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RENDERED: SEPTEMBER 22, 2011
NOT TO BE PUBLISHED

# Supreme Court of Kentucky

2010-SC-000255-MR

DAVID BENNETT — APPELLANT

V.

ON APPEAL FROM TODD CIRCUIT COURT
HONORABLE TYLER L. GILL, JUDGE
NO. 09-CR-00069

COMMONWEALTH OF KENTUCKY — APPELLEE

## MEMORANDUM OPINION OF THE COURT

## AFFIRMING

Appellant, David A. Bennett, appeals as a matter of right, Ky. Const. § 110, from a judgment of the Todd Circuit Court convicting him of manufacturing methamphetamine; unlawful possession of a methamphetamine precursor; possession of drug paraphernalia, second offense; and of being a first-degree persistent felony offender. As a result of these convictions, he was sentenced to a total of fifty-five years' imprisonment.

Bennett now raises the following claims for our review: (1) that the trial court erred by determining the warrantless search of his property was proper; (2) that double jeopardy principles prevent his convictions for both manufacturing methamphetamine and unlawful possession of a methamphetamine precursor; (3) that reversible error occurred when the

Commonwealth improperly introduced his past criminal history during the guilt phase of the trial; (4) that the trial court erred when it overruled his *Batson* challenge to the Commonwealth's exercise of peremptory strikes against African-Americans; and (5) that cumulative error deprived him of his constitutional right to a fair trial. For the reasons explained below, we affirm.

## I. FACTUAL AND PROCEDURAL BACKGROUND

State Trooper Jeff Ayers received a tip from Cecilia Doris that a methamphetamine lab was presently in operation at Bennett's residence. After receiving the tip, Ayers and a fellow trooper went to the Bennett residence to do a knock and talk. Several persons were present at the residence, including Jason King. In the course of the visit, they smelled chemicals they associated with the production of methamphetamine, and followed the smell of the chemicals to discover an active methamphetamine lab[1] in a shed near the residence. After the discovery of the lab, Bennett and his wife consented to a search of their residence. Inside, the troopers found various items associated with the manufacture and use of methamphetamine, including two empty boxes of Sudafed, a drug which contains pseudoephedrine, a methamphetamine precursor.[2]

In due course, Bennett was indicted for manufacturing methamphetamine; possession of precursors to manufacture methamphetamine; possession of anhydrous ammonia in an unapproved

[1] The methamphetamine lab is also referred to in the record as a methamphetamine "generator." These terms appear to be synonymous, and we therefore use the more common term.

[2] Bennett raises no claims relating to the consensual search of his residence.

container; possession of drug paraphernalia; and of being a first-degree persistent felony offender. King was also indicted in connection with the investigation; however, none of the other persons present were charged.

Prior to trial, Bennett moved to suppress the evidence discovered in the shed as the product of a warrantless search. Following a suppression hearing, the trial court denied the motion.

At trial, King testified against Bennett. King testified that Bennett was the one manufacturing the methamphetamine being made in the shed when the Troopers arrived, and that Bennett had gone to the store earlier that day to purchase additional Sudafed to manufacture more methamphetamine. Bennett admitted going to the store, but claimed it was to buy groceries. Bennett testified that when he returned to his residence from the store (without Sudafed), King and others had, without his approval, commenced to manufacture methamphetamine in his shed. Bennett testified that he immediately told them to stop their activities and leave his property.

At the conclusion of the evidence, the jury found Bennett guilty of manufacturing methamphetamine; unlawful possession of a methamphetamine precursor (pseudoephedrine); possession of drug paraphernalia, second offense; and of being a second-degree persistent felony offender. He was sentenced to a total of fifty-five years' imprisonment.

## II. THE WARRANTLESS SEARCH WAS PROPER

Bennett first contends that the trial court erred by failing to suppress the methamphetamine lab evidence discovered by the troopers in his shed. He argues "[i]n order for the warrantless search which led Trooper Ayres to discover the methamphetamine [lab] inside the woodshed to be reasonable, the Commonwealth was required to prove that the officers had probable cause as well as exigent circumstances prior to initiating the search. The facts elicited at the suppression hearing proved neither."

