

IMPORTANT NOTICE
NOT TO BE PUBLISHED OPINION

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RENDERED AUGUST 24, 2006
NOT TO BE PUBLISHED

Supreme Court of Kentucky **FINAL**

2005-SC-00081-MR

DATE 9-14-06 ELLA G. STOVNER, D.C.

MICHAEL A. CUNDIFF

APPELLANT

V.

APPEAL FROM MEADE CIRCUIT COURT
HON. SAM H. MONARCH, JUDGE
INDICTMENT NO. 04-CR-00111

COMMONWEALTH OF KENTUCKY

APPELLEE

MEMORANDUM OPINION OF THE COURT

AFFIRMING

This is an appeal from a judgment entered by the Meade Circuit Court on December 13, 2004, sentencing the Appellant, Michael Cundiff, to twenty (20) years for manufacturing methamphetamine (meth) and five (5) years for possession of drug paraphernalia with sentences to run consecutively for a total of twenty-five (25) years.¹ The Appellant appeals to this Court as a matter of right pursuant to Ky. Const. §110(2)(b).

The Appellant argues that he is entitled to a new trial because the trial court abused its discretion by; 1) limiting evidence that supported the Appellant's alternate perpetrator defense, 2) forcing the Appellant to stipulate to his residence, 3) admonishing the jury incorrectly, and 4) allowing the admission of

¹ The jury found the Appellant to be a persistent felony offender in the second degree, enhancing his sentence.

prejudicial evidence. He moves this Court to reverse the trial court's rulings and remand for a new trial.

FACTS

On May 15, 2004, State Trooper Matt Johnson (Trooper Johnson) investigated a burglary at the Hardin County residence of Angela Cannon, (Angela), where a safe that contained firearms was stolen. The burglary was photographed by surveillance equipment in her home. Angela's nephew, Kevin Cannon, (Kevin), told Angela that the Appellant was responsible for the burglary. Angela then called the police.

Before the police arrived, however, Angela reviewed the surveillance photos of the burglary. She then told the police that the Appellant was not one of the two men in the photos because he was a larger person than the ones portrayed. Also, she thought she knew the two men in the photos. She told the officers that Kevin was lying about the Appellant's involvement in the burglary because he hated the Appellant.

Trooper Johnson then talked to Kevin.² After talking with Kevin, Trooper Johnson and Detective Jason Propes went to the Appellant's residence to conduct a "knock and talk" regarding the burglary.³ The residence was unoccupied when the officers arrived. Even though it was being leased by the Appellant, he and his wife, Nicole, had been living temporarily with Nicole's

² Angela had recently kicked Kevin out of her home and he was not living there during the burglary.

³ Trooper Johnson was not available for trial due to his obligations to the United States army in Iraq. Thus, there is no information as to what Kevin told Trooper Johnson that led him to the Appellant's residence.

mother due to complications with Nicole's pregnancy. Their two dogs, however, were still there.

At the house, the officers noted a bag of garbage in the driveway by the road. It stood separate from five other bags which were on the porch. The police searched the bag and found items that could be used for manufacturing meth. They found a plastic two-liter bottle with a hole and a plastic hose inside, five empty Heet bottles, empty ether cans with holes in the bottom, six empty pseudoephedrine boxes, a mason jar ring, twin empty lithium battery packs, and batteries that had been torn apart. An April phone bill with the Appellant's name on it was also found in the bag.

Based upon this evidence found, the officers obtained a search warrant for the Appellant's residence. While conducting the search, the officers found more items usable for manufacturing meth, such as a meth manufacturer's catalog, multiple boxes of pseudoephedrine, scales, and a bank card issued to the Appellant. A safe was also found in the residence that had several personal items belonging to the Appellant. Thereafter, an arrest warrant was issued for the Appellant. On September 20, 2004, the Appellant was indicted by the Meade County Grand Jury on charges of manufacturing methamphetamine, possession of drug paraphernalia, second offense, and being a persistent felony offender in the second degree.

