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RENDERED: AUGUST 23, 2007
NOT TO BE PUBLISHED

Supreme Court of Kentucky

2005-SC-001019-MR

KENNETH HOUSTON MATTINGLY — APPELLANT

V.

ON APPEAL FROM GRAYSON CIRCUIT COURT
HONORABLE SAM MONARCH, JUDGE
NO. 05-CR-000017

COMMONWEALTH OF KENTUCKY — APPELLEE

MEMORANDUM OPINION OF THE COURT

AFFIRMING

I. Introduction

Kenneth Houston Mattingly was convicted of one count of Manufacturing Methamphetamine,[1] one count of Possession of Anhydrous Ammonia in Unapproved Container,[2] and of being a Persistent Felony Offender in the First Degree.[3] Mattingly received an enhanced sentence of twenty-five (25) years in prison on each count, with the sentences to run concurrently. Appealing as a matter of right,[4] Mattingly argues the trial court committed reversible error by: (1) allowing Officer Payton to testify about a prior uncharged bad act; (2) denying him a unanimous verdict based on the instruction given to the jury for manufacturing methamphetamine; and (3) limiting his cross-

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[1] Kentucky Revised Statute (KRS) 218A.1432.
[2] KRS 250.991(2).
[3] KRS 532.080(3).
[4] Kentucky Constitution §110(2)(b).

examination of Officer Payton[5] concerning the circumstances surrounding the prior uncharged bad act. Finding no error, we affirm.

II. Factual Background

The charges in this case stem from the discovery of a methamphetamine lab in an abandoned farmhouse in a remote part of Grayson County. The farm is owned by Archie Hall, Mattingly's uncle. To reach the Hall farm, you must turn off Yeaman-Olaton Road onto a private gravel road. You then must pass the Sullivan farm on the right and the Hodge farm on the left before the road ends at a locked gate at the entrance to the Hall farm. The farm contains several sheds and an abandoned farmhouse.

Officer Pat Payton, employed by the Kentucky Department of Fish and Wildlife, lives on Yeaman-Olaton Road. Officer Payton, the rear of whose property adjoins the Hall property, is allowed to hunt and fish on the Hall farm in return for keeping an eye on the place. On March 16, 2004, Officer Payton saw Mattingly go by in his vehicle on Yeaman-Olaton Road and turn off toward the Hall farm. Two days later, Officer Payton saw the same vehicle leaving the Hall farm. On the second occasion, Officer Payton was too far away to identify the driver of the vehicle.

On March 20, 2004, Nick Hall, another nephew of Archie Hall, alerted the Grayson County Sheriff's Office to an odor of ether on the Hall farm. Officer Payton and

At the time of the discovery of the methamphetamine lab, the officers could not detect the odor of ether. Nor did the officers discover any methamphetamine. Officers did recover the following equipment: a thermos with the logo "Leisure Years" on the side; a modified propane tank; an oxygen tank; modified brass fittings and valve on the propane tank; a hydrogen chloride gas generator with ¼" tubing attached to the top; a crock-pot containing crushed Sudafed; empty ether cans; the husks from peeled lithium batteries; empty Sudafed blister packs; coffee filters; two (2) nylon bags or satchels hidden in a stove and carefully packed with various components and chemicals from the lab; a plastic jar; a red jug; a cooler with silver lining; an air pump; cooking utensils; aluminum foil; a food chopper; gloves; a power current converter; alligator clips; electric wiring; electrical tape; two (2) alkaline flashlight batteries; plastic measuring cups; Pyrex cooking dishes; tubing; a Coleman burner; glass jars/glasses; and a set of wire cutters. In addition, officers discovered the following chemicals: liquid fire; ground up Sudafed; denatured alcohol; Coleman's fuel; and Morton's salt.

Officer Payton, upon seeing the items recovered from the lab, immediately recognized key components as being identical to items discovered in Mattingly's possession during an incident that occurred September 20, 2000. In September of 2000, Archie Hall contacted authorities after he had discovered burnt places and coffee filters on his farm. A search by Officer Payton and members of the Greater Hardin County Narcotics Task Force resulted in nothing being discovered on the Hall farm. However, as the officers were leaving Officer Payton observed Mattingly pulled off the road at the Sullivan farm. At that time, Mattingly had a methamphetamine lab in his

vehicle.[6] According to Officer Payton, Mattingly was discovered with identical nylon bags or satchels, identical brass fittings and valve on a propane tank, and identical brand chemicals and supplies neatly packed in the satchels. Based on the above evidence, Mattingly was indicted and his trial was scheduled for July 22, 2005.

