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RENDERED: DECEMBER 20, 2012
NOT TO BE PUBLISHED

# Supreme Court of Kentucky

2011-SC-000736-MR

REID D. RIPPETOE — APPELLANT

V.

ON APPEAL FROM RUSSELL CIRCUIT COURT
HONORABLE VERNON MINIARD, JR., JUDGE
NO. 10-CR-00061-002

COMMONWEALTH OF KENTUCKY — APPELLEE

**MEMORANDUM OPINION OF THE COURT**

**AFFIRMING**

A Russell Circuit Court jury found Appellant, Reid Rippetoe, guilty of manufacturing methamphetamine and being a second-degree persistent felony offender (PFO). For these crimes, Appellant received a twenty-year prison sentence. He now appeals as a matter of right, Ky. Const. §110(2)(b), alleging that (1) the Commonwealth failed to disclose its expert witness in violation of RCr 7.24, (2) the Commonwealth failed to prove appropriate venue, and (3) the trial court erred by failing to admonish the jury to correct the Commonwealth's statements regarding the standard of proof. For the reasons that follow, we affirm the trial court.

## I. BACKGROUND

A Russell County Grand Jury indicted Appellant for manufacturing methamphetamine and second-degree PFO. On the day of trial, Appellant filed a motion in limine requesting that the court exclude the testimony of the Commonwealth's forensics expert because the Commonwealth failed to disclose the witness in spite of Appellant's request. The Commonwealth claimed that no such request was ever made, and thus it had no duty to provide a witness list. The trial court overruled the motion, as it did not find the inclusion of the testimony to be prejudicial, and the expert was allowed to testify.

At the close of the Commonwealth's case, Appellant moved for a directed verdict arguing that the Commonwealth offered no evidence to establish that the crimes took place in Russell County, Kentucky. After hearing the arguments, the trial court denied Appellant's motion. Following this denial, Appellant presented his case and he and the parties made their closing arguments.

The Commonwealth concluded its closing statements by asking the jury to "think about what you heard, and make a judgment as to what you believe is *more likely*." At this point counsel for Appellant objected to the Commonwealth's remarks, and asked the trial court to admonish the jury to explain that they were to use the "beyond a reasonable doubt" standard and not the "more likely" standard referenced in Commonwealth's closing. After hearing arguments, the court refused to admonish the jury.

The jury found Appellant guilty of manufacturing methamphetamine and second-degree PFO and recommended a sentence of twenty years' imprisonment. In response to the jury's verdict, Appellant made motions for a judgment notwithstanding the verdict and a new trial. The trial court overruled Appellant's motions, and the court entered a judgment in conformity with the jury's recommendations.

## II. ANALYSIS

### A. Expert Witness

Appellant first argues that the trial court improperly denied his motion to exclude expert testimony presented by the Commonwealth. Specifically, Appellant alleges that he suffered undue prejudice as a result of the Commonwealth's failure to disclose its expert witness in violation of RCr 7.24.[1] "Our case law strongly supports the trial court's discretion in interpreting the meaning of RCr 7.24 . . . [b]road discretion in discovery matters has long been afforded trial courts in both civil and criminal cases. *Commonwealth v. Nichols*, 280 S.W3d 39, 42-43 (Ky. 2009); *see also Sexton v. Bates*, 41 S.W.3d 452, 455 (Ky.App.2001) (trial courts have broad, but not unlimited, discretion over the discovery process). "The test for an abuse of discretion is whether the trial judge's decision was arbitrary, unreasonable, unfair, or unsupported by sound

[1] RCr 7.24 states that "upon written request by the defense . . . the Commonwealth shall furnish to the defendant a written summary of any expert testimony that the Commonwealth intends to introduce at trial. This summary must identify the witness and describe the witness's opinions, the bases and reasons for those opinions, and the witness's qualifications."

legal principles." *Anderson v. Commonwealth*, 231 S.W.3d 117, 119 (Ky. 2007) (*citing Goodyear Tire & Rubber Co. v. Thompson*, 11 S.W.3d 575, 581 (Ky. 2000)).

On the day of trial, Appellant filed a motion in limine to exclude the testimony of the Commonwealth's expert witness, a lab examiner. Appellant alleged that the Commonwealth failed to disclose any information regarding the witness, even though he claims to have made the request in compliance with RCr. 7.24. The trial court addressed the matter before voir dire began, and the Commonwealth responded that the rule only mandated those disclosures upon written request by Appellant, and that no such request was made in this case. The trial court interrupted the Commonwealth, stating: "I'll cut to the chase, it's not prejudicial, overruled."