Trial began on December 10, 2004, with the Appellant asserting an alternate perpetrator defense. The defense was that Kevin hated the Appellant so much that he planted the meth lab and paraphernalia at the Appellant's residence, burglarized Angela's home, and used the burglary as a pretext to

direct the police to the Appellant's residence, knowing, as he and Nicole were not living there, the meth lab and paraphernalia would be discovered.

Thus throughout the questioning of witnesses, the Appellant asked questions concerning the burglary, and the search of his residence, to emphasize that Kevin used the burglary to lure the police to his residence where the meth evidence had been planted. The trial court allowed the Appellant to support his alternative perpetrator theory by showing motive and opportunity. Thus, the Appellant was allowed to show that Kevin told the police where the Appellant lived, that Kevin hated the Appellant, along with other relevant evidence of a set up. However, the court controlled this, ruling that the search and seizure at the Appellant's residence was legal - and thus, its legality should not be questioned as it would only serve to confuse the jury.

Then, during cross-examination of Detective Propes, the Appellant asked about the burglary investigation at the Appellant's residence, insinuating an illegal search. The Commonwealth then objected and the court sustained the objection, again noting that the trial had nothing to do with the burglary (at Angela's house) in Hardin County. In fact, during the trial, the court gave four admonitions to the jury; that the search was legal and the incident in Hardin County was not an issue in this case.⁴ All were in response to questions raising the suspicion of an illegal search.

⁴ The trial court gave the following admonition about the burglary and the search and seizure: ". . . The existing law in the United States is that a person has no expectation to privacy to garbage set out on the side of the road for pick up. The officer acted properly when he picked up that garbage, nobody's rights were violated, the court has previously ruled that the officer acted properly. A search warrant was issued by Judge Miller. That search warrant is the authority that the officers used to search the residence. The court has ruled that that search

At the Appellant's request, Kevin was also brought to Meade County from the Hardin County jails.⁵ In an in-chambers hearing, Kevin testified he lived with Angela until mid-May, but thereafter, was homeless until he was re-incarcerated. He readily agreed that he and the Appellant were enemies. In fact, he stated "I hate [Appellant's] guts. I want him to die slow. That's all I got to say."⁶ However, he denied any involvement in planting the meth lab and paraphernalia at the Appellant's residence.

Kevin was also questioned by the Appellant's counsel regarding letters he had sent to Nicole. He acknowledged he had written the letters. One stated, "tell [Appellant] I said eat a dick and tell Curtis I can't wait till he gets to meet the hogs." Appellant asserted that these letters were not discovered (even though they were written to Nicole) until the night before trial. However, the trial court refused to allow the letters into evidence due to reciprocal discovery violations. Nevertheless, the trial court kept Kevin in Meade County so he would be available for the defense. It ruled, however, that if the Appellant called Kevin as a witness, the Commonwealth could call two rebuttal witnesses that had seen and overheard Kevin, on his way out of the courtroom, wink and tell Nicole he

warrant was proper. So to that extent, the officer did everything he was supposed to do. There has been reference to a burglary prior to this in Hardin County Kentucky. The Appellant is not on trial for that. That case has nothing to do with what we are doing today. Mr. Cundiff is on trial for allegedly manufacturing meth in Meade County Kentucky on May 17, 2004. That's the only issue we're trying. We're not trying anything that may or may not have happened in Hardin County."

⁵ Kevin had been incarcerated from August 28, 2003 to April 26, 2004 and was put back in jail in June 1, 2004.

⁶ About a year prior to this incident, Nicole was pregnant with Kevin's baby and it ended in a miscarriage, causing some animosity between the Appellant and Kevin.

was going to send her boy home to her.⁷ The Appellant did not call Kevin as a witness.

