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RENDERED: JANUARY 27, 2011
NOT TO BE PUBLISHED

Supreme Court of Kentucky

FINAL

DATE 2-17-11 ElAGrant

2009-SC-000645-MR

PATRICK SIZEMORE — APPELLANT

V.

ON APPEAL FROM LAUREL CIRCUIT COURT
HONORABLE JOHN KNOX MILLS, JUDGE
NO. 09-CR-00118

COMMONWEALTH OF KENTUCKY — APPELLEE

MEMORANDUM OPINION OF THE COURT

REVERSING AND REMANDING

Patrick Wayne Sizemore appeals as a matter of right from a circuit court judgment convicting him of manufacturing methamphetamine, second offense, and sentencing him to fifty years' imprisonment. Because the trial court refused to grant Sizemore's request for jury instructions on lesser included offenses, which were supported by the evidence, we reverse and remand for further proceedings consistent with this opinion.

All other issues raised by Sizemore in this appeal are rendered moot by our reversal for failure to give jury instructions on the lesser included offenses. For the purpose of guiding any future proceedings on remand, we further note that the Commonwealth correctly concedes that this case must be remanded for re-sentencing because palpable error occurred during the sentencing phase

of trial when the Commonwealth's witness offered erroneous testimony indicating that Sizemore would be eligible for parole after serving twenty percent of his sentence. In fact, Sizemore would be required to serve eighty-five percent of his sentence if convicted of the Class A felony offense of manufacturing methamphetamine, second offense.[1]

I. FACTS.

Sizemore was charged with manufacturing methamphetamine, second offense. At trial, a state trooper testified to finding Sizemore asleep at home and finding various components of methamphetamine manufacture,[2] as well as coffee filters with powder in them, when the trooper entered Sizemore's home with a search warrant to investigate indications of methamphetamine manufacture. And a detective, who arrived to help clean up the suspected methamphetamine laboratory, testified to finding what he believed to be the

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1 Kentucky Revised Statutes (KRS) 439.3401()1(b) (defining a *violent offender* as including someone who has been convicted of a Class A felony); KRS 439.3401(3) ("A violent offender who has been convicted of a capital offense or Class A felony with a sentence of a term of years or Class B felony who is a violent offender shall not be released on probation or parole until he has served at least eighty-five percent (85%) of the sentence imposed." *See also* KRS 218A.1432(2) ("Manufacture of methamphetamine is . . . a Class A felony for a second or subsequent offense."). So, even though the facts underlying Sizemore's methamphetamine offense do not involve what is typically thought of as violence, he is, nonetheless, statutorily required by virtue of his conviction for a Class A felony to be designated as a violent offender who must serve eighty-five percent of his sentence before becoming eligible for parole.

2 The trooper testified to finding a small jar of a clear liquid in Sizemore's home, which he believed to be the source of an ether-like odor. He also testified to finding in the home rock salt, Claritin, batteries with the outside covering removed, and a bag of ammonium nitrate.

"remnants" of a methamphetamine lab along with a jar of suspected ether,[3] as well as the "finished product," methamphetamine or suspected methamphetamine, in coffee filters.[4]

In his defense, Sizemore presented the testimony of his brother and sister that they lived within sight of his residence and did not see him at home the entire weekend before the trooper apprehended Sizemore at his home very late Sunday night or very early Monday morning. And his brother and sister testified to seeing Sizemore's roommate at his residence that weekend and to seeing several other people coming and going from the residence that weekend.[5]

Sizemore also testified in his own defense that he had been out of town all weekend visiting his son and his estranged wife. According to Sizemore, he returned home on Sunday evening sometime around 7 or 8 p.m.[6] He testified that he did not smell or see anything suspicious when he arrived home, and he

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[3] For safety reasons, the detective added a compound to the jar of suspected ether to neutralize any ether; and the clear liquid found in the jar was never tested to confirm it was ether.

[4] The parties have not drawn our attention to any testimony indicating whether or not the powdered substance found in the coffee filters was subjected to chemical testing to confirm that the powder was indeed methamphetamine. Sizemore has not argued that the powder was not methamphetamine.

[5] We presume that neither the roommate nor any visitors present at Sizemore's home that weekend testified because neither party cites to any testimony in the record from the roommate or visitors. And we shall not scour the record in a possibly vain attempt to locate such testimony.

[6] Sizemore had sought to present testimony of his estranged wife, as well. When she was not present on the day of trial, he sought a continuance, which was denied. Because we reverse on other grounds, we do not reach the issue of whether the trial court properly denied the continuance.

immediately went to sleep. He denied having any knowledge of the presence of a methamphetamine lab or methamphetamine in his home.

