

IMPORTANT NOTICE
NOT TO BE PUBLISHED OPINION

THIS OPINION IS DESIGNATED "NOT TO BE PUBLISHED."
PURSUANT TO THE RULES OF CIVIL PROCEDURE
PROMULGATED BY THE SUPREME COURT, CR 76.28(4)(C),
THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE
CITED OR USED AS BINDING PRECEDENT IN ANY OTHER
CASE IN ANY COURT OF THIS STATE; HOWEVER,
UNPUBLISHED KENTUCKY APPELLATE DECISIONS,
RENDERED AFTER JANUARY 1, 2003, MAY BE CITED FOR
CONSIDERATION BY THE COURT IF THERE IS NO PUBLISHED
OPINION THAT WOULD ADEQUATELY ADDRESS THE ISSUE
BEFORE THE COURT. OPINIONS CITED FOR CONSIDERATION
BY THE COURT SHALL BE SET OUT AS AN UNPUBLISHED
DECISION IN THE FILED DOCUMENT AND A COPY OF THE
ENTIRE DECISION SHALL BE TENDERED ALONG WITH THE
DOCUMENT TO THE COURT AND ALL PARTIES TO THE
ACTION.

Supreme Court of Kentucky

2012-SC-000216-MR

AMY MOSLEY

APPELLANT

V. ON APPEAL FROM LAUREL CIRCUIT COURT
HONORABLE JOHN KNOX MILLS, JUDGE
NO. 11-CR-00130

COMMONWEALTH OF KENTUCKY

APPELLEE

MEMORANDUM OPINION OF THE COURT

AFFIRMING

A circuit court jury convicted Amy Mosley of manufacturing methamphetamine and being a second-degree persistent felony offender (PFO). Following the jury's recommendation, the trial court sentenced her to ten years' imprisonment, enhanced to twenty-five years as a result of the PFO conviction, and entered judgment accordingly. Mosley appeals from this judgment as a matter of right.¹

Mosley alleges a single error. She contends that the trial court erred in denying her motion for a directed verdict of acquittal regarding the manufacturing methamphetamine charge. Finding that the Commonwealth produced sufficient evidence to support Mosley's conviction, we affirm the trial court's judgment.

¹ Ky. Const. § 110(2)(b).

I. FACTUAL AND PROCEDURAL HISTORY.

Two police officers responded to a call at an apartment complex where a resident complained of a strange odor in her apartment. After investigating inside the apartment, the officers noted the odor seemed to come from the vents. The officers concluded that the odor emanated from the apartment overhead.

As one officer knocked at the door of the upstairs apartment, the other officer proceeded to the back of the apartment. Through the back window, the officer saw shadows of movement inside but was unable to discern what the occupants were doing. The residents never responded to the officers' knocks. The officers then contacted the property manager, who unlocked the door after the officers informed her that the odor was the strong chemical smell that "definitely" indicated the presence of a methamphetamine lab.

The odor intensified when the apartment door was opened. The odor was so intense that it caused the property manager's eyes to water and her jaw to lock. When the officers entered the apartment, Amy Mosley and Buck Elkins, Jr., exited the shower. Silas Elkins, the leaseholder of the apartment, gave the officers permission to search the premises.

The search disclosed numerous chemicals and items of equipment often associated with the manufacture of methamphetamine. These items included: road salt, sulfuric acid liquid drain cleaner, a peroxide bottle with a tube through the top, a grooming kit containing lithium batteries and pliers, a soda bottle top with a tube protruding through it, a garbage can full of soda bottles,

a roll of aluminum foil, and coffee filters. The bathroom floor, toilet, and bathtub were also covered with a clear liquid mixed with a red particulate that appeared to be crushed pills.

The county's Public Safety Director Albert Hale was called to the scene to collect, analyze, and dispose of these items, which were immediately associated with the making of methamphetamine. Hale took multiple pH readings and tested for the presence of ammonia. The pH tests showed that many of the items tested had been chemically altered, but the ammonia tests all returned negative. Hale also took samples of the water from the toilet, the liquid on the bathroom floor, and the particulate that appeared to be crushed pills to have them tested for controlled substances. The tests disclosed no controlled substances. Nothing was tested for pseudoephedrine, and none was found in the apartment.

Mosley was charged with manufacturing methamphetamine and being a second-degree PFO; convicted of these charges in a jury trial; and sentenced to ten years' imprisonment, enhanced to twenty-five years as a result of the PFO conviction. She appeals from the resulting judgment.

II. ANALYSIS.

Mosley argues that the trial court erred when it denied her motion for a directed verdict on the manufacturing methamphetamine charge. This issue is properly preserved for review.² Finding that the Commonwealth produced

² Mosley moved the court for a directed verdict at the close of the Commonwealth's evidence and renewed this motion when the defense rested without

sufficient evidence to support Mosley's conviction, we find no error in the trial court's denial of her motion for a directed verdict.

