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Supreme Court of Kentucky

2009-SC-000296-MR

GARRETT ADAMS — APPELLANT

V.

ON APPEAL FROM MADISON CIRCUIT COURT
HONORABLE WILLIAM G. CLOUSE, JR., JUDGE
NO. 08-CR-00130-001

COMMONWEALTH OF KENTUCKY — APPELLEE

MEMORANDUM OPINION OF THE COURT

AFFIRMING

Appellant, Garrett Adams, appeals as a matter of right[1] from a judgment entered upon a jury verdict convicting him of first-degree manufacturing methamphetamine and first-degree possession of a controlled substance. For these crimes, he was sentenced to a total term of twenty years' imprisonment.

On appeal Adams contends: (1) the trial court erroneously denied his motion to suppress the evidence seized in the search of his residence; (2) that he was entitled to a directed verdict upon the charges that he possessed equipment with the intent to manufacture methamphetamine and that he possessed a controlled substance; (3) that the Commonwealth improperly impeached him and his alibi witness, Crystal Tartt; and (4) that the

[1] Ky. Const. § 110(2)(b).

Commonwealth improperly impeached him with his suppression hearing testimony.

For the reasons stated below, we affirm.

I. FACTUAL AND PROCEDURAL BACKGROUND

In the light most favorable to the verdict, the evidence presented at trial was as follows. On February 17, 2008, Officer Jason Parker received a tip from an identified tipster that Adams and co-defendant Gary Owens were manufacturing methamphetamine at a residence located on Old Wallacetown Road in Madison County, Kentucky. The residence was owned by Owens, but he had not stayed there since January 26, 2008, because he was evading a warrant. Though denied by Adams, substantial evidence was presented that he lived at the residence during the relevant time period. Indeed, Owens testified that Adams was the only resident of the house in February 2008. Adams testified that he never lived at the residence and that during the relevant time period he lived in a trailer with his friend Crystal Tartt. Tartt corroborated Adams's testimony.

As a result of the tip, police reviewed the pseudoephedrine[2] logs from several stores in the Richmond and Berea area.[3] From the review it was determined that Adams made purchases of pseudoephedrine on four occasions between August 23, 2007, and October 2, 2007, that Owens made purchases of pseudoephedrine on five occasions in September 2007, that co-defendant

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[2] Pseudoephedrine is an essential ingredient in the manufacture of methamphetamine. *Nichols v. Commonwealth*, 186 S.W.3d 761, 762 (Ky.App. 2005).

[3] The maintaining of records of pseudoephedrine sales is prescribed by KRS 218A.1446.

Rebecca Adams had purchased pseudoephedrine on two occasions in November 2007, and that an acquaintance of the co-defendants, Jessica Day, purchased pseudoephedrine on eight occasions between September 11, 2007, and November 17, 2007.

Based upon the tip and the recorded pseudoephedrine purchases, Officer Parker and Deputy Tim Humble went to the Old Wallacetown Road residence. Adams, Rebecca Adams, Jessica Day, and two other persons unrelated to the litigation were at the residence when he arrived. Rebecca Adams called Owens, and he soon arrived at the scene. According to police testimony, Adams then told them that he lived at the residence and occupied the back right bedroom. In their later search of the residence, police found a letter in the back right bedroom addressed to Adams along with clothing Adams admits may have been his.

Once at the residence, Officer Parker believed he detected the smell of ether coming from inside the house; on the cluttered porch, he saw a propane tank with a rubber hose attached and a jar containing a clear liquid. From his law enforcement experience Officer Parker knew that ether and propane tanks are frequently used in the methamphetamine manufacturing process, and that jars with a clear liquid are frequently found at meth labs. As further discussed below, no source was discovered for the ether smell, and the propane tank and clear liquid were determined to be unrelated to any criminal activity.

Based upon what he saw and smelled, Officer Parker called Officer Rick

Johnson to the scene. Owens consented to allowing police to search the residence, but the police decided to obtain a search warrant before doing so. Officer Johnson executed the affidavit in support of the warrant, and the warrant was issued by a Madison District Court Judge. On the evening of February 19, 2008, police executed the warrant and searched the residence.

In the course of the search the police located a cooler in the attic space accessible only through the back right bedroom. Inside the cooler, police found a jar containing lye and ammonium nitrate; a whiskey bottle covered with a sock; two pieces of hose, and a glove. Also found in the cooler were valves which fit the propane tank found on the porch, though there is no evidence the fittings were used for that purpose. Police also found four lithium batteries with their lithium strips removed, anti-freeze, and Coleman fuel. Also recovered were plastic tubing in the trash on the front porch, two plastic funnels, two wooden spoons, a box of glass jars, and filters.

