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RENDERED: OCTOBER 21, 2010
NOT TO BE PUBLISHED

Supreme Court of Kentucky

2009-SC-000631-MR

CHRISTOPHER DOUGLAS BANKS — APPELLANT

V.

ON APPEAL FROM MONTGOMERY CIRCUIT COURT
HONORABLE BETH LEWIS MAZE, JUDGE
NO. 08-CR-00001

COMMONWEALTH OF KENTUCKY — APPELLEE

MEMORANDUM OPINION OF THE COURT

AFFIRMING

Appellant, Christopher Douglas Banks, was convicted in Montgomery Circuit Court of multiple felony charges, including manufacturing methamphetamine and fourth-degree controlled substance endangerment to a child. He challenges his convictions on multiple grounds. Finding no reversible error, his conviction is affirmed.

I. Background

In July 2007, police executed a search warrant at Appellant's home. Along with Appellant, police found his two young children residing in the house. In their initial sweep of the residence, police discovered items associated with manufacturing methamphetamine in the garage behind the house. Among these were four plastic hydrogen chloride gas generators, rubber tubing, filters with dough residue, drain cleaner, acetone, empty lithium battery casings, dry ice bags, a wooden spoon coated with a white substance,

rock salt, Liquid Fire, a bottle containing ammonium nitrate pellets, a grinder, a duffel bag, and a backpack.

The presence of these items led police to consider the garage a "meth lab." No heat source, essential to the manufacture of methamphetamine, was found in the garage, however, suggesting that the stove in the kitchen of the house was used in the process. Police also discovered five bags of marijuana at the residence.

When questioned by police, Appellant initially claimed ignorance of any methamphetamine being manufactured in his house. Even after police confronted him with incriminating statements purportedly coming from the co-defendants, Appellant continued to deny manufacturing methamphetamine himself, but admitted renting the garage to Gerald Mullis for that activity.

Appellant was charged with manufacturing methamphetamine, possession of marijuana, fourth-degree controlled substance endangerment to a child, and possession of drug paraphernalia. Three alleged co-participants in Appellant's methamphetamine scheme were also charged, but pleaded guilty. Appellant was convicted on all charges. The jury recommended a sentence of twenty years on manufacturing methamphetamine, twelve months for possession of marijuana, five years on each count of controlled substance endangerment to a child, and twelve months for possession of drug paraphernalia. The sentences were ordered to run consecutively for a total sentence of 30 years.

This appeal was then filed directly to this Court as a matter of right. Ky. Const. § 110(2)(b).

II. Analysis

Appellant challenges his convictions on four grounds. He first claims it was reversible error for the trial court to inform the jury of the guilty pleas by co-defendants. Second, he asserts the infringement of his Confrontation Clause rights by the admission into evidence of an interrogation by police in which they informed Appellant of how his co-defendants had incriminated him. Third, he challenges his conviction on two counts of controlled substance endangerment to a child because the meth lab was not located in the house, where the children resided, but in the garage. Finally, he urges that evidence of the children's otherwise poor living conditions, insinuating that Appellant was a poor father, should have been excluded from trial.

A. Guilty Pleas by Co-Defendants

All three co-defendants entered guilty pleas shortly after trial proceedings began. They each entered their plea after voir dire, but before opening statements. Following the final guilty plea, the trial judge instructed the jury that all three co-defendants had pleaded guilty, thus leaving Appellant as the only defendant on trial.

Appellant argues that it was reversible error for the court to tell the jury that his co-defendants had entered guilty pleas and for the Commonwealth to subsequently comment on the pleas in opening argument. He reasons that the guilty pleas of co-defendants unfairly implied to the jury that he must be guilty as well. Appellant argues that such prejudice amounts to reversible error.

While on the one hand Appellant is correct that knowledge of co-defendants' guilty pleas may damage a remaining defendant's credibility, on

the other hand he may be advantaged by their acceptance of responsibility. Indeed, Appellant's own theory of the case was that he did not directly participate in the illegal drug operations, but simply rented the space out for use by the co-defendants. In other words, his entire trial strategy was to depict the co-defendants as the truly guilty parties. Thus, Appellant cannot identify any overall prejudice to his case through the revelation to the jury that those co-defendants had pleaded guilty.