Sizemore requested that the trial court instruct the jury on the lesser included offenses of possession of a controlled substance and unlawful possession of a methamphetamine precursor. The trial court stated on the record that it was denying the requested instruction on unlawful possession of a methamphetamine precursor on the basis that there was no evidence to support a finding of knowing possession of such a precursor with intent to use it to manufacture methamphetamine because of Sizemore's testimony that "it wasn't even there." (Presumably "it" refers to methamphetamine or its precursors or perhaps to a suspected methamphetamine laboratory). The parties do not direct our attention to any portion of the record in which the trial court articulated its reasoning for denying the requested instruction on possession of a controlled substance. Possibly, the trial court may have similarly reasoned that because Sizemore denied any knowledge of methamphetamine or a methamphetamine lab in his residence, there was no evidence to support a finding of knowing possession of methamphetamine.

The jury found Sizemore guilty of manufacturing methamphetamine, second offense. And it recommended that Sizemore be sentenced to fifty-years' imprisonment. The trial court entered judgment upon the jury's verdict and imposed the fifty-year sentence recommended by the jury.

II. ANALYSIS.

Trial Court Erred in Refusing to Give Instructions on Lesser Included Offenses.

Sizemore's request on the record for instructions on the lesser included offenses of possession of a controlled substance and unlawful possession of a methamphetamine precursor, as well as his tendered instructions on these lesser included offenses, preserved this issue for our review.[7] And we conclude that under the facts of this case and the governing law, the trial court erred in denying Sizemore's request to instruct the jury on these lesser included offenses.

Essentially, the evidence indicated that items used to manufacture methamphetamine and the "finished product," actual or suspected methamphetamine, in coffee filters were found in Sizemore's home; but Sizemore testified to being totally unaware of any of these items and to having been out of his home during most of the preceding weekend. Given this evidence, the jury could have reasonably found that Sizemore was guilty of a lesser included possession offense (of a controlled substance or a methamphetamine precursor) but not guilty of the charged manufacturing methamphetamine offense if the jury believed that Sizemore knowingly

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[7] Kentucky Rules of Criminal Procedure (RCr) 9.54(2) ("No party may assign as error the giving or the failure to give an instruction unless the party's position has been fairly and adequately presented to the trial judge by an offered instruction or by motion, or unless the party makes objection before the court instructs the jury, stating specifically the matter to which the party objects and the ground or grounds of the objection.").

possessed the finished product or a chemical precursor but did not believe that he knowingly possessed two or more chemicals or equipment for manufacturing methamphetamine. In light of an apparent lack of evidence that Sizemore was actually seen "cooking" meth or preparing all of the ingredients to do so, it is perhaps as likely that he might have committed a lesser included possession offense as that he actually committed the greater offense of manufacturing methamphetamine. So under our precedent, Sizemore was entitled to the instructions on these lesser included offenses.

Our precedent provides: "An instruction on a lesser included offense is appropriate only when the state of the evidence is such that a juror might entertain reasonable doubt as to the defendant's guilt of the greater offense, and yet believe beyond reasonable doubt that the defendant is guilty of the lesser offense."[8] Our precedent also provides: "In a criminal case, it is the duty of the trial judge to prepare and give instructions on the whole law of the case, and this rule requires instructions applicable to every state of the case deducible or supported to any extent by the testimony"[9] and that "[a]n instruction on a lesser included offense may be authorized even if inconsistent with the defendant's theory of the case, *e.g.*, if it is supported by the Commonwealth's evidence."[10]

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8 *Billings v. Commonwealth*, 843 S.W.2d 890, 894 (Ky. 1992). *See also Fredline v. Commonwealth*, 241 S.W.3d 793, 797 (Ky. 2007) (trial court required to instruct jury on affirmative defenses and lesser included offenses reasonably deducible from the evidence, including evidence that could support an inference of a defense).

9 *Taylor v. Commonwealth*, 995 S.W.2d 355, 360 (Ky. 1999), *citing, e.g.*, RCr 9.54(1).

10 *Williams v. Commonwealth*, 208 S.W.3d 881, 883 (Ky. 2006).

Possibly, the jury could have found Sizemore guilty of a lesser included possession offense but not the greater offense of manufacturing methamphetamine given the evidence that methamphetamine and items associated with its manufacture were found in his home but that he denied having been present in his home during the time methamphetamine was, apparently, produced there. Despite the fact that Sizemore testified to having no knowledge of methamphetamine or a methamphetamine lab in his residence, the jury was not compelled completely to accept or reject his testimony.[11] For example, the jury could have rejected Sizemore's testimony that he was not aware of the presence of methamphetamine when he arrived home and found beyond a reasonable doubt that Sizemore knowingly possessed the finished product (methamphetamine) but accepted his testimony that he did not knowingly possess items for producing methamphetamine and did not intend to manufacture methamphetamine. So the jury could have found him guilty of possession of methamphetamine[12] but not guilty of manufacturing methamphetamine.

