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NOT TO BE PUBLISHED OPINION

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Supreme Court of Kentucky **FINAL**

2006-SC-000063-MR

DATE 6-12-08 E.A.G. Grayson, D.C.

PATRICIA ELAINE NICHOLS

APPELLANT

V. ON APPEAL FROM GRAYSON CIRCUIT COURT
HONORABLE SAM MONARCH, JUDGE
NO. 05-CR-00078

COMMONWEALTH OF KENTUCKY

APPELLEE

MEMORANDUM OPINION OF THE COURT

AFFIRMING

I. Introduction

A Grayson County jury convicted Patricia Elaine Nichols of one count of manufacturing methamphetamine enhanced by possession of a firearm,¹ and one count of possession of anhydrous ammonia in an unapproved container with intent to manufacture methamphetamine.² In accordance with the jury's recommendation, Patricia was sentenced to thirty (30) years for manufacturing methamphetamine and twenty (20) years for possession of anhydrous ammonia, to be served concurrently, for a total of thirty (30) years in prison. Appealing to this Court as a matter of right,³ Patricia argues the circuit court erred by: (1) failing to grant a directed verdict as to both counts; (2) admitting testimony concerning a prior bad act of David Nichols; and (3) denying her motions for a continuance or a mistrial. Finding no error, we affirm.

¹ Kentucky Revised Statute (KRS) 218A.1432 and 218A.992.

² KRS 250.489 and 250.991(2).

³ Kentucky Constitution §110(2)(b).

II. Factual Background

Patricia was married to David Nichols. For some time prior to this incident, the couple had lived at 231 Spurrier Road, Big Clifty, Kentucky. Coincidentally, over a period of several months, the Grayson County Sheriff's Department had received numerous tips and complaints that methamphetamine was being manufactured on this property. On April 30, 2005, Deputy Matt Darst drove by the residence and detected a strong odor of ether coming from the property. Recognizing this odor as a by-product of the manufacture of methamphetamine, Deputy Darst obtained a search warrant for the property.

At approximately 11:59 p.m. on April 30th, officers executed the search warrant at the Nichols' home. As the officers were about to force entry into the residence, David opened the door. Upon finding a .44 caliber handgun within reach of the door, officers placed David, a convicted felon, under arrest. A pat-down subsequent to his arrest resulted in the recovery of \$837.00 and six rounds of .44 caliber ammunition. Numerous other weapons, including a .357 magnum, a stun gun, and various rifles and shotguns were recovered from the residence.

In executing the search warrant, officers did not find methamphetamine or ephedrine. However, they did encounter the odor of ether which was strong enough to require the officers to periodically exit the residence in order to get fresh air. In addition, officers discovered equipment and chemicals associated with the manufacture of methamphetamine throughout the residence. In the living room, they discovered a set of valves that could be used to transfer anhydrous ammonia from one tank to another, as well as the empty blister packs from 43 Sudafed packages. A search of the kitchen revealed the following items: ten unopened packs of pseudoephedrine, each containing

24 pills; lithium strips soaking in Coleman fuel; lithium batteries; cans of starter fluid; a can of acetone; and glass jars. A storage tub was also recovered from the kitchen containing fertilizer, salt, and coffee filters with the red stains associated with straining pseudoephedrine in order to extract ephedrine. From the master bedroom, officers recovered a camouflage bag containing two funnels, plastic tubing, additional coffee filters, professional drain opener, an HCl generator, and a box of Epsom salts. In the bathroom, officers found several glass jars standing in warm murky water in the tub.

Additional items were discovered outside the residence. From inside David's Bronco, officers recovered a modified tank containing anhydrous ammonia hidden inside a duffle bag; a respirator commonly used as protection from the fumes produced during the manufacture of methamphetamine; and a can of starter fluid. In another vehicle, officers found a can of carburetor cleaner. In the garage, they recovered a large mason jar, containing part of a gallon of hydrochloric acid; and a punctured can of starter fluid (spray cans are commonly punctured to obtain ether in liquid form). Near the front of the residence, a second tank which had been modified to store anhydrous ammonia was recovered. Further, officers discovered a burn pile containing the remains of a can of starter fluid and a can of paint thinner.

Patricia, who was not present at the residence at the time the search warrant was executed, was indicted by a Grayson County grand jury. Some time later, Officer Terry Blanton returned to the Nichols' residence, found Patricia, and served her with an arrest warrant. At Patricia's request, Officer Blanton allowed her to obtain a change of clothes from inside the residence prior to taking her to jail.