When ruling on a directed-verdict motion, a trial court must assume the evidence produced by the Commonwealth to be true and "must draw all fair and reasonable inferences . . . in favor of the Commonwealth."³ Yet, the trial court must be careful to "reserv[e] to the jury questions as to the credibility and weight to be given to such testimony."⁴ Upon appellate review, a trial court's denial of a directed verdict motion will be reversed only if, "under the evidence as a whole, it would be clearly unreasonable for a jury to find guilt[.]"⁵ This requires evidence of substance, and the Commonwealth is required to present more than a mere scintilla of evidence.⁶

For one to be convicted of manufacturing methamphetamine, Kentucky Revised Statutes (KRS) 218A.1432 requires, in pertinent part, that "he knowingly and unlawfully . . . [w]ith intent to manufacture methamphetamine possesses two (2) or more chemicals or two (2) or more items of equipment for the manufacture of methamphetamine."

Mosley acknowledges that many of the items and chemicals often used to manufacture methamphetamine are common household items. So common, in fact, it would not be unreasonable to suppose that a majority of the homes in

calling any witnesses. See *Schoenbachler v. Commonwealth*, 95 S.W.3d 830, 836 (Ky. 2003) (citing *Baker v. Commonwealth*, 973 S.W.2d 54, 55 (Ky. 1998)).

³ *Commonwealth v. Benham*, 816 S.W.2d 186, 187 (Ky. 1991).

⁴ *Id.*

⁵ *Id.* (citing *Commonwealth v. Sawhill*, 660 S.W.2d 3 (Ky. 1983)).

⁶ *Id.* at 187-88.

the Commonwealth contain many items that could be used to manufacture methamphetamine. But these innocent persons are not charged with manufacturing methamphetamine because KRS 218A.1432 requires the Commonwealth to prove that the possessor also *intended* to use those items to manufacture methamphetamine. And this intent element is the one with which Mosley takes issue. She contends that the Commonwealth did not produce enough evidence to carry its burden of showing that she intended to manufacture methamphetamine, thus, entitling her to a directed verdict.

Mosley argues that the Commonwealth cannot prove she intended to manufacture methamphetamine because none of the items seized from the apartment tested positive for any controlled substances and because no pseudoephedrine, a necessity for manufacturing methamphetamine, was found in the apartment. This evidentiary void notwithstanding, we believe the Commonwealth presented sufficient evidence to allow a reasonable jury to conclude that Mosley intended to manufacture methamphetamine.

The items found in the apartment, when taken without context, are seemingly innocuous. But, when viewed in the context of the testimony provided by Director Hale, who has been involved in the cleanup of 500-1,000 methamphetamine labs, the likely use of the otherwise innocuous items comes to light.

Hale testified that upon his arrival at the apartment, he was immediately met by the chemical smell that is associated with the manufacture of methamphetamine. He also explained that the road salt and sulfuric acid

drain cleaner, found together in a bedroom closet, are commonly used in the manufacture of methamphetamine. His testimony also described the purpose behind the alteration of the peroxide bottle and the soda bottle top. He explained that bottles altered to allow a piece of tubing to protrude through the top are referred to as "smoke bottles." These smoke bottles are altered in this manner to allow methamphetamine manufacturers to complete the final step in the manufacturing process, commonly referred to as "smoking out" the methamphetamine. He also testified that pliers are used to remove the lithium strips from batteries to be used to begin the chemical reaction necessary to make methamphetamine.

Hale further testified that many of the suspicious items found in the apartment had undergone some sort of chemical alteration. He explained that water typically has a neutral pH of seven; but the toilet water, which appeared to have had something hastily dumped into it, had a pH of ten. He further testified that a Sprite bottle he tested had a pH of ten, whereas Sprite's pH is usually below seven. Finally, he testified that his pH test of the altered peroxide bottle returned a pH of one, as opposed to five, which is the pH a normal bottle of peroxide would return. It is also noteworthy that Hale testified that sulfuric acid, such as that found in the drain cleaner found in the apartment, also has a pH of one.

Although Mosley correctly points out that no pseudoephedrine was found in the apartment and that none of the suspicious implements tested positive for controlled substances, this absence of evidence is not fatal to the

Commonwealth's case. Instead, these facts are more properly to be contemplated when determining what weight should be given to the evidence. Because this analysis falls squarely within the province of the jury, it should not be undertaken by an appellate court.

In light of the evidence presented by the Commonwealth, we are compelled to find that the Commonwealth produced more than a mere scintilla of evidence regarding Mosley's intent to manufacture methamphetamine. So when all inferences are made in favor of the Commonwealth, we must find that it was not clearly unreasonable for the jury to find Mosley guilty of manufacturing methamphetamine.

III. CONCLUSION.

Based on the foregoing, we find that the trial court did not err; and we affirm the judgment of conviction and sentence.

All sitting. All concur.

COUNSEL FOR APPELLANT:

Karen Shuff Maurer
Assistant Public Advocate

COUNSEL FOR APPELLEE:

Jack Conway
Attorney General of Kentucky

William Robert Long, Jr.
Assistant Attorney General