Two metal spoons which tested positive for methamphetamine residue were also found in the residence. One was found in a drawer in the right-rear bedroom and the other was found on top of a kitchen cabinet. The residue on the spoons was the basis for the possession of a controlled substance charge against Adams.

On July 3, 2008, the Madison County Grand Jury returned an indictment against Adams, Owens, and Rebecca Adams. Adams was charged with manufacturing methamphetamine and first-degree possession of a

controlled substance, and with being a second-degree persistent felony offender.

On November 18, 2008, Adams filed a motion to suppress the evidence obtained as a result of the police search of the Old Wallacetown Road residence. In support of his motion, Adams stated that "[t]he affidavit in support of the search warrant executed in the case at bar contained material false statements." As further discussed below, following an evidentiary hearing, the trial court denied the motion.

Appellant Adams, Gary Owens and Rebecca Adams were tried together. Adams was convicted of first-degree possession of a controlled substance and manufacturing methamphetamine. His defense at trial was that he never lived at the Old Wallacetown Road residence. The jury could not reach a unanimous verdict on his sentence, and by agreement he was sentenced to a total of twenty-years' imprisonment, with the second-degree persistent felony offender charge being dismissed.[4] This appeal followed.

II. THE TRIAL COURT DID NOT ERR BY FAILING TO SUPPRESS THE EVIDENCE DISCOVERED AT APPELLANT'S RESIDENCE

Adams first argues that the trial court erred by denying his motion to suppress the evidence obtained in the search conducted pursuant to a warrant of the Old Wallacetown Road residence. He argues that the affidavit for a search warrant executed by Officer Johnson contained "reckless and

[4] Owens was found guilty of unlawful possession of a methamphetamine precursor and of being a second-degree persistent felony offender and was sentenced to a total of seven-years' imprisonment; Rebecca Adams was found guilty of unlawful distribution of a methamphetamine precursor and was sentenced to two-years' imprisonment.

untruthful statements" relating to the smell of ether detected by Officer Parker and the propane tank and glass jar observed on the porch of the residence.

The relevant portions of Officer Johnson's affidavit were as follows:

> . . . . In plain view on the front porch Detective Parker observed a propane tank with a piece of hose sitting on the front porch and also detected an order [sic] that he believed to be ether, an item commonly used in the production of methamphetamine. At that time Detective Parker asked that [sic] occupants to exit the residence.
>
> Your affiant responded to the residence after speaking with Detective Parker who stated that there were numerous persons at the residence. While at the residence your affiant observed a clear glass quart size jar with a clear unknown liquid sitting in plain view on the front porch. From training and experience your affiant knows that clear glass jars are frequently used in the production of methamphetamine. Also in plain view on the front porch your affiant observed the above described propane tank that is commonly uses [sic] with a gas grill. There was not a gas grill in the area of the propane tank and the gas grill was located on the opposite side of the porch. The propane tank had a plastic or rubber hose placed on the valve. Your affiant has also seen this used in the past in the process of manufacturing methamphetamine. The propane is used in the Birch Reduction process of manufacturing methamphetamine, and further used to make anhydrous ammonia which is an ingredient that is necessary for the illicit production of methamphetamine. Beside the propane tank, a piece of rubber or plastic hose was observed that had been fitted with a brass type fitting that appeared to be consistent with the valve on the propane tank on the porch.
>
> From training and experience, your affiant knows that the above described items are commonly used by persons manufacturing methamphetamine using the Birch Reduction or "Nazi" method.
>
> The affiant has received Clandestine Laboratory Investigations Training from the Drug Enforcement Administration (DEA) and has been involved in the investigation of numerous Methamphetamine Labs and the arrest and prosecution of persons involved in manufacturing methamphetamine. From training and experience, the affiant knows that the above listed items are ingredients and

items that are commonly utilized in the illicit manufacture of methamphetamine.

During the course of the search, no ether or any likely source for the aroma detected by Officer Parker was found. The liquid content of the glass jar was analyzed and was not linked to methamphetamine production. The identity of the liquid is not reflected in the record. Further, it was later determined that the hose attached to the propane tank was fitted with a torch, and evidence was presented that Owens used the apparatus to do roofing work. The propane tank and glass jar were not offered by the Commonwealth at trial as evidence of methamphetamine manufacturing.