Given the record presented to this Court, we cannot establish that any initial request for disclosure of witnesses was made by Appellant. Appellant's brief includes a string of emails between his counsel (Derrick Helm) and the attorney for the Commonwealth (Matthew Leveridge), but from their text no request can be ascertained:

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|---|---|
| Helm: | Do I need to do an order for Randy Browns case or were you going to do it? Thanks. |
| Leveridge: | Any order for what? |
| Helm: | For his release pursuant to agreement in Court yesterday. Also, I do not have your witness list on Rippetoe yet. Is it just Officer and the Forensics Examiner? Thanks. |
| Leveridge: | On Brown, we generally do not need an order releasing him. Shelia will have the bond info on the surety, so |

> all anyone has to do is just go sign the bond and that will be done. On Rippetoe, the Commonwealth is not required to provide a witness list.

From this exchange, there is nothing demonstrating a request, just a statement that a list had not been received. If Appellant did make such a request, it is his duty to provide evidence of said request, as "[i]t is the appellant's duty to present a complete record on appeal." *Steel Technologies, Inc. v. Congleton,* 234 S.W.3d 920, 926 (Ky.2007). Without further evidence in the record we cannot say that the trial court abused its discretion in allowing the testimony. Furthermore, Appellant concedes that he possessed a copy of the forensic examiner's report, thus no prejudice would have been incurred as Appellant had sufficient material to be fully prepared to cross-examine the expert.

**B. Venue**

Appellant next argues that the trial court erred in denying his motion for a directed verdict. Specifically, Appellant alleges that the Commonwealth failed to offer any evidence which would establish proper venue.[2] This Court outlined the standard by which a trial court should evaluate a motion for a directed verdict in *Commonwealth v. Benham*:

> [T]he 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 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.

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[2] This issue was properly preserved at trial by Appellant's motion for a directed verdict, motion for judgment notwithstanding the verdict, and motion for a new trial.

816 S.W.2d 186, 187 (Ky. 1991); *see also Smith v. Commonwealth*, 361 S.W.3d 908, 920 (Ky. 2012).

For our purposes, "the test of a directed verdict is, if under the evidence as a whole, it would be clearly unreasonable for a jury to find guilt . . . then the defendant is entitled to a directed verdict of acquittal." *Id.* (*citing Commonwealth v. Sawhill*, 660 S.W.2d 3 (Ky. 1983)); *see also Beaumont v. Commonwealth*, 295 S.W.3d 60, 67 (Ky. 2009). Thus, "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." *Benham*, 816 S.W.2d at 187-88. However, we reemphasize that an evaluation of the sufficiency of evidence depends on "whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Beaumont*, 295 S.W.3d at 68 (*citing Jackson v. Virginia*, 443 U.S. 307, 319 (1979)).

There is no dispute that appropriate venue must be established as an element of a crime, but the presumption is that a trial was held in the appropriate county. *Hays v. Commonwealth*, 14 S.W. 833 (Ky. 1890). "Only slight evidence is required to sustain the venue." *Bedell v. Commonwealth*, 870 S.W.2d 779, 781 (Ky. 1993) (*citing Hardin v. Commonwealth*, Ky. 437 S.W.2d 931 (1968). Furthermore, "[i]t has generally been held in this state that it is not necessary to show by direct evidence that the crime occurred in the county of prosecution, but the fact may be inferred from evidence and circumstances

which would allow the jury to infer where the crime was committed." *Commonwealth v. Cheeks*, 698 S.W.2d 832, 835 (Ky.1985) (*citing Giley v. Commonwealth*, 133 S.W.2d 67 (1939)).

In *Cheeks*, the following circumstantial evidence was found sufficient to prove the venue was Fayette County, Kentucky:

> The witness Captain Gilbert Grogan stated that he was a paramedic with the Lexington Fire Department and that he was dispatched to go to Warren Court. The witness Lieutenant Robert Summers stated that he was fire investigator for the Lexington Metropolitan Fire Department and that although he didn't go to the home on Warren Court, he did go to the hospital where the child had been taken. The witness William H. Lilly stated that he was a captain with fire investigation and that he had prepared and filed a report, introduced as Commonwealth's Exhibit #10. The report showed that the form is one for the Lexington-Urban County Division of Fire and that the author of the report had been dispatched at 21:47 hours to 120 Warren Court. The witness Allen Ernest stated that he was a detective with the Division of Police, Fayette-Urban County Government, and that he was assigned to work a possible child abuse case.