On the morning of July 22, 2005, the trial court considered Mattingly's objection to the Commonwealth's motion to introduce prior bad acts evidence under Kentucky Rule of Evidence (KRE) 404(b). After an evidentiary hearing during which Officer Payton testified, the trial court ruled evidence of specific similarities would be allowed. The trial court noted that:

> With respect to the September 20, 2000 occurrence, the identity of the defendant was not an issue. Further, it could not then be disputed that the defendant was in possession and control of certain property normally associated with the manufacture of methamphetamine.

In addition, the trial court noted that:

> With respect to the March 20, 2004 occurrence, the defendant was not located in physical possession or control of the methamphetamine lab. His identity as the perpetrator must be proven, if at all, by finger print analysis and the personal observations of Officer Pat Payton.

The court reasoned that Officer Payton's testimony concerning the identical nylon bags or satchels, identical brass fittings and valve on a propane tank, and identical brand chemicals and supplies neatly packed in the satchels, was in the nature of identification. In particular, the trial court stated:

> The methods of producing methamphetamine are varied and with each method (red phosphorus, anhydrous ammonia, one batch, and ammonia nitrate) the equipment can be strikingly dissimilar. For equipment in two (2) labs to be identical and for custom container fittings to be identical is a form of fingerprinting in and of itself.

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[6] Mattingly was convicted of possession of a handgun by a convicted felon as a result of the September 20, 2000 incident. A search of his vehicle resulted in the recovery of a Marlin .35 caliber rifle and a .45 caliber pistol. However, there is no explanation in the record for why he was not charged with any methamphetamine related offenses at that time.

At Mattingly's trial, the Commonwealth called a variety of witnesses to tie Mattingly to the lab. Mattingly's mother testified that he lived with her in Owensboro. Further, she testified she had been employed at the Leisure Years Nursing Home in Owensboro for the past eighteen (18) years. Nick Hall testified to the events that led to the discovery of the methamphetamine lab in 2004.

The lead investigator, Officer Danny Payne,[7] testified to the equipment and chemicals recovered from the Hall farm. Officer Payne confirmed that while no lithium was discovered, the peeled husks of lithium batteries were recovered. Since lithium reacts strongly with any moisture, Officer Payne testified that it is not common to find lithium on lab sites. Officer Payne also testified to the discovery of crushed Sudafed and empty blister packs. Further, Officer Payne testified to the discovery of pill soak or pill dough. Officer Payne indicated that pill soak or pill dough, which is created during the manufacturing process, can yield further ephedrine and is often retained so that it may be reused during a subsequent manufacturing process.

The Commonwealth also called Officer Billy Edwards,[8] who gave testimony concerning anhydrous ammonia and propane tanks. Officer Edwards, referring to the rating system set out by the federal government, explained that a propane tank is not an approved container for storing anhydrous ammonia. Because the anhydrous ammonia is corrosive to the tanks, Officer Edwards testified that the original valves have to be removed and replaced with brass fittings and a new valve.

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[7] Officer Payne, an employee of the Leitchfield Police Department, had 3 ½ years of experience with the Greater Hardin County Narcotics Task Force. In addition, Officer Payne was trained to dismantle and clean up methamphetamine lab sites.

[8] Officer Edwards, an employee of the Elizabethtown Police Department, is also a member of the Greater Hardin County Narcotics Task Force. Officer Edwards had 26 years of experience, 18 of which involved drug investigations.

Scientific evidence was presented through several employees of the Kentucky State Police (KSP) Lab. Thomas Wintek confirmed that four of Mattingly's fingerprints were discovered on a glass jar recovered from the dismantled methamphetamine lab. Rebecca Riley reviewed the results of the chemical analysis conducted on the equipment, residue, and chemicals recovered from the Hall farm. Riley confirmed the discovery of crushed Sudafed/ephedrine, as well as pill soak or pill dough. Riley ruled out the existence of any finished product or residue containing methamphetamine.

The Commonwealth completed its case through the testimony of Officer Payton. Officer Payton testified to his observations in 2004, including seeing Mattingly going into and out of the Hall farm in the days prior to the discovery of the disassembled methamphetamine lab. Further, Officer Payton testified as to the items discovered in 2004. Finally, Officer Payton testified to those items that were identical to items he had found in Mattingly's possession in September of 2000.