A two pronged approach is utilized to review a trial court's suppression ruling. *Commonwealth v. Neal*, 84 S.W.3d 920, 923 (Ky. App. 2002). First, we must determine whether the trial court's factual findings are supported by substantial evidence. If so, then they are conclusive. RCr 9.78. Next, we must determine whether, based on those findings, the trial court properly applied the law. In this regard, our review is *de novo*. *Id.*

*A. Factual Findings*

Following a suppression hearing, the trial court made the following findings relevant to our review:

> After receiving the tip from the driver, Trooper Ayers notified his supervisor and requested another officer accompany him to the Bennett residence to conduct a knock and talk . . . .
>
> [After arresting King] Trooper Ayers went back towards the residence and smelled ether. Trooper Ayers is familiar with the smell of chemicals used in the production of methamphetamine. He followed the ether [smell] to a truck parked near the residence. When he approached the truck, he smelled anhydrous ammonia. He observed a can of liquid fire and three large propane tanks in the bed of the truck. He lifted and shook one of the tanks and

discovered a liquid inside the tank.

> [The troopers received consent from Bennett to search *only* the residence, but instead of doing so immediately,] they followed the smell of ether to a shed beside the residence. The shed had a door and a window and was approximately twelve foot by twelve foot. The window had a fan in it and the fan was blowing. There was an interior light on in the shed. There was a strong odor of ether and marijuana around the shed. The door of the shed was not entirely closed. There was a one to two inch gap through which Trooper Ayers viewed what he knows through his training to be a "meth generator." At the hearing, Trooper Ayers described the generator as a bottle with a tube coming out of it and vapor emanating from the top. Trooper Ayers notified Trooper Engler that he saw a generator inside the shed and then Trooper Ayers entered the shed. In addition to the generator, Trooper Ayers found other containers and a pipe. In his training, Trooper Ayers [thought] that these materials are used to manufacture methamphetamine and that these items can be dangerous. He contacted dispatch and told them to send individuals trained in disposing of the hazardous materials and cleaning up methamphetamine labs.

The trial court's factual findings as recited above are supported by substantial evidence — Trooper Ayers suppression hearing testimony — and are therefore conclusive. RCr 9.78.

*B. De Novo Legal Review*

In light of the above factual findings, we next apply the applicable Fourth Amendment search and seizure standards to determine whether the warrantless discovery and seizure of the methamphetamine lab was proper. Pursuant to the exigent circumstances exception to the warrant requirement, we conclude that the discovery and seizure of the evidence was proper.

A well established exception to the warrant requirement is the exigent circumstances exception. For this exception to apply there must exist both (1)

probable cause and (2) exigent circumstances. *Kirk v. Louisiana*, 536 U.S. 635, 638 (2002). This exception applies when "'the exigencies of the situation' make the needs of law enforcement so compelling that [a] warrantless search is objectively reasonable under the Fourth Amendment." *Mincey v. Arizona*, 437 U.S. 385, 394 (1978); 68 Am.Jur.2d Searches and Seizures § 134 (2000) (Exigent circumstances exist when "swift action to prevent imminent danger to life or serious damage to property" required).

Bennett does not dispute that the troopers' initial entry upon his property was proper under established knock and talk principles. *See Quintana v. Commonwealth*, 276 S.W.3d 753, 758 (Ky. 2008) (An officer who approaches the main entrance of a house has a right to be there, just as any member of the public might have). Further, Kentucky courts have recognized a "plain smell" analogue to the "plain view" doctrine by which a police officer may infer probable cause to believe that an offense has been or is being committed based upon his sense of smell. *Cooper v. Commonwealth*, 577 S.W.2d 34, 36 (Ky. App. 1979) *overruled on other grounds by Mash v. Commonwealth*, 769 S.W.2d 42, 44 (Ky. 1989).

Therefore, when the troopers recognized the smell of chemicals they knew are used in the manufacture of methamphetamine, they had probable cause to believe that there was an active methamphetamine lab at the location from which the smell was originating. Moreover, there also existed exigent circumstances because it is well recognized that an active methamphetamine

lab presents a significant danger to police and the public by its toxic fumes and the possibility of explosion. *Pate v. Commonwealth*, 243 S.W.3d 327, 331 (Ky. 2007); *United States v. Atchley*, 474 F.3d 840, 850 (6th Cir. 2007).

