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RENDERED: FEBRUARY 21, 2013
NOT TO BE PUBLISHED

Supreme Court of Kentucky

2011-SC-000354-MR

MATTHEW SHELTON — APPELLANT

V.

ON APPEAL FROM CLINTON CIRCUIT COURT
HONORABLE EDDIE C. LOVELACE, JUDGE
NO. 10-CR-00046

COMMONWEALTH OF KENTUCKY — APPELLEE

MEMORANDUM OPINION OF THE COURT

AFFIRMING

A circuit court jury convicted Matthew Shelton of manufacturing methamphetamine, cultivation of marijuana, and of being a second-degree Persistent Felony Offender (PFO 2), resulting in a judgment sentencing him to thirty years' imprisonment. Shelton's matter-of-right appeal[1] from that judgment seeks reversal on two grounds: (1) the trial court erred by denying Shelton's motion for directed verdict at the close of the guilt phase of the trial and (2) palpable error occurred in the penalty phase of the trial when the Commonwealth introduced false and misleading testimony about statutory good-time credits. We find no error and affirm.

[1] Ky. Const. § 110(2)(b).

I. FACTUAL AND PROCEDURAL HISTORY.

As Wendell Shelton looked for his missing hunting dog, he heard and followed the dog's distinctive baying when treeing a coon. As he walked into the area surrounding Matthew Shelton's trailer, his eyes began to burn and he smelled ammonia. Wendell associated ammonia fumes in a remote area with the making of methamphetamine. So he went home and called 911 to report a suspected meth lab. Wendell had noticed movement inside the trailer, but he did not identify who was moving inside it. Wendell had heard from Matthew Shelton's father that Matthew was living in the trailer.

Trooper Brian Sheppard responded to the 911 call and went to the trailer. Upon arrival, Sheppard discovered a burn pile and the remnants of an apparent "shake and bake" meth lab near the back porch. Sheppard contacted Matthew Shelton by phone, confirmed he lived in the trailer, and received his consent to search it.

Shelton was not present for the search. But Indica Sears, Shelton's girlfriend, was present while Sheppard performed the search. Sears was on house arrest and living in the trailer at the time. During the search, Sheppard encountered a locked door. Sheppard called Shelton and requested that he come to the trailer to open the door. Matthew said he would come, but he did not come and had no further communication with Sheppard. Sears told Sheppard that she was not allowed access to the room, but she proceeded to kick the door open for him. In the room, Sheppard discovered marijuana plants growing.

The evidence gathered in the search resulted in grand jury indictments against Shelton and Sears. In their joint trial, Sears testified against Shelton. She testified that Shelton made methamphetamine at the trailer on the back porch and in the front yard or back yard as many as five times while she lived there. The jury convicted Shelton of manufacturing methamphetamine and of cultivating marijuana. The jury also found Shelton guilty of being a PFO 2 and recommended enhanced sentences of twenty-four years' and six years' imprisonment, to be served consecutively. The trial court entered judgment in accord with the jury's recommendation.

II. ANALYSIS.

A. The Trial Court Did Not Err in Denying Shelton's Motion for Directed Verdict.

Shelton first claims that the trial court erred in denying his motion for a directed verdict of acquittal because the evidenced produced at trial was insufficient to support his convictions for manufacturing methamphetamine and cultivation of marijuana. This claim of insufficiency is two-pronged: first, the Commonwealth simply did not produce enough evidence; second, the evidence was fatally lacking in credibility.

When reviewing a ruling on a motion for directed verdict, we turn to the standard outlined in *Commonwealth v. Benham*:[2]

> On motion for directed verdict, the trial court must draw all fair and reasonable inferences from the evidence in favor of the Commonwealth. If the evidence is sufficient to induce a reasonable juror to believe beyond a reasonable doubt that the defendant is

[2] 816 S.W.2d 186 (Ky. 1991).