Angela also testified in chambers by avowal. She testified she told Trooper Johnson about the burglary and then he went to talk to Kevin. In addition, she told Trooper Johnson that Kevin had supposedly seen the Appellant in her yard before, and suggested that it was the Appellant who burglarized her home. She also said that in her opinion neither of the men in the pictures were the Appellant. She acknowledged that Kevin disliked the Appellant because he and Nicole had previously dated and he was still in love with her. Hence, she believed that Kevin had set the Appellant up because he was adamant about the Appellant being the one who burglarized her home. She did admit that Kevin never told her he was going to set the Appellant up and she had no evidence of a set up. While she did not name anyone specifically, she stated she also heard “rumors” that Kevin had been trying to sell the guns that were stolen from her safe.

When Angela was asked why Trooper Johnson went to the Appellant’s residence after talking to Kevin, she said she did not know because she did not talk to police after they talked to Kevin, but she believed Kevin sent them there. She noted that she barely knew the Appellant and did not know anything about a set up or have any evidence of a set up. She ended by stating, “I don’t know anything, I barely know Moe.”⁸ The trial court then ruled her testimony irrelevant

⁷ The two witnesses were courthouse employees that verified to the judge that they witnessed this occurrence.

⁸ Moe was the Appellant’s nickname.

and inadmissible because she had no first hand knowledge of any evidence to offer and anything she did have was speculative.

The Appellant's wife, Nicole, was called as a witness at trial and testified that Kevin hated the Appellant because she had gotten pregnant by Kevin the year before, but lost the baby. She testified that the Appellant and Kevin had trouble before and that Kevin had told her he would eventually "get" the Appellant. She admitted that the residence was being leased by them, but denied they had been to the residence since they moved to her mother's at the beginning of May. The search occurred on May 15th. Still, she admitted to going to the residence with the Appellant to check on their dogs.

She also noted that the residence was easy to get into because they only had twist locks on the doors. When asked how she explained the items that were found in the residence, she stated she believed they were set up. However, when the Appellant asked her who she thought set her up, the trial court intervened and conducted a hearing in chambers. After the hearing, the trial court sustained objections to her testimony about a possible set up because she had no personal knowledge about a set up.

At the close of the trial, the jury found the Appellant guilty of manufacturing meth and possession of drug paraphernalia, second offense. The jury also found that the Appellant was a persistent felony offender in the second degree and recommended a sentence of twenty years for manufacturing meth and five years for possession of drug paraphernalia, to run consecutively for a total of twenty five years. The court sentenced the Appellant accordingly.

ARGUMENT AND ANALYSIS

I. Limitation of evidence.

The Appellant argues he was denied a fair trial when the court limited his evidence in support of his alternate perpetrator theory.

a. Evidence of the search and seizure

The Appellant argues the trial court abused its discretion by limiting evidence of the burglary at Angela's residence. However, after reviewing the record, the limitation was not on the burglary, but on the legality of the search and seizure at the Appellant's home. Each time the search was questioned, the trial court admonished the jury that the search was legal and the garbage bag was correctly seized and searched.

In chambers, the Appellant argued that the questioning of the witnesses concerning the burglary was necessary to support his alternative perpetrator defense. He argued the questioning would show that the basis for the affidavit and search warrant of his residence was based upon Angela telling Trooper Johnson that it was the Appellant who burglarized her home. The trial court reminded the Appellant that it did not want the legality of the search and seizure at the Appellant's residence questioned, but that he could expand on his theory and show motive and opportunity for someone else to commit the crime and set him up. The court noted there was a fine line between the separate issues, but, the Appellant needed to be careful not to open the door to other crimes evidence

which would be prejudicial to him.⁹ However, the Appellant was allowed to put forth evidence that tended to show motive and opportunity for a set up.

KRE 401 states that evidence is relevant if it has any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence. KRE 403 provides in pertinent part that although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of undue prejudice, *confusion of the issues, or misleading the jury.* (Emphasis added). See Burchett v. Commonwealth, 98 S.W.3d 492 (Ky. 2003); Partin v. Commonwealth, 918 S.W.2d 219 (Ky. 1996).