Because the police had both probable cause to believe that there was criminal activity occurring in the shed, and reasonable grounds to believe that the activity presented a danger to themselves and those in proximity to the lab, the elements for the exigent circumstances exception to apply were fulfilled, and the discovery and seizure of the methamphetamine lab was proper. *Bishop v. Commonwealth*, 237 S.W.3d 567, 570 (Ky. App. 2007) ("The court did not clearly err by finding that a search was justified by the exigent circumstances created when an active methamphetamine lab was found in the trunk of a car parked in an apartment complex lot next to an elementary school.") We also note that the danger of fire and explosion posed by a functioning methamphetamine lab extends not only to persons and property in the immediate vicinity, but also to the evidence that may be destroyed by same. In *Kentucky v. King*, 131 S.Ct. 1849, 1858 (2011) the United States Supreme Court reminds us that, where police did not create the exigent circumstances, the risk of destruction of evidence creates exigent circumstances to justify a warrantless search.

We conclude, therefore, that with probable cause and exigent circumstances to believe a methamphetamine lab was in operation in or about the shed, the troopers legitimately approached the shed, and upon seeing

portions of the lab through the open door of the shed, they were authorized to enter and seize the evidence. Thus, we find that the trial court's denial of Bennett's motion to suppress was proper.

III. THERE WAS NO DOUBLE JEOPARDY VIOLATION

Bennett next argues that a double jeopardy violation occurred as a result of his being convicted of both manufacturing methamphetamine and possession of a manufacturing precursor (here, a drug product containing pseudoephedrine). He argues that these multiple convictions violate the *Blockburger* test[3] and the double jeopardy principles contained in KRS 505.020(1)(c)[4], which prohibit multiple convictions for a continuing course of conduct.

To be convicted of manufacturing methamphetamine under KRS 218A.1432(1)(a), the Commonwealth must prove that the defendant "knowingly and unlawfully . . . manufacture[d] methamphetamine." The manufacturing instruction allowed a guilty verdict only if the jury believed Bennett "on or about the 5th day of July 2009 . . . knowingly manufactured methamphetamine." Here, the troopers discovered an active methamphetamine lab in a shed located on Bennett's property on July 5, 2009,

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[3] "The applicable rule is that, where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not." *Blockburger v. United States*, 284 U.S. 299, 304 (1932).

[4] KRS 505.020(1)(c) provides as follows: "When a single course of conduct of a defendant may establish the commission of more than one (1) offense, he may be prosecuted for each such offense. He may not, however, be convicted of more than one (1) offense when: . . . (c) The offense is designed to prohibit a continuing course of conduct and the defendant's course of conduct was uninterrupted by legal process, unless the law expressly provides that specific periods of such conduct constitute separate offenses."

and the manufacturing conviction relates to that particular episode of manufacturing.

To be convicted under KRS 218A.1437(1), possession of a methamphetamine precursor, it must be proven that the defendant "knowingly and unlawfully possesse[d] a drug product or combination of drug products containing ephedrine, pseudoephedrine, or phenylpropanolamine, or their salts, insomers, or salts or isomers, with the intent to use the drug product or combination of drug products as a precursor to manufacturing methamphetamine or other controlled substance." The corresponding jury instruction for the possession of a methamphetamine precursor charge was as follows:

> You will find the Defendant, DAVID BENNETT, guilty of Unlawful Possession of a Methamphetamine Precursor under this instruction if, and only if, you believed from the evidence beyond a reasonable doubt all of the following:
>
> A. That in Todd County on or about the 5th day of July 2009, the Defendant had in his possession a drug product or combination of drug products containing pseudoephedrine;
>
> AND
>
> B. That he knew the substance so possessed by him was a drug product or combination of drug products containing pseudoephedrine;
>
> AND
>
> C. That *he intended to use* the drug product or combination of drug products containing pseudoephedrine as a precursor to manufacturing methamphetamine.