Patricia and David were tried together. At trial, they presented evidence that the items recovered were used by David to repair vehicles and to make chrome polish,

which David would sell to truck drivers. The Nichols also presented witnesses who testified there was no heavy smell of ether at the residence. Finally, the Nichols relied on the fact that no methamphetamine or ephedrine was found during the search. Despite these arguments, both were convicted by the jury.⁴

III. Analysis

A. The Denial of a Directed Verdict

Patricia, acting alone or in complicity with David, was convicted of possession of anhydrous ammonia in an unapproved container and of manufacturing methamphetamine. Patricia argues the circuit court erred in failing to grant a directed verdict as to both counts. In support of her position, Patricia asserts that the Commonwealth failed to show David knowingly possessed the anhydrous ammonia, or that he manufactured or intended to manufacture methamphetamine. Further, she argues the Commonwealth failed to show she was complicit in either count. We disagree.

In considering a motion for a directed verdict,

[T]he 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 purpose 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). “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.” Id., citing Commonwealth v. Sawhill, 660 S.W.2d 3 (Ky. 1983).

⁴ This Court affirmed David Nichols' conviction in an unpublished opinion rendered November 1, 2007. See 2006-SC-000104-MR.

Under KRS 218A.1432, “[a] person is guilty of manufacturing methamphetamine when he knowingly and unlawfully ... [p]ossesses the chemicals or equipment for manufacturing methamphetamine with the intent to manufacture methamphetamine[.]”⁵ Further, KRS 250.991 makes it a Class B felony to “knowingly possess anhydrous ammonia in a container other than an approved container in violation of KRS 250.489 ... with the intent to manufacture methamphetamine in violation of KRS 218A.1432[.]” Finally, KRS 502.020(1) states in pertinent part that:

A person is guilty of an offense committed by another person when, with the intention of promoting or facilitating the commission of the offense, he:
(a) Solicits, commands, or engages in a conspiracy with such other person to commit the offense; or
(b) Aids, counsels, or attempts to aid such a person in planning or committing the offense[.]

“[T]o convict a defendant of guilt by complicity, the jury must find beyond a reasonable doubt that the offense was, in fact, committed by the person being aided or abetted by the defendant.” Parks v. Commonwealth, 192 S.W.3d 318, 327 (Ky. 2006), citing Harper v. Commonwealth, 43 S.W.3d 261, 265 (Ky. 2001).

Patricia was convicted under KRS 218A.1432 and KRS 250.991. Both statutes require a showing of intent. As to intent, this Court has held that it “can be inferred from the actions of an accused and the surrounding circumstances.” Anastasi v. Commonwealth, 754 S.W.2d 860, 862 (Ky. 1988) (citation omitted). Likewise, intent may be inferred from the defendant’s knowledge. See Marshall v. Commonwealth, 60 S.W.3d 513, 518 (Ky. 2001). Finally, we are mindful that a “person is presumed to intend the logical and probable consequences of his conduct[.]” Parker v. Commonwealth, 952 S.W.2d 209, 212 (Ky. 1997).

⁵ As Patricia’s offense occurred in April of 2005, the jury was instructed on the pre-June 2005 version of KRS 218A.1432.

As to the charge of manufacturing methamphetamine enhanced by possession of a firearm, we find the Commonwealth presented sufficient evidence to avoid a directed verdict motion. When officers first entered the residence to execute the search warrant, they discovered a .44 caliber handgun. This was the first of many weapons and ammunition discovered in the residence. Further, officers discovered extensive circumstantial evidence that methamphetamine had been, and would continue to be, manufactured. They discovered a large amount of chemicals and equipment throughout the Nichols' property. From the items seized – including empty punctured cans of starter fluid, empty blister packs from a large amount of pseudoephedrine, a partial container of hydrochloric acid, and coffee filters with red stains – the jury could infer that methamphetamine had been produced. This inference was reinforced by the evidence of a strong smell of ether, both before and during the execution of the search warrant. The condition of the equipment seized also suggested that methamphetamine had been processed. Given the large amount of chemicals on hand, as well as the equipment available, the jury could infer methamphetamine would be processed again. Under these circumstances, we reject Patricia's argument that it was clearly unreasonable for the jury to find David was manufacturing methamphetamine while in possession of a firearm.

Likewise, as to the charge of possession of anhydrous ammonia in an unapproved container with intent to manufacture methamphetamine, we find that the evidence recovered, and the inferences that can be drawn from it, were sufficient to withstand a directed verdict motion. In executing the search warrant, officers discovered a tank of anhydrous ammonia hidden in a duffle bag in David's Bronco. They also found a second tank, modified to store anhydrous ammonia, in front of the

residence; and a set of valves, which could be used to transfer anhydrous ammonia between storage tanks, in the living room. There is no dispute that the tanks recovered, both the empty one and the one containing anhydrous ammonia, were not approved for the storage of anhydrous ammonia. When these facts are considered in light of the remaining items found throughout the property, we cannot say it was clearly unreasonable for the jury to find David possessed anhydrous ammonia in an unapproved container with the intent to manufacture methamphetamine.