“It is within the sound discretion of the trial judge to determine whether the probative value of evidence is outweighed by its possible prejudicial effect and to admit or exclude it accordingly.” King v. Grecco, 111 S.W.3d 877, 885 (Ky. App. 2002)(citing Rake v. Commonwealth, 450 S.W.2d 527 (Ky. 1970)). “A trial judge’s decision with respect to relevancy of evidence under KRE 401 and 403 is reviewed under an abuse of discretion standard.” Love v. Commonwealth, 55 S.W.3d 816, 822 (Ky. 2001). The test for abuse of discretion is whether “the trial judge’s decision was arbitrary, unreasonable, unfair or unsupported by sound legal principles.” Woodard v. Commonwealth, 147 S.W.3d 63, 67 (Ky. 2004).

Limiting the introduction of immaterial and irrelevant evidence regarding the search at the Appellant’s residence was proper and was not an abuse of discretion. The trial court properly kept unnecessary evidence from causing

⁹ The trial court warned the Appellant that any detailed discussion of the burglary could possibly open the door to evidence of other crimes of the Appellant and how the officers knew of him and any possible history with the Appellant which would otherwise be a violation of KRS 404(b).

confusion to the jury. The legality of the search was an issue of law which was properly decided within the discretion of the court.

b. Testimony of Angela and Nicole

The Appellant also argues that the trial court abused its discretion by limiting the testimony of Angela and Nicole.

Angela testified by avowal in chambers mainly about the burglary and what she told Trooper Johnson. She testified that after she talked to Trooper Johnson, he went to talk to Kevin. Although she stated she believed Kevin sent the officers to the Appellant's residence, she had no personal knowledge of this, as she did not talk to police after they talked to Kevin. Thus, she did not know what made the officers decide to take their investigation to the Appellant's residence. She also testified that Kevin disliked the Appellant because he and Nicole had previously dated and he was still in love with her. She said Kevin was adamant about the Appellant being the one who burglarized her home, and therefore, she believed Kevin set the Appellant up. However, Kevin never told her he was going to set the Appellant up and she admitted she had no evidence of a set up. She also admitted she barely knew the Appellant and did not know anything about a set up or have any evidence of a set up. When she was excused, she told the court, "I don't know anything, I barely know Moe."

The trial court then ruled that her testimony was irrelevant and inadmissible because she had no admissible evidence to offer, other than Kevin's dislike for the Appellant, which was already established through other testimony.

Nicole did testify at trial. She testified that since she and the Appellant had moved to her mother's at the beginning of May, they had only been to the residence to care for their dogs. In addition, she testified that the residence was easy to get into with a credit card because there were only twist locks on the doors, and so, she believed they had been set up. She further told the jury that Kevin told her that he would eventually "get" the Appellant. However, when she was asked specifically who she thought had set them up, the trial court conducted a hearing in chambers. After the hearing, the trial court found that her testimony about a possible set up was inadmissible because she had no personal knowledge about a set up. Therefore, she could not testify as to **who** she thought set them up.

"Evidence is not automatically admissible simply because it tends to show that someone else committed the offense." Beaty v. Commonwealth, 125 S.W.3d 196, 208 (Ky. 2004)(citing Commonwealth v. Maddox, 955 S.W.2d718, 721). A trial court may infringe upon the defendant's right to pursue, an alternative perpetrator theory, if the evidence is "unsupported,' 'speculat[ive],' and 'far-fetched'" causing the jury to be confused or misled. Id. at 207. There is no error in excluding avowal testimony that would have been entirely speculative and could only confuse or mislead the jury. Cf. Beaty v. Commonwealth, 125 S.W.3d 196 (Ky. 2004).