(emphasis added). The clear meaning of this instruction is that the

pseudoephedrine possessed in relation to this charge be related to an *intended* (i.e., *future*) manufacture of methamphetamine, which necessarily means a batch of methamphetamine unrelated to the manufacture underway at the time the Troopers arrived. Accordingly, the two instructions refer to the manufacture of two distinct batches of methamphetamine, one in the past and one intended for the future.

In *Shemwell v. Commonwealth*, 294 S.W.3d 430 (Ky. 2009), we addressed this identical issue. Therein we stated:

> A review of the statutes and jury instructions for these crimes show that double jeopardy was not violated. Each statute clearly requires that to be guilty, the defendant must have committed separate and distinct acts, each completed at different times. To be guilty under KRS 218A.1432(1)(a), one must have "actually manufactured some quantity of methamphetamine." *Beaty v. Commonwealth*, 125 S.W.3d 196, 212 (Ky. 2004). To be guilty under KRS 218A.1437(1), one must have the precursor necessary to produce methamphetamine and the intent to use it to produce methamphetamine *in the future*. Thus, the unique element between the two offenses is whether the defendant has manufactured methamphetamine in the past, or whether he has the materials and intent to produce it in the future. KRS 218A.1432(1)(a) and KRS 218A.1437(1) do not violate the *Blockburger* rule or KRS 505.020(1).

*Id.* at 433 (emphasis in original).

Here, King testified that on July 5, 2009, he loaned Bennett $20.00 to buy Sudafed, and that Bennett did in fact purchase the Sudafed. King testified that he saw Bennett in possession of the Sudafed. Bennett himself acknowledged making the trip to the store, but denied buying Sudafed. Bennett further testified that when he returned, there was methamphetamine

being manufactured in his shed.

From the above evidence, a reasonable inference is that Bennett began one batch of methamphetamine before he went to the store, and that he went to the store to buy additional Sudafed that he intended to use to manufacture a separate and distinct batch of methamphetamine at a later time. As explained in *Shemwell*, because the manufacturing verdict and the possession of a precursor verdict refer to "separate and distinct acts, each [to be] completed at different times" there is no double jeopardy violation.[5]

## IV. THE INTRODUCTION OF BENNETT'S PAST CRIMINAL HISTORY DURING THE GUILT PHASE OF THE TRIAL WAS PROPER

Bennett next argues that the trial court erred by permitting the Commonwealth to introduce evidence of his prior drug convictions in violation of KRE 609. In addressing his prior criminal history, Bennett argues that the Commonwealth could only ask him if he had ever been convicted of a felony, and that he did not open the door to admission of his extensive prior drug history by implying that he was singled out for arrest among numerous others who were present on the property at the time of the discovery of the methamphetamine lab.

The issue arose as follows. During his testimony, Bennett, in response to questioning by trial counsel, stated "I made [Bennett's daughter] a promise a long time ago I wasn't going to get in no more trouble no more." He further

[5] The fact that no actual Sudafed tablets were found does not undermine our conclusion. King's testimony alone is sufficient to support a verdict that Bennett possessed the recently bought Sudafed to manufacture a new batch of methamphetamine. And while only two *empty* Sudafed boxes were found, nevertheless, a reasonable inference is that the boxes were empty because the actual pills were destroyed or hidden while Bennett detained the troopers in the driveway after their arrival.

testified that he had already spent "eight months of my life in jail [on the current charges] because of what this man over there [Trooper Ayers] thought. What his assumption was." Near the end of his testimony trial counsel asked Bennett whether there was anything else he would like to add. Bennett responded he felt he had a duty to let the jury know just "why I was the only one and King was the only one that was arrested." Bennett then explained that he believed that he was targeted because Cecilia Doris (from whom Trooper Ayers received the tip) had vindictively implicated him because he had asked her to leave his property shortly before she spoke to Trooper Ayers. Bennett stated that usually everybody goes to jail in a methamphetamine bust. He further claimed that King had received a substantial reduction in his sentence by testifying against him, thereby implying that King's testimony was bought by a favorable plea deal.