Similarly, it would have been possible under the evidence presented for the jury to find that Sizemore was guilty of unlawful possession of a

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[11] *Gillispie v. Commonwealth*, 212 Ky. 472, 279 S.W. 671, 672 (1926) ("The jury was not required to believe all or none of the testimony of the witnesses. In their discretion they may believe any part or all of the testimony of any of the witnesses, or may disbelieve all of it.").

[12] KRS 218A.1415(1) ("A person is guilty of possession of a controlled substance in the first degree when he knowingly and unlawfully possesses: a controlled substance that contains any quantity of methamphetamine, including its salts, isomers, and salts of isomers . . . .").

methamphetamine precursor but not guilty of manufacturing methamphetamine. Sizemore was charged with manufacturing methamphetamine by knowingly possessing chemicals and/or equipment used in methamphetamine manufacture with the intent to manufacture methamphetamine, and the trial court instructed the jury to consider whether he knowingly possessed two or more of the chemicals and/or equipment for methamphetamine manufacture with the intent to manufacture methamphetamine.[13] Unlawful possession of a methamphetamine precursor differs from this type of manufacturing methamphetamine offense in that it requires knowing and unlawful possession of a chemical precursor rather than two or more items used to manufacture methamphetamine, but it similarly requires that the defendant have the intent to manufacture methamphetamine.[14] Again, because the jury might believe only part of Sizemore's testimony, it might believe that Sizemore knowingly and unlawfully possessed a chemical precursor (such as a drug product containing ephedrine) with intent to manufacture methamphetamine but did not knowingly possess any other of the items used in methamphetamine

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[13] KRS 218A.1432(1)(b) ("A person is guilty of manufacturing methamphetamine when he knowingly and unlawfully: With intent to manufacture methamphetamine possesses two (2) or more chemicals or two (2) or more items of equipment for the manufacture of methamphetamine.") *Cf.* KRS 218A.1432(1)(a) ("A person is guilty of manufacturing methamphetamine when he knowingly and unlawfully: Manufactures methamphetamine . . . .").

[14] KRS 218A.1437(1) ("A person is guilty of unlawful possession of a methamphetamine precursor when he or she knowingly and unlawfully possesses a drug product or combination of drug products containing ephedrine, pseudoephedrine, or phenylpropanolamine, or their salts, isomers, or salts of isomers, with the intent to use the drug product or combination of drug products as a precursor to manufacturing methamphetamine or other controlled substance.").

manufacture (such as the peeled batteries, suspected ether, etc.) which police found in his home. Thus, the jury might reasonably find him guilty of unlawful possession of a methamphetamine precursor but not guilty of manufacturing methamphetamine.

Although the Commonwealth argues that the statute prohibiting unlawful possession of a methamphetamine precursor, KRS 218A.1437, only "applies to situations where the products have not been used in the manufacturing process[,]" it cites no authority for this proposition. Furthermore, despite its argument that the officers' testimony was that the remains of a methamphetamine lab was discovered and that "[t]hey did not testify that they discovered [] components of a methamphetamine lab that had not been used," the Commonwealth cites to nothing of record indicating that every portion of all methamphetamine components found had been used in the methamphetamine manufacturing process. And we agree with Sizemore that "[t]he jury could conclude that Sizemore possessed [a] meth precursor[] but was not responsible for the meth discovered at the scene."

We further reject the Commonwealth's argument "there was no evidence to suggest [Sizemore] knew of this methamphetamine, and possessed it, without being involved in the manufacturing process." As Sizemore points out, given the testimony that a number of people were seen coming and going from his residence that weekend, a reasonable jury could find that he did not participate in or intend to engage in the methamphetamine manufacturing process even if it rejected his testimony that he was unaware of the presence of

methamphetamine in his house. In any event, the type of manufacturing methamphetamine offense he was charged with did not actually require that he had been actively "involved" in manufacturing methamphetamine. It simply required that he had possessed two or more of the chemicals or equipment for methamphetamine manufacture with the intent of manufacturing methamphetamine (with no specific statutory language explicitly requiring immediate intent to manufacture, thus, implying that an intent to manufacture at some point in the future would suffice).[15]

We conclude that the trial court erred in denying Sizemore's request for jury instructions on the lesser included offenses of possession of a controlled substance and unlawful possession of a methamphetamine precursor.

III. CONCLUSION.

For the foregoing reasons, the judgment of the trial court is reversed; and the case is remanded to the trial court for further proceedings consistent with this opinion.

All sitting. All concur.

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[15] *See* KRS 218A.1432(1)(b).

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