Neither Angela nor Nicole had any personal knowledge of Kevin actually setting the Appellant up. Both of them merely stated that *they believed* he would set the Appellant up and that he did not like the Appellant.

Angela had no testimony that was relevant to this case, only speculative assertions. Furthermore, the trial court would have allowed Angela to testify that Kevin did not like the Appellant, but, it would have been cumulative. Her belief that Kevin set up the Appellant, however, was speculative and not based upon personal knowledge. Therefore, the trial court correctly excluded it at trial.

Nor did the trial court hinder the Appellant in his right to a fair defense by limiting speculative testimony as to who may have set the Appellant up. It allowed Nicole to testify that Kevin said he would eventually get the Appellant and that she believed they had been set up. Even though, she admitted she had no personal knowledge of a set up or who would have set the Appellant up.

Thus, the disallowance of testimony, which was speculative or based on hearsay, was proper and was not an abuse of discretion.

c. Letters from Kevin to Nicole

At the end of the first day of trial, the Appellant proffered letters written by Kevin to Nicole that spoke of the dislike Kevin had for the Appellant. However, the letters had not been given to the Commonwealth as the Appellant claimed not to have found them until the night before. The trial court then denied admission on the grounds of a violation of reciprocal discovery. We agree.

RCr. 7.24 (9) states: "If at any time during the course of the proceedings it is brought to the attention of the court that a party has failed to comply with this rule or an order issued pursuant thereto, the court may direct such party to permit the discovery or inspection of materials not previously disclosed, grant a continuance, or *prohibit the party from introducing in evidence the material not*

disclosed, or it may enter such other order as may be just under the circumstances.” (Emphasis added).

Thus, the letters from Kevin to Nicole, ostensibly acquired after trial began, were properly disallowed due to the violation of reciprocal discovery. Moreover, Nicole testified that Kevin hated the Appellant and had threatened to “get” him. Thus, the letters were cumulative at best.

All in all, the trial court carefully and thoroughly considered the evidence introduced by, and proffered by, the Appellant. The trial court’s limitation on the admission of evidence was not arbitrary, unreasonable, or unfair. Woodard, 147 S.W.3d at 67. Therefore, limiting the admission of speculative evidence that would have misled the jury was not an abuse of the trial court’s discretion. Beaty, 125 S.W.3d at 208.

II. Probation officer’s testimony

The Appellant next argues that the trial court abused its discretion when it forced the Appellant to stipulate that 9200 Highway 60 was his residence.

Nicole and her mother testified that she and the Appellant were not living at 9200 Highway 60 at the time the officers found the meth lab due to complications with her pregnancy through two witnesses. To rebut this evidence, the Commonwealth was going to call the Appellant’s probation officer, Mr. Barnes, to testify to the Appellant’s address as being 9200 Highway 60. The Appellant argued that allowing Mr. Barnes to testify was prejudicial to his case because the jury would know that the Appellant was on probation. In connection therewith, the trial court offered the Appellant a stipulation on the evidence so it would not show that the Appellant was on probation. The trial court noted that

the Appellant's main argument was that he had no access or control over the residence, and therefore, unless he stipulated to the residence, Mr. Barnes would be allowed to testify. The Appellant then accepted the stipulation.

The admission of rebuttal evidence is largely a matter within the discretion of the trial court. Stopher v Commonwealth, 57 S.W.3d 787, 799 (Ky. 2001). As stated previously, "[t]he test for abuse of discretion is whether "the trial judge's decision was arbitrary, unreasonable, unfair or unsupported by sound legal principles." Woodard, 147 S.W.3d at 67.

Here, the trial court did not abuse its discretion. It gave the Appellant a choice to stipulate to his residence address or to allow Mr. Barnes to testify. The Appellant, thus, had the chance to avoid any prejudice he felt would be placed upon him if Mr. Barnes testified. Just as the Appellant was certainly entitled to offer the evidence he was not living there temporarily, the Commonwealth was entitled to offer evidence in rebuttal. Therefore, the trial court's offer and ruling was appropriate.