After this testimony the Commonwealth argued that Bennett opened the door to the introduction of his prior methamphetamine related arrests. The trial court permitted the introduction of the prior convictions, but admonished the jury concerning its use of the testimony:

> Ordinarily, those things are not relevant, prior crimes are not relevant to prove a current crime. The reason you are hearing about that now is because the defense has been raised and the question has been raised as to why no one else was charged in this incident and because of that, that has now made this prior conviction relevant. But it's only relevant in so far as it might explain why this defendant may have had a charge brought against him and others not.

Pursuant to this ruling the Commonwealth elicited from Bennett that he had previously been convicted of manufacturing methamphetamine; facilitation to manufacturing methamphetamine; possession of methamphetamine; and possession of drug paraphernalia on three separate occasions.

Under KRE 609(a), a party may impeach the credibility of another party on cross-examination by asking whether he has been convicted of a felony. *Polk v. Greer*, 222 S.W.3d 263, 265 (Ky. App. 2007). As a general rule, "[i]f the examined party answers affirmatively, the impeaching party may not inquire further about the matter or introduce extrinsic evidence regarding the nature of the conviction or convictions." *Id.* Therefore, in the usual situation, the Commonwealth would only have been able to ask Bennett if he had been convicted of a felony, and upon his admission that he had, would not have been able to present the specifics of his prior crimes.

However, according to the doctrine of "curative admissibility," when one party introduces improper evidence, it "opens the door" for the other party to introduce improper evidence in rebuttal for the purpose of explaining or rebutting the prior inadmissible evidence. *Metcalf v. Commonwealth*, 158 S.W.3d 740, 746 (Ky. 2005); Lawson, *The Kentucky Evidence Law Handbook*, § 1.10[51], at 43-44 (4th ed. 2003). Although the evidence which "opens the door" is typically inadmissible evidence, it can also be misleading evidence, to which the other party must be allowed to respond to remove any unfair prejudice. *Norris v. Commonwealth*, 89 S.W.3d 411, 414-415 (Ky. 2002).

Here, Bennett sought to portray himself as being targeted for prosecution to the exclusion of others present (except for King) based upon being falsely implicated by Doris, who bore a grudge against him for running her off of his property. He further implied that because of Doris's alleged false allegation, the police deviated from their normal practice of charging everyone present, and unjustly targeted him. Bennett also implied that the prosecutors bought King's testimony with a favorable plea bargain. Thus, Bennett communicated to the jury that his prosecution was unusual, and was triggered exclusively by Doris's false allegation and further supported by a favorable plea deal for King.

Based upon the totality of circumstances, we are unable to conclude that the trial court abused its discretion[6] in concluding that Bennett opened the door for the Commonwealth to correct the misimpression he gave to the jury by introducing evidence that the actual reason he was suspected of being behind the meth operations was not because of the information given by Doris, but rather because police investigations revealed that Bennett had an extensive history of this same type of criminal conduct. *North Carolina v. Singletary*, 594 S.E.2d 64, 68 (N.C. App. 2004) ("[W]here a defendant "opens the door" by misstating his criminal record or the facts of crimes or actions, or where a defendant uses his criminal record to create inferences in his favor, the State is allowed to cross-examine the defendant about the details of those prior crimes or actions.") Thus, we find the trial court did not err by allowing the admission of Bennett's prior drug history.

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[6] *See Goodyear Tire & Rubber Co. v. Thompson*, 11 S.W.3d 575, 577 (Ky. 2000) (We review a trial court's evidentiary rulings for an abuse of discretion).

## V. NO *BATSON* VIOLATION OCCURRED

Bennett next contends that the trial court erred in overruling his *Batson* challenge to two of the Commonwealth's peremptory strikes. In using its peremptory strikes, the Commonwealth struck two African–American members of the venire. Bennett is white; however, *Batson* nevertheless applies under these circumstances. *See Powers v. Ohio,* 499 U.S. 400 (1991) (holding that a criminal defendant has standing to object to the race-based exclusion of jurors irrespective of whether the defendant and the excluded jurors are of the same race). Following arguments, the trial court held that the strikes were for a race-neutral reason.