"To attack a facially sufficient affidavit, it must be shown that (1) the affidavit contains intentionally or recklessly false statements, and (2) the affidavit, purged of its falsities, would not be sufficient to support a finding of probable cause." *Commonwealth v. Smith*, 898 S.W.2d 496, 503 (Ky. App. 1995) (citing *Franks v. Delaware*, 438 U.S. 154 (1978)). "Statements in an affidavit that are intentionally false or made with reckless disregard for the truth must be stricken." *United States v. Ayen*, 997 F.2d 1150, 1152 (6th Cir. 1993) (citing *Franks*, 438 U.S. 154). "After setting aside the affidavit's false material, if the remaining content of the affidavit is insufficient to establish probable cause, the search warrant must be voided and the fruits of the search must be suppressed." *Id.* "It is not enough for defendants to show that the affidavit contains false information; in order to obtain a *Franks* hearing,

defendants must make a 'substantial preliminary showing' that the false statements originated with the government affiant, not with the informants, or that the government affiant repeated the stories of the [informant] with reckless indifference to the truth." *United States v. Giacalone,* 853 F.2d 470, 475-476 (6th Cir. 1988). "[T]he fourth amendment does not require 'that every fact recited in the warrant affidavit is necessarily correct, for probable cause may be founded upon hearsay and upon information within the affiant's own knowledge that sometimes may be garnered hastily.'" *Id.* at 476 (quoting *Franks,* 438 U.S. at 165). "Under *Franks,* suppression is required only when the affiant deliberately lied or testified in reckless disregard of the truth." *Id.* at 477.

An evidentiary hearing consistent with the foregoing requirements was held on November 20, 2008. In its order denying Adams's motion to suppress, the trial court made the following finding: "The issue before the Court is whether or not the law enforcement officers prepared the affidavit and application for the search warrant with deliberate falsehood or reckless disregard for the truth. *Under the totality of the circumstances, they did not do so.*" (emphasis added).

RCr 9.78 provides that "If supported by substantial evidence, the factual findings of the trial court shall be conclusive." *Commonwealth v. Neal,* 84 S.W.3d 920, 923 (Ky. App. 2002). For the reasons stated below, we conclude that the trial court's finding that Officer Johnson's affidavit was not prepared

with deliberate falsehoods or reckless disregard for the truth is supported by substantial evidence, and is, accordingly, conclusive upon the issue.

At the hearing, Officer Johnson testified that he had ten years of experience with the Drug Enforcement Administration Task Force, had received DEA Clandestine Laboratory Investigation Training, had previous investigative and clean-up experience with methamphetamine lab operations, and was certified to clean-up such sites.

Officer Johnson testified that based upon his experience and training, he is aware that propane tanks and jars with clear liquid are routinely found at methamphetamine labs and are used in the manufacturing process. While in this particular case the tank and the jar were not shown to be connected to contemporaneous methamphetamine manufacturing, it does not follow that Officer Johnson intentionally or recklessly included false information in his affidavit. It is undisputed that propane tanks and jars containing clear liquids are commonly found at methamphetamine lab sites,[5] and that the tank and jar were on the porch of the residence. Therefore, the observations contained in the affidavit were truthful, as were the corresponding statements that these items are often found in connection with a methamphetamine lab. Thus, the information contained in the affidavit relating to the propane tank and the jar was truthful, not false, notwithstanding that the items were unrelated to an active methamphetamine lab.

Officer Parker's detection of the ether smell is more problematic. Neither

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[5] *See, eg., Hayes v. Commonwealth,* 175 S.W.3d 574, 580 (Ky. 2005).

ether, nor source for the ether odor was discovered during the search. It is unclear whether Parker was mistaken in his belief that he smelled the substance, whether he lied about it, or whether the source of the odor disappeared in the interval between his first visit to the site and the execution of the warrant. While there is no readily apparent explanation for the absence of an apparent source of the smell, it was for the trial court to judge Officer Parker's credibility in reporting that he had smelled ether, and the court determined that there was no deliberate falsehood or reckless disregard for the truth associated with Officer Parker's determination.

In any event, if the ether reference is stricken from the affidavit, probable cause nevertheless would have existed to support the search warrant. The original report that methamphetamine manufacturing was occurring at the residence was from a known tipster. Reports of criminal activity from known tipsters are entitled to more weight than reports from anonymous tipsters, and in some cases, standing alone, may support probable cause. *Commonwealth v. Kelly,* 180 S.W.3d 474, 478 (Ky. 2005). Further, the substantial purchases of pseudoephedrine by persons linked to the residence strongly supported probable cause that illegal drug manufacturing was occurring there.[6] When the foregoing is combined with the presence of the propane tank and the jar containing a clear liquid, items which are commonly found at methamphetamine lab sites, we are persuaded that probable cause existed for issuance of the search warrant, even if the references to the ether odor are

[6] Adams does not raise the issue of whether those purchases were stale.

struck. *See Commonwealth v. Pride,* 302 S.W.3d 43, 49 (Ky. 2010) (Noting that standard for issuing a search warrant is whether under the "totality of the circumstances" as presented within the four corners of the affidavit, a warrant-issuing judge would have a substantial basis for concluding that probable cause exists).