At trial, Patricia presented evidence that she moved out of the marital residence the evening the search warrant was executed. However, contrary to her claim that she no longer lived at the marital residence, the jury was also presented with evidence that Officer Blanton discovered her in the residence after she had been indicted, and that following her arrest she requested to be allowed to go back inside the residence and retrieve a change of clothes and items she would need while in jail. Thus, the jury was free to reject her claim that she did not live at 231 Spurrier Road.⁶ Likewise, the jury was not required to accept Patricia's claim that the items recovered from the residence were used by David to either repair vehicles or to make chrome polish. Rather, based on the evidence presented and the inferences that may be drawn from it, the jury was free to accept the Commonwealth's version of the case. In addition, as intent "can be inferred from the actions of an accused and the surrounding circumstances[,]" it was not clearly unreasonable for the jury to conclude Patricia was complicit in both counts. See Anastasi, 754 S.W.2d at 862.

Finally, we find Patricia's argument that the jury convicted her merely for associating with David to be without merit. This was not a case of David hiding

⁶ In challenging the search warrant and filing a motion to suppress, Patricia took the position that as 231 Spurrier Road was her home, she had standing to assert her Fourth Amendment rights.

evidence of his actions from Patricia's view. On the contrary, an extensive amount of evidence was found throughout the property. Under these circumstances, the jury was free to infer Patricia's knowledge and involvement in the offenses which occurred at her residence. As "[t]he jury has wide latitude in inferring intent from the evidence[.]" we cannot say the circuit court erred in denying Patricia's motion for a directed verdict on either count. Id.

B. The Admission of David's Prior Bad Act

During trial, the Commonwealth attempted to introduce evidence showing that David had pled guilty to unlawful distribution of a methamphetamine precursor in the first degree. This incident arose when a Kroger store located in Hardin County informed authorities that David had purchased ten packages of Sudafed. Based on this information, officers stopped David's vehicle. David informed the officers that he had purchased the Sudafed for another individual for use in manufacturing methamphetamine.

Patricia, who was in the vehicle at the time David was stopped, objected to the introduction of this evidence. She argued that while David had received notice under Kentucky Rule of Evidence (KRE) 404(c), she had not. The circuit court granted Patricia's motion to the extent it precluded the Commonwealth from informing the jury that Patricia had been in the car during the stop. Further, because David's conviction was pending on appeal, the court precluded the Commonwealth from mentioning that he had been convicted. However, because the court believed David would argue the items were not intended for the purpose of manufacturing methamphetamine, it found the evidence surrounding the stop to be admissible in order to show David's knowledge and intent to manufacture methamphetamine. Having found the evidence of the stop

was admissible, the circuit court then rejected Patricia's claim that it was unduly prejudicial and should be excluded under KRE 403.

On appeal, Patricia argues the circuit court committed reversible error in admitting this evidence. She argues the circuit court's decision was arbitrary and unreasonable. In particular, Patricia asserts that the circuit court abused its discretion when it failed to exclude the evidence under KRE 403. Alternatively, Patricia argues that at a minimum the circuit court, in accordance with KRE 105, should have given a limiting instruction to the jury. We disagree.

Kentucky has long recognized that rulings on the admissibility of evidence are within the sound discretion of the trial judge. See Simpson v. Commonwealth, 889 S.W.2d 781, 783 (Ky. 1994). Further, "such rulings should not be reversed on appeal in the absence of a clear abuse of discretion." Id. "[T]he 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 this case, the circuit court found the evidence surrounding David's stop to be admissible for the purpose of showing his intent to utilize the large quantity of chemicals, and in particular pseudoephedrine, to manufacture methamphetamine. The court's decision to allow the evidence for this purpose is in accordance with KRE 404(b)(1) ("Evidence of other crimes, wrongs, or acts ... may be admissible if offered for some other purpose, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident[.]"). Further, as the Commonwealth had to prove she was complicit with David in the offense of manufacturing methamphetamine, we find the evidence was equally admissible against

Patricia. See Parks v. Commonwealth, 192 S.W.3d at 327 (“[T]o convict a defendant of guilt by complicity, the jury must find beyond a reasonable doubt that the offense was, in fact, committed by the person being aided or abetted by the defendant.”).