During cross-examination, Mattingly's attorney attempted to question Officer Payton as to exactly which chemicals and brands were the same between 2000 and 2004. During an ensuing bench conference, the Commonwealth argued that if Mattingly persisted in this line of questioning it would open the door for the Commonwealth to ask follow-up questions. The trial court indicated that it had limited Officer Payton's testimony concerning the 2000 incident to the identical satchels, the identical fittings and valve on the propane tank, and the way the items had been packaged in the bag. After listening to the arguments of the attorneys, the court verified that the Commonwealth had no objection. The trial court then indicated that Mattingly was free to "ask anything you want to ask and I am going to let [the Commonwealth] follow-up as

appropriate." As the attorneys were leaving, the trial court reiterated, "Do what you want to do." Mattingly's attorney elected not to pursue this line of questioning.

Mattingly's attorney did elect to question Officer Payton as to whether Mattingly had been charged with manufacturing methamphetamine as a result of the September 2000 incident. When Officer Payton indicated he could not say whether Mattingly was charged or convicted of any drug offenses related to that incident, Mattingly sought an admonition. The trial court gave the following admonition:

> Ladies and Gentlemen, the record will reflect in regards to the 2000 incident the defendant was not, "N" "O" "T", not charged with the manufacture of methamphetamine. We are trying him for March 2004. We are not trying him for 2000.

Following the Commonwealth's case in chief, Mattingly's motion for a directed verdict was denied. Mattingly called just one witness, Officer Payne. Officer Payne testified as to the chemicals and equipment necessary to manufacture methamphetamine. As to the chemicals, Officer Payne testified that only lithium, ephedrine, and ammonia are required. The remaining chemicals serve only to refine the product or increase the yield. As to the equipment, Officer Payne testified that the process required only a glass jar to contain the reaction. Given what was recovered from the Hall farm, Officer Payne testified that all of the chemicals and all of the equipment necessary for manufacturing methamphetamine had been recovered.

At the close of Mattingly's case, the court granted the Commonwealth's motion to dismiss the possession charge. The court then denied Mattingly's renewed motion for a directed verdict on the remaining charges. During a conference concerning jury instructions, Mattingly objected to the instruction dealing with manufacturing methamphetamine under KRS 218A.1432(1)(a). In overruling the objection, the trial court noted there was circumstantial evidence that Mattingly had manufactured

methamphetamine prior to the disassembly of the lab. The jury returned guilty verdicts on the remaining counts, and Mattingly was sentenced in accordance with the jury's recommendation. This appeal followed.

III. Analysis

Mattingly has argued the trial court committed reversible error by: (1) allowing Officer Payton to testify concerning the September 2000 incident; (2) denying him a unanimous verdict by including KRS 218A.1432(1)(a) as an alternate theory in the instruction given for manufacturing methamphetamine; and (3) limiting his cross-examination of Officer Payton concerning the circumstances surrounding the prior uncharged bad act. We address each argument in turn.

A. The trial court did not abuse its discretion in allowing the Commonwealth to introduce evidence concerning the September 2000 incident.

Mattingly argues the trial court erred by allowing Officer Payton to testify to the September 2000 incident. In particular, he argues Officer Payton should not have been allowed to testify as to the similarities between items found in his possession in September of 2000 and those recovered from the Hall farm in March of 2004. To the extent the evidence was probative, Mattingly argues it was out-weighed by undue prejudice. Further, Mattingly argues the trial court should have considered alternative evidence when weighing the prejudice. Mattingly argues such evidence included the existence of his fingerprints on a glass jar recovered from the Hall farm and Officer Payton's testimony that he had seen Mattingly going into and out of the Hall farm in the days leading to the discovery of the lab. Under these circumstances, Mattingly argues it was reversible error to allow the testimony into the record.

Mattingly has challenged the evidentiary ruling made by the trial court. Evidentiary rulings are reviewed for an abuse of discretion. See Barnett v.

Commonwealth, 979 S.W.2d 98, 103 (Ky. 1998). "The test for abuse of discretion is whether the trial judge's decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles." Commonwealth v. English, 993 S.W.2d 941, 945 (Ky. 1999)(Citations omitted.).

In Kentucky, 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; or
> (2) If so inextricably intertwined with other evidence essential to the case that the separation of the two (2) could not be accomplished without serious adverse effect on the offering party.

See KRE 404(b). This Court has cautioned that "trial courts must apply [KRE 404(b)] cautiously, with an eye towards eliminating evidence which is relevant only as proof of an accused's propensity to commit a certain type of crime." Daniel v. Commonwealth, 905 S.W.2d 76, 78 (Ky. 1995), quoting Bell v. Commonwealth, 875 S.W.2d 882, 889 (Ky. 1994). However, this Court has also acknowledged that "[e]vidence otherwise admissible is not rendered inadmissible merely because it shows unrelated criminal acts." See Epperson v. Commonwealth, 809 S.W.2d 835, 842 (Ky. 1990).