In summary, the trial court properly denied Adams's motion to suppress the evidence seized during the search of the Old Wallacetown Road residence.

III. APPELLANT WAS NOT ENTITLED TO A DIRECTED VERDICT ON THE CHARGES OF MANUFACTURING METHAMPHETAMINE AND POSSESSION OF A CONTROLLED SUBSTANCE

Adams next contends that he was entitled to a directed verdict on the manufacturing methamphetamine charge and the possession of controlled substance charge. The basis for his argument is that there was insufficient evidence that he resided at the Old Wallacetown Road residence, and, therefore, there was insufficient evidence to link him to the incriminating evidence discovered during the search. For the reasons stated below, we disagree.[7]

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[7] Adams does not contend that sufficient chemicals and/or equipment were not found at the residence to support a conviction under KRS 218A.1432(1)(b) (providing that a person is guilty of manufacturing methamphetamine when he knowingly and unlawfully with the intent to manufacture methamphetamine possesses two or more chemicals or two or more items of equipment for the manufacture of methamphetamine). *See Fulcher v. Commonwealth,* 149 S.W.3d 363, 368 (Ky. 2004) for a listing of the chemicals and equipment to manufacture methamphetamine using the Nazi method of manufacture. Nor does he contend that the methamphetamine residue found on the two spoons would not support a conviction for first-degree possession of a controlled substance. *See Hampton v. Commonwealth,* 231 S.W.3d 740, 750 (Ky. 2007) (noting that the "any quantity" language in KRS 218A.1415 is satisfied by possession of the residue of an illegal narcotic).

In considering a motion for a directed verdict, the trial court is required to draw all fair and reasonable inferences from the evidence in favor of the Commonwealth. *Commonwealth v. Benham*, 816 S.W.2d 186, 187 (Ky. 1991).

> [I]f the evidence is sufficient to induce reasonable juror to believe beyond reasonable doubt that defendant is guilty, directed verdict should not be given; for purpose of ruling on motion, trial court must assume that evidence for Commonwealth is true, but reserving to jury questions as to credibility and weight to be given to such testimony.
>
> On appellate review, test of directed verdict is, if under evidence as whole, it would be clearly unreasonable for jury to find guilt, only then defendant is entitled to directed verdict of acquittal . . . there must be evidence of substance, and the trial court is expressly authorized to direct a verdict for the defendant if the prosecution produces no more than a mere scintilla of evidence.

Id. (internal citations omitted).

As noted, Adams's claim to a directed verdict turns upon whether he "possessed" the evidence seized during the police search of the residence. For purposes of KRS Chapter 218A, "possession" includes constructive possession as well as actual possession. *Houston v. Commonwealth,* 975 S.W.2d 925, 927 (Ky. 1998) ("Kentucky courts have continued to utilize the constructive possession concept to connect defendants to illegal drugs and contraband."); *Franklin v. Commonwealth,* 490 S.W.2d 148, 150 (Ky. 1972) ("Two or more persons may be in possession of the same drug at the same time and this possession does not necessarily have to be actual physical possession. It may be constructive as well as actual."). "To prove constructive possession, the Commonwealth must present evidence which establishes that the contraband

was subject to the defendant's dominion and control." *Pate v. Commonwealth*, 134 S.W.3d 593, 598-599 (Ky. 2004) (citing *Burnett v. Commonwealth*, 31 S.W.3d 878, 881 (Ky. 2000) and *Hargrave v. Commonwealth*, 724 S.W.2d 202, 203 (Ky. 1986)).

While Adams vehemently denies that he at anytime resided at the Old Wallacetown Road house, at trial, five witnesses testified to the contrary. Co-defendant Owens, the owner of the residence, testified that Adams was the only resident of the house at the time of the search, and that he occupied the back right bedroom. Owens testified that he had not resided at the house since January 26, 2008, because he was trying to avoid an arrest warrant. Detective Parker testified that Rebecca Adams told him that Adams lived at the residence and occupied the right rear bedroom; Officer Parker and Detective Hampton both testified that Adams told them he lived at the residence. Detective Hampton further testified that Adams told him that he occupied the back right bedroom. Finally, Owens's mother testified that Adams resided at the house.

Adams testified that during February 2008 he lived in a trailer with Tartt, and that while he had at times stayed at the Old Wallacetown Road residence, he never lived there. Tartt testified that Adams lived with her during February 2008. Thus there was conflicting testimony concerning whether Adams lived at the Old Wallacetown Road residence. It was for the jury to resolve the conflict.