Appellant did not complain at trial about the mention of these guilty pleas. On the contrary, when asked whether he was ready to proceed following the entering of the pleas, Appellant stated that he was "ready to roll." Moreover, in a conference held the following day, Appellant clarified that it was his informed decision to proceed in light of the jury's awareness of the guilty pleas.

As this Court recently explained, "Ordinarily, it is 'improper for the Commonwealth to show during its case-in-chief that a co-indictee has already been convicted under the indictment.'" *King v. Commonwealth*, 276 S.W.3d 270, 277 (Ky. 2009) (quoting *St. Clair v. Commonwealth*, 140 S.W.3d 510, 544 (Ky. 2004)).[1] This general caution applies equally to the court, which should not ordinarily inform the jury of such developments. "However, if it is apparent from the record that the defendant did not object to the introduction of this

[1] The best practice when co-defendants are dropped from the trial is for the trial judge to simply state that they will no longer be part of the trial. As our other cases indicate, there is potential prejudice in telling the jury about the guilty plea.

evidence and that the defendant tried to use that information as part of his trial strategy, no reversible error occurred." *Id.*

Clearly, Appellant should not be permitted to have his cake and eat it, too. He did not object to the mention of the guilty pleas and attempted to foist responsibility onto his former co-defendants at trial, in part by referencing their guilty pleas. No reversible error occurred.

B. Statements from Interrogation

When first questioned by police, Appellant denied any knowledge of manufacturing methamphetamine. Attempting to undermine his denial, police fabricated statements, purportedly from the co-defendants, that incriminated Appellant. The fabrication was designed to convince Appellant to admit culpability. These statements consisted of claims that the co-defendants bought Appellant pseudophedrine for the manufacturing process as well as an assertion that Appellant was manufacturing methamphetamine to stave off the pending foreclosure of his house. After being confronted with these statements, Appellant admitted knowledge of the methamphetamine, but insisted he merely rented out the storage building for other people to manufacture it.

Over Appellant's objection, the Commonwealth played a recording of this interrogation for the jury. He now claims that admission of portions of this interrogation violated his rights under the Confrontation Clause. Specifically, he challenges the introduction of the underlying statements supposedly made by the co-defendants.

This Court essentially resolved this issue in *Turner v. Commonwealth*, 248 S.W.3d 543 (Ky. 2008). There, we followed federal precedent to conclude that, although hearsay exceptions cannot immunize an out-of-court statement from Confrontation Clause review, if a statement is not hearsay at all, i.e. not offered for the truth of the matter, no constitutional dilemma exists. *Id.* at 545-46. The basis for this rule is that the Confrontation Clause protects a defendant's right "to be confronted with the witnesses against him." U.S. Const. amend. VI. If a statement is not offered for its truth, its declarant is not serving as a witness.

The Commonwealth did not seek to introduce the fabricated statements of co-defendants for their truth, but instead to provide the context of the interrogation. In context, they serve to demonstrate how police caught Appellant in a lie—that he didn't know anything about the methamphetamine. This helped prove Appellant's manufacturing of methamphetamine by illustrating how he attempted to cover it up. A cover-up is highly relevant, "constituting circumstantial evidence of consciousness of guilt and hence of the fact of guilt itself." *Woodard v. Commonwealth*, 147 S.W.3d 63, 67 (Ky. 2004) (cover-up by false identification). To the extent these statements were offered for this purpose, they were constitutionally permissible.

Of course, as is often the case, the introduction of these statements for a legitimate purpose contains the potential for abuse. It obviously would be improper to rely on these fabricated statements to confirm that Appellant did in fact know about the methamphetamine or that he was manufacturing it to offset his financial woes. Such misuse would not only deprive Appellant of his

confrontation right, but would also have the absurd effect of permitting police to simply fabricate incriminating assertions against Appellant.

Thus, the introduction of the recording would unquestionably have been subject to an admonition against use for truth, if Appellant had so requested. Appellant did not, however, request an admonition at trial, nor has he asserted his right to one on appeal. As Appellant failed to request the only remedy he was entitled to, this Court will not disturb the verdict resulting from proper rulings by the trial court. *See Bray v. Commonwealth*, 177 S.W.3d 741, 752 (Ky. 2005).