To balance these competing interests, trial courts should consider several factors prior to admitting evidence under KRE 404(b). These factors include:

> (1) Is the evidence relevant for some purpose other than to prove criminal predisposition of the accused?
>
> (2) Is proof of the other crime sufficiently probative of its commission to warrant introduction of the evidence against the accused?
>
> (3) Does the probative value of the evidence outweigh its potential for prejudice to the accused?

Daniel, 905 S.W.2d at 78, quoting Drumm v. Commonwealth, 783 S.W.2d 380, 381 (Ky. 1990).[9] Rulings based on a proper balancing of prejudice against probative value will not be disturbed on appeal unless it is determined that the trial court abused its discretion. Daniel, 905 S.W.2d at 78, citing Bell, 875 S.W.2d at 890.

Turning to the case sub judice, we find the trial court considered the Commonwealth's use of the evidence concerning the September 2000 incident prior to the trial. The court realized that, as Mattingly had not been discovered in possession of the lab, his identity as the perpetrator would have to be proven based on fingerprint evidence and the observations of Officer Payton. Further, the court recognized that there was no dispute that Mattingly had in fact possessed identical property in September of 2000. Finally, the court found that, given the varied methods and equipment used for producing methamphetamine, the fact that unique equipment between two labs proved to be nearly identical served as a form of fingerprinting in and of itself.

The court then took actions directed at limiting the prejudicial effect of the evidence. To begin with, the court made it clear that Officer Payton's testimony would be limited to the identical unique items found during both incidents. In this way the court intended to prevent the evidence from confusing the jury as to which incident Mattingly was being tried for. During the trial, the court took further steps to limit the prejudice and possible confusion of the jury. As a result of questions by Mattingly concerning whether charges for manufacturing methamphetamine had resulted from the September 2000 incident, the court admonished the jury that Mattingly was being tried only for the March 2004 incident.

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[9] Drumm has been superseded in part due to the adoption of KRE 803(4). See Garrett v. Commonwealth, 48 S.W.3d 6, 10-11 (Ky. 2001).

It is clear from our review of the record that the trial court's actions took into account the necessary factors. The court found the evidence was relevant and probative as to issues in dispute in the case. Further, the evidence was not being introduced merely to show a predisposition. The court then took steps to limit possible prejudice by limiting the evidence the Commonwealth was allowed to introduce. At the same time, the court gave Mattingly the discretion to introduce the evidence he felt was necessary for his defense. When Mattingly's questions led to possible jury confusion, the court responded to Mattingly's request for an admonition. As we recognize the presumption that such admonitions are followed by the jury,[10] the admonition served to preclude any prejudice. See Epperson, 809 S.W.2d at 842. Under these circumstances, we cannot say the trial court abused its discretion in allowing evidence of specific unique items found in Mattingly's possession during the September 2000 incident.

B. Mattingly was not denied a unanimous verdict based on the alternative theories contained in the instruction for manufacturing methamphetamine.

Mattingly argues he was denied a unanimous verdict based on the instruction given for manufacturing methamphetamine. While Mattingly concedes sufficient evidence existed to present an instruction based on possession of all the chemicals or all the equipment (KRS 218A.1432(1)(b)), he argues there was insufficient evidence to present the theory of manufacturing methamphetamine (KRS 218A.1432(1)(a)). Mattingly points out officers failed to recover either finished methamphetamine or residue of methamphetamine. Mattingly argues that by allowing the jury to accept an unsupported theory, he was denied due process. See Commonwealth v. Whitmore, 92 S.W.3d 76, 81 (Ky. 2002).

[10] See Johnson v. Commonwealth, 105 S.W.3d 430, 441 (Ky. 2003).

As noted by this Court in Wells v. Commonwealth, "[s]ection 7 of the Kentucky Constitution requires a unanimous verdict be reached by a jury of twelve persons in all criminal cases." 561 S.W.2d 85, 87 (Ky. 1978)(Citations omitted.). See also Burnett v. Commonwealth, 31 S.W.3d 878, 882 (Ky. 2000); Kentucky Rule of Criminal Procedure (RCr) 9.82(1). The statute governing the offense of manufacturing methamphetamine states in pertinent part that:

> A person is guilty of manufacturing methamphetamine when he knowingly and unlawfully:
> (a) Manufactures methamphetamine; or
> (b) Possesses the chemicals or equipment for the manufacture of methamphetamine with the intent to manufacture methamphetamine.