698 S.W.2d at 835.

Although there was no direct testimony that the crimes occurred in Russell County, there was a substantial amount of circumstantial evidence pointing to the fact. In this case, much like that in *Cheeks*: 1) Appellant's neighbor testified as to Appellant's address (behind the "Curves" and across from the "Bluebird Trailer Park"), 2) three Deputies from the Russell County Sheriff's office testified that they were dispatched to Appellant's address, and 3) representatives from the CVS and Kroger in Russell Springs also provided testimony that Appellant had purchased Sudafed in their stores. We are satisfied that, given the evidence presented at trial, the jury could properly

infer that the crimes at Appellant's residence occurred within the bounds of Russell County. Therefore, "[w]e are of the opinion that these circumstances provided the jury with a sufficient basis upon which they could infer that venue was established." *Id.* A review of the evidence presented in this case clearly indicates that the trial court correctly determined that a reasonable jury could fairly find that proper venue had in fact been established in this case. It is therefore reasonable that a jury could find Appellant guilty, and thus a directed verdict was not warranted.

**C. Standard of Proof**

Appellant first argues that the trial court erred by refusing to give an admonishment after the Commonwealth misled the jury as to the appropriate standard of proof. Specifically, Appellant alleges that, in its closing, the Commonwealth led the jury members to believe that they were to judge the evidence and decide what "most likely" occurred. Appellant claims that the trial court erred when it failed to give an admonishment to correct the statements made by the Commonwealth, and thus he is entitled to a new trial.[3] We review the trial court's denial of Appellant's motion for a new trial for an abuse of discretion. *Hall v. Commonwealth,* 337 S.W.3d 595, 613 (Ky. 2011).[4]

During closing arguments, the Commonwealth asked the jury when they went to deliberate to consider the facts presented by both sides and "think

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[3] This issue was properly preserved at trial through Appellant's objection and request for an admonishment.

[4] "The test for an abuse of discretion is whether the trial judge's decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles." *Anderson*, 231 S.W.3d at 119.

about what you heard, and make a judgment as to what you believe is more likely." Appellant objected and argued that the Commonwealth had misstated the burden of proof. The Commonwealth's Attorney argued that he was only commenting on the facts presented, and not on the standard of proof. The trial court overruled the objection and refused to admonish the jury.

Appellant argues that a new trial is warranted, given that the Commonwealth committed a highly prejudicial act of prosecutorial misconduct. Courts will only reverse for prosecutorial misconduct in a closing argument "if the misconduct is 'flagrant' or if each of the following three conditions is satisfied: '(1) proof of defendant's guilt is not overwhelming; (2) defense counsel objected; and (3) the trial court failed to cure the error with a sufficient admonishment to the jury.'" *Barnes v. Commonwealth*, 91 S.W.3d 564, 568 (Ky. 2002) (*quoting United States v. Carroll*, 26 F.3d 1380, 1390 (6th Cir. 1994)). In this case, there does not appear to have been any "flagrant" misconduct on the part of the Commonwealth. Considering the Commonwealth's closing in its entirety, it becomes apparent that it was simply presenting two fact scenarios and asking the jury to consider the credibility of each set of facts. In reviewing the closing argument, it does not appear that the Commonwealth was in any way suggesting that the burden of proof required for guilt was anything but "beyond a reasonable doubt." Therefore, given that no misconduct occurred, the trial court was under no duty to admonish the jury.

Even if we were to assume the comment was improper, which we do not, it would not undermine our confidence in the verdict. There was substantial

evidence pointing to Appellant's guilt in this case including: 1) an active methamphetamine manufacturing lab found in Appellant's home in his presence, 2) chemicals and other required paraphernalia associated with methamphetamine production found throughout his home, and 3) testimony that Appellant had purchased Sudafed four times in the short time frame leading up to the bust. Furthermore, the trial judge directly instructed the jury as to the reasonable doubt standard in the instructions read aloud in court, and in the written instructions given to the jury to take into deliberation. Thus, the jury was properly instructed as to the appropriate burden of proof to apply to this case. The trial court did not abuse its discretion in denying Appellant's motion for a new trial.

## III. CONCLUSION

For the aforementioned reasons, we affirm Appellant's convictions and corresponding sentence.

Minton, C.J.; Abramson, Cunningham, Noble, Scott, and Venters, JJ., concur. Schroder, J., not sitting.

COUNSEL FOR APPELLANT:

Derrick Giles Helm
Bertram & Wilson
One Monument Square
PO Box 25
Jamestown, KY 42629

COUNSEL FOR APPELLEE:

Jack Conway
Attorney General of Kentucky

Kenneth Wayne Riggs
Assistant Attorney General
Office of the Attorney General
Office of Criminal Appeals
1024 Capital Center Drive
Frankfort, KY 40601