C. Controlled Substance Endangerment to a Child

Appellant next contends that he was entitled to a directed verdict on the two counts of fourth-degree controlled substance endangerment to a child. The crime for which he was convicted is laid out in KRS 218A.1444, which states in relevant part:

> A person is guilty of controlled substance endangerment to a child in the fourth degree when he or she knowingly causes or permits a child to be present when any person is illegally manufacturing . . . methamphetamine or possesses a hazardous chemical substance with intent to illegally manufacture a controlled substance or methamphetamine under circumstances that place a child in danger of serious physical injury or death, if the child is not injured as a result of the commission of the offense.

KRS 218A.1444(1). The basis of Appellant's claim is that none of the components of the meth lab were found in Appellant's house, where the children resided, but instead in the neighboring garage. Thus, Appellant reasons, manufacturing methamphetamine posed no danger to his children.

Notwithstanding the discovery of the manufacturing components in the garage only, there was sufficient evidence to conclude that Appellant did endanger his children through the manufacture of methamphetamine. First, it was reasonable for the jury to infer that Appellant used the stove in the house's kitchen to manufacture the methamphetamine, based on expert testimony that a heat source is required and none existed in the garage. Second, even more direct evidence was offered by Brad Isaacs, a confidential informant, who testified to observing Appellant in that kitchen wearing a chemical mask with the materials used to manufacture methamphetamine alongside him, while the children played in the next room. Finally, when Appellant was asked by Isaacs whether the chemicals bothered his children, he responded that one of his children was a "tough little f*****," thereby implicitly admitting that the chemicals posed some hazard and that the children were exposed to them.

Because there was ample evidence to demonstrate that the children were exposed to the danger of methamphetamine manufacture in the house, this Court need not address whether the existence of such a danger in the garage alone is sufficient for a conviction. Based on the evidence in this case, Appellant was not entitled to a directed verdict.

D. Poor Living Conditions

The Commonwealth introduced evidence that Appellant's children were found hungry and that their home was in disarray, with animal excrement and urine throughout, and marijuana and drug paraphernalia in the living room. Appellant did not object to this evidence, but had unsuccessfully objected to discussion of it in opening statement.

Appellant's objection to the Commonwealth's discussion of the poor living conditions in opening statement was inadequate to preserve any error with regard to admission of such evidence. Without delving into the precise requirements of the contemporaneous objection rule, it suffices to say that to preserve an evidentiary error, a party must object to the admission of *evidence.* *See* RCr 9.22. Opening statements are not evidence, *Morgan v. Commonwealth*, 189 S.W.3d 99, 114 (Ky. 2006), and thus an objection thereupon fails to preserve an evidentiary error.

This result is clear in light of the broader latitude afforded to parties in their discussion of the evidence during opening statement. *Id.* A court may properly permit discussion, offered on a good faith basis in opening, of evidence that is ultimately inadmissible. *See Freeman v. Commonwealth*, 425 S.W.2d 575, 578 (Ky. 1967) ("Counsel has the right to direct the attention of the jury to all facts and circumstances that he in good faith believes will be allowed to develop in the evidence."). Consequently, the overruling of an objection made during opening is not necessarily dispositive of the admissibility of the same subject matter in the form of evidence. To give the trial court an adequate basis for evaluating its admissibility, therefore, a party must object to the admission of evidence at the time it is presented.[2]

Due to Appellant's failure to properly preserve this matter, it is reviewed solely for palpable error. For an error to be palpable, and thus reversible, it must result in a manifest injustice. *Martin v. Commonwealth*, 207 S.W.3d 1, 3

[2] This is not to say that a proper pre-trial motion in limine would not preserve the error. But no such motion was made in this case.

(Ky. 2006). "[T]he required showing is probability of a different result or error so fundamental as to threaten a defendant's entitlement to due process of law." *Id.; see also id.* at 5 ("When an appellate court engages in a palpable error review, its focus is on what happened and whether the defect is so manifest, fundamental and unambiguous that it threatens the integrity of the judicial process."). The implication of Appellant's poor fathering, though possibly improper KRE 404 evidence, certainly was not "so manifest, fundamental and unambiguous that it threatens the integrity of the judicial process." Nor is there any real possibility in this case of a different result when considering the other, overwhelming evidence of guilt supplied by the Commonwealth.

III. Conclusion

For the foregoing reasons, the judgment of the Montgomery Circuit Court is affirmed.

All sitting. All concur.

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