III. Admonitions to the jury

The Appellant next argues the trial court denied his due process right to a fair trial when it gave admonitions to the jury about the legality of the search and seizure of the garbage bag found at his home.

At trial, Appellant offered testimony attempting to show that Kevin told the police to go to the Appellant's home because he had planted the meth evidence there. During cross-examination, the Appellant asked questions which alluded to the search of the Appellant's residence. However, each time the Appellant's questions delved into a possible illegal search issue, the trial court admonished

the jury the search and seizure was legal and that the incidentally connected burglary was not an issue in the case. The Appellant argues that these admonitions improperly directed the jury how it was to consider the evidence presented, thereby invading the province of the jury. This argument is without merit.

“[A] trial judge should be cautious and guarded at all times in the use of his words in the presence of the jury to the end that they will not affect the finding of the jury.” Miller v. Commonwealth, 240 Ky. 355, 42 S.W.2d 523, 524 (Ky. 1931). The justification for this is that “comments by a trial judge which may reflect upon the credibility of a witness or tend to indicate the court’s view of the quality or weight of the evidence are considered improper.” Chism v. Lampach 352 S.W.2d 191, 194 (Ky. 1961). However, “[w]hen evidence is admitted for the purpose of proving intent, etc. . . . it becomes the duty of the court to admonish the jury the purpose for which . . . [it was] admitted.” Alexander v. Commonwealth, 369 S.W.2d 110, 111-2 (Ky. 1963).

The trial court’s admonitions did not reflect upon the credibility of any of the witnesses at trial. Its admonitions did not indicate a view of the weight of the evidence. Even though the evidence was relevant to the Appellant’s defense, the trial court had a right and obligation to advise the jury as to how to view the evidence so as to avoid confusion of the real issues in the case. In this respect, the trial court did allow questions regarding the circumstances concerning the search of the garbage bag found at the Appellant’s residence, but admonished the jury only when the questions could lead to possible misconceptions about the legality of the search. There was no abuse of discretion.

IV. Letter from the Appellant's Attorney

At trial, the Commonwealth introduced a letter from the Appellant's attorney, found in the Appellant's residence at 9200 Highway 60, in order to show the Appellant was in possession and control of the residence. The Appellant objected and argued that the letter was prejudicial because it came from his attorney. He now argues that the prejudicial nature of the evidence outweighed its evidentiary value to prove facts at issue, and therefore, the trial court abused its discretion.

A conviction for manufacturing meth under part two of KRS 218A.1432 requires proof that the Appellant possessed either the chemicals or equipment for the manufacture of meth. Constructive possession has long been a concept applied to offenses described in the Controlled Substances Act. See William S. Cooper, Kentucky Instructions to Juries §9.10B, Vol. 1 (1998 Cumulative Supplement). We have stated that in the context of KRS Chapter 218, the term possession need not always be actual physical possession and that a defendant may be shown to have had constructive possession by establishing that the contraband involved was subject to his dominion and control. Rupard v. Commonwealth, 475 S.W.2d 473, 475 (Ky. 1973).

The letter was pertinent to rebut the Appellant's defense that he was not living at, and had no possession or control of, the residence where the officers found the meth lab. Moreover, the Commonwealth was only allowed to introduce the heading of the letter, showing that it was addressed to the Appellant at the 9200 address, not the substantive parts. Allowing the address label of this letter

to be shown to the jury did not unduly prejudice the Appellant. Notably, the trial court carefully limited the nature of the correspondence.

Thus, the trial court, again, did not abuse its discretion.

CONCLUSION

From the foregoing, it is our opinion that the trial court did not abuse its discretion in its rulings.

Accordingly, the Appellant's judgment of conviction is affirmed.

Lambert, C.J.; Graves, Roach, Scott and Wintersheimer, JJ., concur.

McAnulty and Minton, JJ., concur in result only.

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