Having found the evidence to be relevant in the Commonwealth’s case against both David and Patricia, we now consider the argument that the circuit court erred in not excluding it under KRE 403. A review of the record indicates that the circuit court considered and rejected Patricia’s argument that any probative value of the evidence was substantially outweighed by the danger of undue prejudice. As this Court noted in Cook v. Commonwealth, “[t]he outcome of a KRE 403 balancing test is within the sound discretion of the trial judge, and that decision will only be overturned if there has been an abuse of discretion[.]” 129 S.W.3d 351, 361-62 (Ky. 2004), citing Commonwealth v. English, 993 S.W.2d at 945.

While Patricia may disagree with the result of the circuit court’s analysis, this is insufficient to demonstrate it was “arbitrary, unreasonable, or unsupported by sound legal principles.” The court’s decision to preclude the Commonwealth from mentioning either the fact that Patricia was present in the vehicle when David was stopped, or that David was convicted of the offense, belies her argument that the circuit court approached this issue in an arbitrary manner. Further, we find the court’s reasoning concerning the evidence that was admitted was both reasonable and supported by sound legal principles. Under these circumstances, we reject Patricia’s claim that the circuit court abused its discretion in admitting the evidence surrounding David’s prior stop.⁷

⁷ As an alternative argument, Patricia suggests the circuit court erred by failing to give the jury a limiting instruction under KRE 105. A review of the record demonstrates that Patricia failed to seek such an instruction at trial. Further, as we have concluded the evidence was admissible in the Commonwealth’s case in chief against Patricia, we find KRE 105 to be inapplicable.

C. The Denial of Motions for Continuance or Mistrial

Once the circuit court overruled Patricia's objection under KRE 403 and determined the Commonwealth would be allowed to introduce limited evidence concerning David's stop, Patricia moved for a continuance. She argued a continuance was appropriate in light of the fact that she never received notice under KRE 404(c), and that she was not prepared to deal with this evidence. When her motion for a continuance was denied, Patricia argued she was entitled to a mistrial. Patricia now argues the circuit court abused its discretion in failing to grant her motions.

We believe Patricia's argument fails to take into account the fact that the circuit court granted her motion to the extent that it precluded the Commonwealth from making any reference to her involvement or knowledge of the incident. Specifically, the jury was never informed that she was in the car when David was stopped. In effect then, Patricia no longer had any basis for a KRE 404(c) objection.

Further, this Court has long recognized that "[t]he granting of a continuance is in the sound discretion of a trial judge, and unless from a review of the whole record it appears that the trial judge abused that discretion, this court will not disturb the findings of the court." Williams v. Commonwealth, 644 S.W.2d 335, 336-37 (Ky. 1982). In this case, the trial court recognized that while Patricia may not have known the Commonwealth would introduce it, she had prior knowledge of the facts surrounding the incident and her role in it. Further, as Patricia's sole justification for the continuance was a lack of KRE 404(c) notice, the circuit court concluded Patricia had not shown sufficient cause to warrant a continuance. This is in keeping with the trial court's discretion set out in Kentucky Rule of Criminal Procedure (RCr) 9.04. Under these circumstances, we conclude Patricia has failed to demonstrate how the circuit court

abused its discretion in denying her motion for a continuance and, thus, reject her claim that she is entitled to a new trial. See Dishman v. Commonwealth, 906 S.W.2d 335, 339 (Ky. 1995) (citation omitted) (“A reviewing court will not reverse a criminal conviction unless the trial court abused its discretion in the denial of a continuance.”).

Likewise, we reject Patricia’s claim that she was entitled to a mistrial. We have long recognized that “a mistrial is an extreme remedy and should be resorted to only when there is a fundamental defect in the proceedings which will result in a manifest injustice.” Gould v. Charlton Co., Inc., 929 S.W.2d 734, 738 (Ky. 1996). Stated another way, “[a] defendant’s motion for a mistrial should only be granted where there is a ‘manifest necessity for such an action or an urgent or real necessity.’” Gosser v. Commonwealth, 31 S.W.3d 897, 906 (Ky. 2000) (citation omitted). Further, we recognize that “[t]he trial court has broad discretion in determining when a mistrial is necessary.” Id. In this case, the circuit court considered Patricia’s arguments and acted within its discretion when it rejected them. Other than disagreeing with the circuit court’s decision, Patricia has failed to demonstrate the existence of a manifest necessity for a continuance. For this reason, we reject her claim that the circuit court abused its discretion in denying her motion for a mistrial.

IV. Conclusion

Patricia Nichols has raised three arguments on appeal. Having considered and rejected each in turn, we conclude the Grayson Circuit Court did not commit reversible error and we affirm Patricia’s conviction.

All sitting. All concur.

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