> guilty, a directed verdict should not be given. For the purpose of ruling on the motion, the trial court must assume that the evidence for the Commonwealth is true, but reserving to the jury questions as to the credibility and weight to be given to such testimony.[3]

On appellate review, this Court must determine if, given the totality of the evidence, "it would be clearly unreasonable for a jury to find guilt."[4] If so, the defendant is entitled to a directed verdict of acquittal. Further, the Commonwealth must only produce more than a "mere scintilla" of evidence to overcome its burden on a defendant's motion for directed verdict.[5]

1. *The Commonwealth Met its Burden and Produced More than a "Mere Scintilla" of Evidence.*

Shelton argues that he was entitled to a directed verdict because the Commonwealth failed to produce even a scintilla of evidence to convict him. We disagree. First, with respect to the charge of manufacturing methamphetamine, KRS 218A.1432 requires that a person knowingly: (1) manufacture methamphetamine; or (2) with intent to manufacture methamphetamine, possesses two or more chemicals or two or more items of equipment for the manufacture of methamphetamine. The Commonwealth presented numerous items of evidence found at Shelton's trailer that are commonly associated with the manufacture of methamphetamine. The evidence presented included: a "burn pile," common to meth labs as individuals burn the evidence upon completion of the process; a bottle of

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[3] *Id.* at 187.

[4] *Id.*

[5] *Commonwealth v. Sawhill*, 660 S.W.2d 3 (Ky. 1993).

"liquid fire" drain cleaner, commonly used as an ingredient in the manufacture of methamphetamine; a "one-step meth lab" made out of a soda bottle; the residue of methamphetamine on an item recovered at the scene; suspected ammonium nitrate; blister packaging from medicine; and batteries missing their lithium strips. The trial court correctly determined that the Commonwealth met its burden with respect to the manufacturing methamphetamine charge. There was no error in denying Shelton's motion for directed verdict.

Second, with respect to the charge of cultivation of marijuana, KRS 218A.1423 requires a person knowingly plant, cultivate, or harvest marijuana with the intent to sell or transfer it. Again, the Commonwealth produced various pieces of evidence relating to this charge. The plants found in Shelton's trailer were scientifically determined to be marijuana, there were more than five plants, and it appeared it was a relatively sophisticated growing operation with lights and incubators. The trial court correctly determined there was sufficient evidence relating to the cultivation of marijuana charge to defeat Shelton's motion for directed verdict.

Finally, we must acknowledge Shelton's argument that he was entitled to a directed verdict because the Commonwealth failed to produce enough evidence to tie him sufficiently to the crime. We disagree.

The Commonwealth produced evidence from various witnesses that identified the trailer as Shelton's residence. Shelton's family testified that he was not living there at the time, but other testimony suggested that he had

been seen going in and out of the trailer. The appropriate weight to be given to the testimony is exclusively a jury issue. Here, the Commonwealth produced more than the requisite scintilla of evidence; and the case was properly presented to the jury.

Looking at the totality of the evidence and drawing all reasonable inferences in favor of the Commonwealth, we cannot say that it would be unreasonable for a jury to find guilt. The trial court did not err.

2. *The Credibility of Sears's Testimony was a Proper Determination for the Jury.*

Shelton next argues that Sears, the Commonwealth's primary witness, was so lacking in credibility that the evidence to support his convictions was rendered insufficient. This attack on Sears's credibility is based on her telling "a number of different stories," being "openly bitter" toward Shelton, and having a strong motive to fabricate her account of the events during her time living with Shelton. We reject this argument.

Here, Shelton's entire argument centers on the credibility of Sears's testimony, labeling it "flagrantly against the evidence" and "highly improbable." Shelton attempts to perform an end-around on the deep-rooted principle that the jury is the exclusive arbiter of witness credibility[6] by turning our attention to a so-called "safety valve" in *Coney Island Co. v. Brown*.[7] The rule espoused in *Coney Island* is to be "sparingly employed" and reads:

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[6] *Fairrow v. Commonwealth*, 175 S.W.3d 601, 609 (Ky. 2005).