As discussed above, *Benham* requires us to accept as true the testimony of those witnesses who testified that Adams resided at the residence over the

testimony presented by Adams that he did not. Moreover, we must credit the testimony that he occupied the back right bedroom, the source of much of the incriminating evidence.

As to constructive possession, this case is similar to *Clay v. Commonwealth*, 867 S.W.2d 200 (Ky. App. 1993). In *Clay*, following the execution of a search warrant on her residence, the defendant was charged with various drug offenses. Clay denied ownership of cocaine found during the search, and, in fact, her brother claimed to be its owner. Clay was nevertheless charged with trafficking in cocaine. In upholding her denial of a directed verdict, the Court of Appeals stated as follows:

> In a related argument, Clay maintains that a directed verdict also was appropriate because the Commonwealth failed to show that Clay was in possession of the cocaine at the time of the search. Again we find no error. As no cocaine was found on Clay's person, the Commonwealth relied on the theory of constructive possession to connect Clay to the three ounces of cocaine found in her kitchen and bathroom. This connection may be accomplished by establishing that the contraband was subject to the defendant's dominion and control. *Leavell v. Commonwealth*, Ky., 737 S.W.2d 695 (1987); *Rupard v. Commonwealth*, Ky., 475 S.W.2d 473 (1971). It is uncontroverted that Clay owned the house where the cocaine was found, that she lived in the house, and that she used the kitchen and bathroom where the cocaine was stored. Morgan maintained, however, that the cocaine belonged to him and was for his personal use only. The court ultimately concluded that the evidence was sufficient to create a jury issue, and we are sufficiently convinced that pursuant to the standard set forth in *Benham, supra*, it was not clearly unreasonable for the jury to conclude that Clay constructively possessed the cocaine. Accordingly, the trial court did not err in denying Clay's motion for a directed verdict as it relates to the issue of constructive possession.

Id. at 202-203.

While here, Owens owned the residence, sufficient evidence was presented to support the conclusion that Adams was its sole occupant during February 2008. As in *Clay*, we believe that a reasonable jury could have similarly concluded that Adams constructively possessed the incriminating evidence located throughout the residence. In any event, as the occupant of the right rear bedroom, he would by any standard be adjudged to have been in constructive possession of the evidence discovered in that location. This would include the methamphetamine manufacturing contraband located in the attic above the bedroom, and the spoon with methamphetamine residue located in a drawer in that room – sufficient evidence to support a conviction for both manufacturing methamphetamine and first-degree possession of a controlled substance.

In summary, the trial court properly denied Adams's motion for a directed verdict on the manufacturing methamphetamine and possession of a controlled substance charges.

IV. APPELLANT AND HIS ALIBI WITNESS WERE IMPROPERLY QUESTIONED CONCERNING PRIOR BAD ACTS, BUT THE ERROR WAS HARMLESS

Adams next contends that he was improperly questioned concerning: (1) the arrest of Tartt's mother, Dottie Croucher, for manufacturing methamphetamine; (2) the condemnation of Croucher's former trailer (where Adams claimed to have lived in February 2008) in December 2007 as a result of

the methamphetamine manufacturing; and (3) Tartt's arrest in February 2008 for, among other things, trespass for living in the condemned trailer. Adams also claims that Tartt was improperly questioned concerning whether she knew that Adams had been incarcerated in 2007. In a multi-pronged attack, Adams argues that the questioning was improper impeachment upon collateral matters, in violation of KRE 404(b), and improper as eliciting irrelevant evidence.

As previously discussed, Adams's alibi was that he did not live at the Old Wallacetown Road residence in February 2008, but, rather, lived in a trailer occupied by Crystal Tartt located in Phillips Trailer Park on Baugh Street in Berea. The trailer had previously been occupied by Tartt's mother, Ms. Croucher.

It appears uncontested that in December 2007 Croucher was arrested for manufacturing methamphetamine in the trailer, and that the trailer was thereafter quarantined as a safety hazard. While the trailer was still quarantined, during the latter part of January 2008, Tartt moved into the trailer. Adams and Tartt both testified that he moved into the trailer at about this time and that he had continued to reside there until his arrest on February 19, 2008. The Commonwealth contends that because the trailer was quarantined during February 2008, questions relating to its status were proper to challenge Adam's claim that he resided there.