The Commonwealth struck two African-American jurors, one male and the other female. After Bennett questioned the strikes, the Commonwealth offered that it struck the male juror because he had "marijuana in his past," and that this might create a bias in a drug prosecution. The Commonwealth stated that it struck the female juror because she had the same surname as some individuals involved with the case. The trial court stated that it "note[d]" Bennett's objection, but never specifically ruled on the *Batson* challenges, nor did Bennett request a more specific ruling. We accordingly interpret the trial court's ruling as accepting the Commonwealth's proffered race-neutral reasons, and overruling the *Batson* challenges.

In *Batson,* the United States Supreme Court prohibited deliberate racial discrimination during jury selection. Under *Batson,* we have explained:

[a] three-prong inquiry aids in determining whether a prosecutor's

> use of peremptory strikes violated the equal protection clause. Initially, discrimination may be inferred from the totality of the relevant facts associated with a prosecutor's conduct during a defendant's trial. The second prong requires a prosecutor to offer a neutral explanation for challenging those jurors in the protected class. Finally, the trial court must assess the plausibility of the prosecutor's explanations in light of all relevant evidence and determine whether the proffered reasons are legitimate or simply pretextual for discrimination against the targeted class.

*McPherson v. Commonwealth*, 171 S.W.3d 1, 3 (Ky. 2005) (citations and footnotes omitted).

The trial court's ultimate decision on a *Batson* challenge "is akin to a finding of fact, which must be afforded great deference by an appellate court." *Chatman v. Commonwealth*, 241 S.W.3d 799, 804 (Ky. 2007) (citation omitted). "Deference," of course, does not mean that the appellate court is powerless to provide independent review, *Miller–El v. Dretke*, 545 U.S. 231 (2005) (holding that the trial court's finding of non-discrimination was erroneous in light of clear and convincing evidence to the contrary), but the ultimate burden of showing unlawful discrimination rests with the challenger. *Rodgers v. Commonwealth*, 285 S.W.3d 740, 757–758 (Ky. 2009). "A trial court's ruling on a *Batson* challenge will not be disturbed unless clearly erroneous." *France v. Commonwealth*, 320 S.W.3d 60 (Ky. 2010).

In the present matter, the male venire person was thought to have a history of drug use. A peremptory strike based on an illegal drug background is a proper race-neutral reason for excluding a potential juror in a drug prosecution. *Berry v. Commonwealth*, 84 S.W.3d 82, 88–89 (Ky. App. 2001)

(upholding strike of juror because she had stated that a family member had been a defendant in a criminal case).

Further, the striking of a potential juror thought to be related to persons involved in the case is a valid and race-neutral reason to exercise a peremptory strike. *See Commonwealth v. Snodgrass*, 831 S.W.2d 176, 178-179 (Ky. 1992) (No due process or equal protection violation by a prosecutor in peremptorily striking an African-American juror who lived nearby or in the same neighborhood as the defendant, and whose family knew the defendant's family). Thus, the striking of the female potential juror with the same surname as several individuals involved with the case was proper. Bennett complains, however, that it was never ascertained that the potential juror was related to the persons with the same surname who were involved in the case. Nevertheless, "[Bennett] cannot fault the trial court for failing to find pretext when [Bennett] himself stood mute instead of attempting to show the alleged pretext underlying the Commonwealth's facially neutral reasons for exercising a peremptory strike" by himself questioning the potential juror about her potential family relationship with the other persons of the same surname. *Chatman*, 241 S.W.3d at 805.

In summary, the trial court properly upheld the Commonwealth's strikes, and there was no *Batson* violation.

## VI. NO CUMULATIVE ERROR OCCURRED

Finally, Bennett contends that his convictions should be reversed on the basis of cumulative error.

Cumulative error is "the doctrine under which multiple errors, although harmless individually, may be deemed reversible if their cumulative effect is to render the trial fundamentally unfair." *Brown v. Commonwealth*, 313 S.W.3d 577, 631 (Ky. 2010). Here, however, as reflected in our discussions above, there were no errors at all — even harmless errors — to accumulate into cumulative error, and so the doctrine is inapplicable. In summary, our review of the entire case reveals that the appellant received a fundamentally fair trial, and that there is no cumulative effect or error that would mandate reversal. *Hunt v. Commonwealth*, 304 S.W.3d 15, 55-56 (Ky. 2009).

## VII. CONCLUSION

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

All sitting. All concur.

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