trial court.").

IV. EXPERT WITNESS.

Appellant asserts that the trial court erred in allowing Detective Cooper to testify as both a fact witness and an expert witness without alerting the jury to his dual roles, thus invading the province of the jury. See United States v. Thomas, 74 F.3d 676, 681-83 (6th Cir. 1996), abrogated on other grounds by Morales v. Am. Honda Motor Co., 151 F.3d 500, 515 n.4 (6th Cir. 1998). Detective Cooper testified at trial generally about how to manufacture methamphetamine, then displayed some photographs taken during the search of Appellant's house, telling the jury at one point that he saw "a cooker on the stove that was . . . drying or cooking off some of the red phosphorous." Appellant initially objected to this general area of testimony on grounds that Cooper had not been properly qualified as an expert on the subject of how to manufacture methamphetamine. In response to Appellant's objection, the prosecutor elicited from Cooper that he had been certified as a hazardous waste technician and a site safety officer, and that he had been trained in how to recognize and clean up a methamphetamine laboratory. The trial court never ruled on Appellant's objection and the objection was not renewed. As a result, this claim is not preserved for appeal. Hayes v. Commonwealth, 175 S.W.3d 574, 596 (Ky. 2005) ("[I]f an objection is made, the party making the objection must insist that the trial court rule on the objection, or else it is waived.") (quoting Bell v. Commonwealth, 473 S.W.2d 820, 821 (Ky. 1971)).

Even if preserved, the claim of error would fail. "The decision as to the qualifications of an expert rests in the sound discretion of the trial court . . . ." Fugate v. Commonwealth, 993 S.W.2d 931, 935 (Ky. 1999); Edwards v. Commonwealth, 554

S.W.2d 380, 385 (Ky. 1977). The evidence presented provided a sufficient basis for the trial court to have found that Detective Cooper had sufficient expertise to describe the process by which methamphetamine is manufactured and that such information would assist the jury in determining a fact in issue, i.e., whether methamphetamine was being manufactured in Appellant's house. Like the Sixth Circuit in Thomas, we decline to establish a per se rule that a fact witness cannot also render an expert opinion if qualified to do so.

Accordingly, the judgments of conviction and the sentences imposed by the Whitley Circuit Court are affirmed.

All concur.

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