On cross-examination, the Commonwealth asked Adams if it was true

that Tartt's mother, Croucher, had been arrested for manufacturing methamphetamine. Adams objected, arguing that the purpose of the testimony was to impeach Adams's character because he was acquainted with Croucher and her daughter. The Commonwealth argued that the purpose of the question was "to establish relationship." Upon this basis, the trial court permitted the question. In a related question, the Commonwealth asked Adams was it not true that Croucher was arrested with one of his relatives, Phillip Adams. Adams responded that he was not related to this person.

Adams's principal argument is that this questioning served to impeach his character on a collateral matter. "[A]lthough there is no provision in the Kentucky Rules of Evidence prohibiting impeachment on collateral facts, we have consistently recognized that prohibition as a valid principle of evidence." *Metcalf v. Commonwealth*, 158 S.W.3d 740, 745 (Ky. 2005) (citing *Purcell v. Commonwealth*, 149 S.W.3d 382, 397-98 (Ky. 2004)). "Although a witness in a criminal case may be impeached by contradictory evidence, 'such evidence is not admissible for that purpose unless it pertains to a material matter.'" *Chumbler v. Commonwealth*, 905 S.W.2d 488, 495-496 (Ky. 1995) (quoting *Nugent v. Commonwealth*, 639 S.W.2d 761, 764 (Ky. 1982)).

Impeachment on a collateral matter is most generally intended to refer to impeachment by the introduction of a prior inconsistent statement irrelevant to any issue in the trial. *See, Chumbler*, 905 S.W.2d. at 488. The questioning concerning Tartt's mother does not fall within this framework; accordingly, we

will focus our review of the line of questioning under the rules of relevancy contained in KRE 402 and KRE 403.

In order to be admitted, evidence must be relevant. KRE 402. Relevant evidence is "evidence having 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 401. However, even 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, or by considerations of undue delay, or needless presentation of cumulative evidence." KRE 403.

Croucher's arrest for manufacturing methamphetamine was of no consequence to any issue in the trial. On the other hand, it linked Adams, through Tartt and the trailer, to Croucher's methamphetamine manufacturing activities. The message of the questioning was that Adams associated with methamphetamine manufacturers. Further, the credibility of Tartt was essential to Adams's defense, and the fact that her mother was a methamphetamine manufacturer was harmful to that. Thus, there was considerable potential for undue prejudice and confusion of the issues. Accordingly, the trial court abused its discretion by permitting introduction of the evidence of Croucher's arrest for manufacturing methamphetamine. *Love v. Commonwealth,* 55 S.W.3d 816, 822 (Ky. 2001) (trial court's KRE 401 relevancy determinations and KRE 403 prejudice determinations are reviewed

under the abuse of discretion standard). If the Commonwealth wanted to show that Croucher, the prior occupant of the trailer, was Tartt's mother (the Commonwealth's stated purpose of the questioning was "to show relationship"), it was unnecessary to introduce Croucher's arrest in order to do that.

Nevertheless, while the introduction of Croucher's arrest for methamphetamine manufacturing should not have been admitted, RCr 9.24 requires us to disregard an error if it is harmless. A non-constitutional evidentiary error may be deemed harmless if the reviewing court can say with fair assurance that the judgment was not substantially swayed by the error. *Kotteakos v. United States*, 328 U.S. 750 (1946). The inquiry is not simply "whether there was enough [evidence] to support the result, apart from the phase affected by the error. It is rather, even so, whether the error itself had substantial influence. If so, or if one is left in grave doubt, the conviction cannot stand." *Id.* at 765; *Winstead v. Commonwealth*, 283 S.W.3d 678, 688-89 (Ky. 2009). While there was a guilt-by-association aspect to the introduction of Croucher's arrest for methamphetamine manufacturing, nevertheless, the evidence did not directly incriminate Adams and, therefore, did not have a substantial influence on the verdict. Thus, the error was harmless.

Adams also complains of questioning relating to the condemnation of Croucher's trailer *as a result of the manufacturing* and Tartt's arrest in February 2008 for, among other things, living in the condemned trailer.

Because of Adams's failure to timely object to the questioning, the alleged errors are not preserved. RCr 9.22; *Edmonds v. Commonwealth*, 906 S.W.2d 343, 346 (Ky. 1995). We accordingly review the alleged errors under the palpable error standard contained in RCr 10.26. A palpable error is one which "affects the substantial rights of a party" and will result in "manifest injustice" if not considered. *Schoenbachler v. Commonwealth*, 95 S.W.3d 830, 836 (Ky. 2003). "Manifest injustice" means that "a substantial possibility exists that the result of the trial would have been different." *Brock v. Commonwealth*, 947 S.W.2d 24, 28 (Ky. 1997).