[7] 162 S.W.2d 785 (Ky. 1942).

> This prerogative of courts of error is sparingly employed, but that it exists, as an emergency expedient, for the correction of verdicts palpably wrong, is certain. The appropriate use of it does not require a court to be convinced that the jury found an event to have occurred that was physically impossible or miraculous. It is enough if the event found was so improbable, according to the ordinary operation of physical forces, or was so overwhelmingly disproved by credible witnesses, as to compel the conviction that the jury either failed to weigh the evidence carefully, or drew unwarranted inferences, or yielded to a partisan bias.[8]

This is not a novel argument, and Shelton's reliance on *Coney Island* is misplaced. This Court laid Shelton's argument to rest in *Potts v. Commonwealth.*[9] In *Potts*, the defendant asserted he was entitled to a directed verdict because the evidence was insufficient because of the primary witness's lack of credibility. The Court disregarded this argument, including the defendant's reliance on *Coney Island* and analogous cases because the "rule does not apply to situations . . . where a witness's perception could have been impaired or circumstances indicate that a witness may have had a motive to fabricate."[10] The Court emphasized that determinations of witness credibility are unequivocally reserved for the jury. Further, the Court in *Potts* specifically rejected the application of *Coney Island* to the circumstances presented, noting that *Coney Island* "reaffirmed the factfinder's role in determining questions of credibility[] but held that a directed verdict would be appropriate when a claim is based on testimony that is so contrary to scientific principles or common

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[8] *Id.* at 787-88.

[9] 172 S.W.3d 345 (Ky. 2005).

[10] *Id.* at 350.

experience as to be manifestly without probative value."[11] This case does not present such testimony. Sears's testimony, while possibly inconsistent, did not reach the level of unreliability required under *Coney Island.*

Again, considering the evidence as a whole and drawing all reasonable inferences in favor of the Commonwealth, we do not find it unreasonable for a jury to find guilt. The trial court did not err.

B. The False or Misleading Statements Regarding Good-Time Credit During Shelton's Penalty Phase do not Constitute Palpable Error.

Shelton further claims that the Commonwealth presented incorrect or false testimony during the penalty phase of the trial regarding the application of statutory good-time credits awarded against the actual amount of time a prisoner would be required to serve in custody. And Shelton claims that the error, although not preserved for review, constitutes palpable error affecting his substantial rights and resulting in manifest injustice as required under Kentucky Rules of Criminal Procedure (RCr) 10.26.

During Sears's penalty phase, which preceded Shelton's penalty phase in the order of presentation, the Commonwealth called Sarah Hughes, a probation and parole officer with the Kentucky Department of Corrections, Division of Probation and Parole, to testify regarding parole eligibility. Hughes testified that under the parole eligibility guidelines, all prisoners are guaranteed ninety days of statutory good time each year, resulting in a three months' credit for

[11] *Id.* at 351.

each year of the imposed sentence.[12] As a result of Hughes's testimony, the jury received inaccurate information about when the statutory good-time credits would be applied to reduce a sentence.

This Court faced a similarly misinformed jury in *Robinson v. Commonwealth*.[13] Here, the Commonwealth argues that the information provided by Hughes was not incorrect or misleading because statutory good time is automatically recorded upon a prisoner's entrance to a detention facility. But, in *Robinson*, we noted that "although statutory good time is listed in the sentence calculation on a prisoner's resident record card, the prisoner does not actually receive credit for his good time until he reaches the minimum parole eligibility."[14] Our holding in *Robinson* completely refutes the Commonwealth's argument. The simple notation of good time on a prisoner's resident record card is not enough to make Hughes's testimony true. The award of this statutory good-time credit is not guaranteed.