See KRS 218A.1432(1).[11] The instruction given by the court stated:

> You will find the Defendant guilty of manufacturing Methamphetamine under this instruction if, and only if, you believe from the evidence beyond a reasonable doubt, that in this county on or about March 20th, 2004, and before the finding of the indictment herein, he:
> A. Knowingly manufactured Methamphetamine; **OR**
> B. Knowingly had in his possession all of the chemicals or all of the equipment necessary for the manufacture of Methamphetamine **AND** did so with the intent to manufacture Methamphetamine. (Emphasis in original.)

Under this instruction, a juror could have believed any one of the three alternative theories in finding Mattingly guilty of manufacturing methamphetamine.

This Court has held that a verdict returned under an instruction containing alternative theories "can not [sic] be successfully attacked upon the ground that the jurors could have believed either of two theories of the case where both interpretations are supported by the evidence and the proof of either beyond a reasonable doubt constitutes the same offense." Wells, 561 S.W.2d at 88. Further, in Burnett, this Court went on to say that, under the holding in Wells, the Commonwealth does not have to

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[11] The language set out for KRS 218A.1432 is as it existed at the time of Mattingly's offense.

show that each juror adhered to the same theory. Rather, the Commonwealth has to show that it has met its burden of proof under all alternative theories presented in the instruction. Once that is shown, it becomes irrelevant which theory each individual juror believed. 31 S.W.3d at 883.

Thus, the question becomes one of whether the Commonwealth presented sufficient evidence to support each of the theories contained in the instruction. Stated another way, we must determine whether Mattingly was entitled to a directed verdict as to any of the alternative theories. When considering a motion for a directed verdict, the trial court must draw all fair and reasonable inferences from the evidence in favor of the Commonwealth. If the evidence is sufficient to induce a reasonable juror to believe beyond a reasonable doubt that the defendant is guilty, a directed verdict should not be given. For the purposes of ruling on the motion, the trial court must assume that the evidence for the Commonwealth is true, but reserving to the jury questions as to the credibility and weight to be given to such testimony. Commonwealth v. Benham, 816 S.W.2d 186, 187 (Ky. 1991). Upon 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. Id. As Mattingly concedes sufficient evidence existed to allow instructions concerning possession of all of the chemicals or all of the equipment, we need only consider whether the Commonwealth presented sufficient evidence to support the instruction for manufacturing (KRS 218A.1432(1)(a)).

While the Commonwealth failed to present evidence as to the existence of either finished methamphetamine or methamphetamine residue, it did present circumstantial evidence that methamphetamine had been manufactured by Mattingly on the Hall farm.

This evidence included: (1) the empty Sudafed blister packs; (2) the either smell that led the Halls to call authorities out to the Hall farm; (3) the existence of pill soak or pill dough, a byproduct of the manufacturing process; (4) possession of all the chemicals necessary to manufacture methamphetamine; and (5) possession of all of the equipment to manufacture methamphetamine. All of this evidence supports the inference that methamphetamine had been manufactured on the Hall farm. When this circumstantial evidence is considered in light of the evidence linking Mattingly to the Hall farm and to the lab itself, we cannot say it would be clearly unreasonable for a jury to find Mattingly guilty of manufacturing methamphetamine. Further, as sufficient evidence supported each of the alternative theories presented to the jury, we cannot say Mattingly was denied a unanimous verdict under the instruction given.

C. Mattingly's argument concerning limitation on cross-examination of Officer Payton is without merit.

Mattingly argues the trial court committed reversible error when it limited his cross-examination of Officer Payton. In particular, Mattingly argues he should have been allowed to question Officer Payton as to the similarity between the chemicals and brand of chemicals found in Mattingly's possession in September of 2000 and those found in March of 2004.

Mattingly's argument as to this issue is without merit. As the record reflects, the trial court did not limit Mattingly as to questions concerning items discovered in Mattingly's possession. In fact, the court informed Mattingly's attorney that he could "ask anything he wanted[.]" Mattingly's attorney elected not to pursue this line of questioning. Having elected not to ask the questions, Mattingly cannot now argue the court refused to allow them. See Bayless v. Boyer, 180 S.W.3d 439, 446 (Ky. 2005); Moody v. Commonwealth, 170 S.W.3d 393, 399 (Ky. 2005). Further, we reject any

claim that the court's reference to the possibility of opening the door for further questions by the Commonwealth served to limit Mattingly's questions. See Norris v. Commonwealth, 89 S.W.3d 411 (Ky. 2002). Under these circumstances, we are not able to conclude the trial court limited Mattingly's cross-examination in any way.

IV. Conclusion

For the above stated reasons we affirm Mattingly's conviction by the Grayson Circuit Court.

All sitting. Lambert, C.J., Cunningham, Minton, Noble, Schroder, Scott, JJ., concur.

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