The condemnation of Croucher's trailer *as a result of manufacturing methamphetamine* was, again, of no relevance to any fact in issue and, because of its tendency to associate Adams with Croucher's criminal conduct, there was undue prejudice as a result of its admission. The Commonwealth attempts to argue that the fact that the trailer was condemned casts doubt on whether Adams lived there; however, on the other hand, it is uncontested that Tartt did live in the condemned trailer in February 2008 with her children and was arrested for so doing. The fact that the trailer was condemned as a result of methamphetamine manufacturing does not demonstrate that Adams could not also have lived there illegally as well. Further, it could have been shown that the trailer was condemned without reference to Croucher's illegal conduct. The evidence that the trailer was condemned for Croucher's methamphetamine manufacturing (*as opposed to that the trailer was condemned in general*) should

not have been admitted. However, the error does not rise to the level of palpable error. Absent the evidence there is not a substantial possibility that the result of the trial would have been different.

The Commonwealth's questioning of Adams about Tartt's February 2008 arrest was inadmissible under KRE 404(b). KRE 404(b) provides as follows:

> (b) Other crimes, wrongs, or acts. Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible:
>
> > (1) If offered for some other purpose, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident;

As is clear from the language of the rule, application of KRE 404(b) is not limited to criminal defendants. Robert G. Lawson, The Kentucky Evidence Law Handbook, § 2.25[2] (4th ed. 2003). As this Court has previously stressed, KRE 404(b) is "exclusionary in nature," and as such, "any exceptions to the general rule that evidence of prior bad acts is inadmissible should be 'closely watched and strictly enforced because of [its] dangerous quality and prejudicial consequences.'" *Clark v. Commonwealth*, 223 S.W.3d 90, 96 (Ky. 2007). (quoting *O'Bryan v. Commonwealth*, 634 S.W.2d 153, 156 (Ky.1982)). As recognized in *Tamme v. Commonwealth*, 973 S.W.2d 13, 29 (Ky. 1998), the list of exceptions enumerated in the rule is illustrative, not exclusive.

Tartt's arrest was inadmissible character evidence implicating no other legitimate purpose for admission such as motive, opportunity, intent,

preparation, plan, knowledge, identity, or absence of mistake or accident.[8] In addition, the evidence was irrelevant, and its admission resulted in undue prejudice, that is, the impugning of the character of Adams's principal alibi witness. However, again, the error does not rise to the level of palpable error.

The final alleged improper questioning we are referred to under this argument heading is the cross-examination of Tartt by Owens's attorney wherein she was asked if she was aware that Adams had been incarcerated in May 2007. Tartt stated that she was not aware of this. The Commonwealth argues that this question was proper under KRE 404(b) because Tartt previously testified that she first met Adams in May 2007. If the date that the two met were relevant to some matter at issue in the trial, the evidence would have been admissible under KRE 404(b)(1) as being offered for a purpose other than to reflect on Adams's character. However, it was not relevant for any such purpose, and demonstrated a prior bad act for which Adams was incarcerated. As such, the question amounted to impeachment on a collateral matter, *Chumbler,* 905 S.W.2d at 495-496, which, in addition, improperly boot-strapped in improper KRE 404(b) evidence. Because it made no practical difference when Adams and Tartt first met, the information was also irrelevant.

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[8] In connection with the questioning Adams was also asked if the police found any of his possessions at the trailer at the time of Tartt's arrest. Adams answered that he was not there and did not know. While this may have been a proper exception so as to permit the introduction of the prior bad act evidence, the question did not establish that none of Adams's possessions were at the location, and we are cited to no other testimony establishing this assertion by the Commonwealth. Questioning of, for example, a police officer who was present when Tartt was arrested and had knowledge that none of Adams's possessions were at the trailer may have laid a proper foundation for admission of the evidence.

The issue was not preserved by proper objection, however, and the admission of the evidence does not rise to the level of palpable error.

In summary, while Adams does cite to several instances where inadmissible evidence was allowed into the trial, for the reasons explained above, no reversible error occurred.

V. APPELLANT WAS NOT IMPROPERLY IMPEACHED WITH HIS SUPPRESSION HEARING TESTIMONY

Finally, Adams contends that he was improperly impeached at trial with his suppression hearing testimony.

"[W]hen a defendant testifies in support of a motion to suppress, his testimony may not thereafter be admitted against him at the trial on the issue of guilt unless he fails to object." *Shull v. Commonwealth*, 475 S.W.2d 469, 472 (Ky. 1972) (citing *Simmons v. United States*, 390 U.S. 377 (1968)); *see also Commonwealth v. Bertram*, 596 S.W.2d 379, 380 (Ky. App. 1980) (Identifying that the right "is clear as a matter of state constitutional law[.]").