Further, in *Robinson*, we discussed the analysis used when a jury receives false or misleading information:

> The use of incorrect, or false, testimony by the prosecution is a violation of due process when the testimony is material. This is

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[12] Hughes's testimony was inaccurate because of the language found in KRS 197.045(1)(b). The statute states that any person convicted and sentenced to a state penal institution "[m]ay receive a credit on his or her sentence for: 1. Good behavior in an amount not exceeding ten (10) days for each month served, to be determined by the department from the conduct of the prisoner." While it may be possible to receive ninety days off of a sentence, the plain language of the statute indicates that a prisoner is not guaranteed to receive any amount of statutory good time.

[13] 181 S.W.3d 30 (Ky. 2005).

[14] *Id.* at 38. *See also* KRS 197.045(3).

> true irrespective of the good faith or bad faith of the prosecutor. When the prosecution knows or should have known that the testimony is false, the test for materiality is whether 'there is any reasonable likelihood that the false testimony could have affected the judgment of the jury.'[15]

The probation and parole officer in *Robinson* testified that for each year a prisoner serves, the prisoner receives three months of statutory good time, practically identical to the testimony of Hughes in this case. We found the testimony to be material in *Robinson.* We do not so find here.

Although *Robinson* holds that incorrect testimony regarding good-time credits can reach the level of palpable error, we find it to be easily distinguishable from the case at hand in three ways.

First, in *Robinson*, the defendant received maximum sentences for his convictions.[16] In the case at hand, Shelton did not receive the maximum allowed sentence for any of his convictions. In fact, Shelton faced up to sixty years' imprisonment as a result of his PFO 2 conviction; but the jury only sentenced him to thirty years' imprisonment.[17] Shelton's sentence was near

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[15] *Id.* (citations omitted).

[16] Robinson received twenty years for manufacturing methamphetamine, which is a Class B felony. He also received ten years for trafficking in a controlled substance, which is a Class C felony. According to KRS 532.060, twenty years is the maximum allowed for a Class B felony; and ten years is the maximum sentence allowed for a Class C felony.

[17] Shelton's PFO 2 conviction elevated manufacturing methamphetamine from a Class B felony to a Class A felony and cultivation of marijuana from a Class D felony to a Class C felony. Under KRS 532.060, a Class A felony has a maximum sentence of fifty years; and a Class C felony has a maximum sentence of ten years. As a result, Shelton faced the possibility of sixty years' imprisonment.

the statutory minimum for both manufacturing methamphetamine and cultivation of marijuana.[18]

Second, unlike in *Robinson*, the Commonwealth did not elicit the incorrect testimony in Shelton's penalty-phase trial. Hughes's testimony providing inaccurate good-time credit arose in Sears's penalty phase. In Shelton's penalty phase, Hughes's testimony was brief, the only mention of good-time credit came in response to questioning from Shelton's own counsel; and Hughes's testimony did not repeat the inaccurate information of guaranteed good-time credit that she had given during Sears's penalty phase.

Finally, in *Robinson*, the Commonwealth emphasized the guarantee of good-time credit during closing arguments of the sentencing phase. Shelton's sentencing phase involved no emphatic mention of any guaranteed good-time credit in an attempt to influence the jury.

We find that the testimony at issue, though inaccurate, did not reach the level of palpable error. Shelton did not have his substantial rights affected and did not experience manifest injustice. Indeed, Shelton's counsel had the opportunity to correct any potential impact Hughes's inaccurate statement might have had on the jury by bringing it to the attention of the trial court before Shelton's penalty phase began. Defense counsel having failed to attempt

[18] The statutory minimum for manufacturing methamphetamine and cultivation of marijuana is, in Shelton's case because of his PFO 2 conviction, twenty years and five years, respectively. Shelton received twenty-four years for manufacturing methamphetamine and six years for cultivation of marijuana.

to rectify the matter in a timely manner, we are disinclined to find palpable error. We affirm.

III. CONCLUSION.

For the foregoing reasons, we affirm Shelton's convictions on the underlying charges.

Minton, C.J.; Abramson, Cunningham, Noble, Scott, and Venters, JJ., sitting. All concur.

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