The first alleged misuse of his suppression hearing testimony occurred when the Commonwealth asked him on cross-examination if he had admitted at the hearing that he had clothes in the back right bedroom of the Old Wallacetown Road residence. Adams responded that he did not remember. The Commonwealth then read Adams's suppression hearing testimony transcript out loud.[9] At the suppression hearing, Adams testified that it was possible that he had clothes at the residence. Adams then conceded that he

[9] The trial court asked the prosecutor if this was for the purpose of refreshing his memory and she responded that it was.

may have had clothes at the residence.

We are persuaded that the Commonwealth's use of the suppression hearing testimony as it did was improper. First, at the time the Commonwealth asked the question, Adams had not contradicted his suppression hearing testimony, and thus there had arisen no basis for the impeachment.[10] Second, the undertone of the question was directed to the issue of guilt (placing Adams's clothing at the residence in contradiction of his alibi that he lived at the Tartt trailer) and Adams timely objected; this brings the use of the suppression hearing testimony squarely into the prohibition as stated in *Shull*. Nevertheless, we are persuaded that any error was harmless. In light of the multiple other witnesses who had testified concerning Adams's residency at the house, Adams's testimony that he may have had clothing at the location would not have had a substantial impact on the verdict. *Winstead*, 283 S.W.3d at 688.

The second instance of alleged improper impeachment with suppression hearing testimony involved a letter written by Adams's girlfriend, addressed to him, which was found in the right back bedroom during the search. The letter was not seized, but a photograph of it was introduced at trial.

On direct-examination, Adams testified that he had received letters from his girlfriend at the Old Wallacetown Road residence. During cross-examination the Commonwealth referenced the letter and asked Adams whether it was true that he denied receiving the letter during his suppression

[10] If the Commonwealth had simply asked Adams whether he had clothing at the residence first, if he gave an answer inconsistent with his suppression hearing testimony, as discussed *infra*, the questioning would have been proper.

hearing testimony. No objection was entered to the question. Adams responded he could not remember. The Commonwealth then read Adams's suppression hearing testimony on the issue wherein he testified that it was not possible that he had received mail from his girlfriend at the residence.

The Commonwealth's theory was that Adams did receive the letter at the Old Wallacetown Road residence. Adams's suppression hearing testimony was that he did not receive mail there. Thus, the Commonwealth's use of the letter evidence was not upon the issue of guilt, and *Shull* does not apply. Rather, the purpose of the use of the suppression hearing testimony in the instance of the letter was as a prior inconsistent statement contradicting Adams's trial testimony.[11] The Supreme Court has noted that a defendant's suppression hearing testimony could likely be used for impeachment purposes if the defendant took the stand and testified to the contrary. *See United States v. Salvucci*, 448 U.S. 83, 88 n. 8 (1980) (noting, without deciding, that "[a] number of courts considering the question [of whether a defendant's suppression hearing testimony could be used to impeach a defendant at trial] have held that such testimony is admissible as evidence of impeachment.")) (citations omitted). *See also United States v. Jaswal,* 47 F.3d 539, 543 (2d Cir. 1995) ("Prior inconsistent suppression hearing testimony may properly be used

[11] In order to introduce a prior inconsistent statement, a proper foundation must first be established, whereby the witness is "inquired of concerning it, with the circumstances of time, place, and persons present, as correctly as the examining party can present them." KRE 613; *see also Noel v. Commonwealth,* 76 S.W.3d 923, 929-931 (Ky. 2002) (noting strict compliance with the foundation requirements). Adams does not raise as error the procedure used by the Commonwealth to introduce the prior inconsistent statement.

to impeach a defendant during trial."). As such, we find no error in the use of Adams's suppression hearing testimony in regards to the letter.

In regards to the letter, Adams also objects to its use at trial on the grounds of the Best Evidence Rule, KRE 1002. The foundation of the best evidence rule, found in KRE 1002, provides that "[t]o prove the content of a writing, recording, or photograph, the original writing, recording, or photograph is required, except as otherwise provided in these rules, in other rules adopted by the Kentucky Supreme Court, or by statute."

As previously noted, neither the letter nor the envelope it was contained in was seized during the search. A photograph of the letter was introduced for the purpose of connecting Adams with the residence and bedroom. As such, the purpose of introducing the picture of the envelope was not "[t]o prove the content" of the letter. It was, rather, to establish that mail addressed to Adams was located in the residence and bedroom. Thus, we do not believe KRE 1002 is applicable under these circumstances.

VI. CONCLUSION

For the foregoing reasons the judgment of the Madison Circuit Court is affirmed.

All sitting. All concur.

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