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NOT TO BE PUBLISHED OPINION

THIS OPINION IS DESIGNATED "NOT TO BE PUBLISHED." PURSUANT TO THE RULES OF CIVIL PROCEDURE PROMULGATED BY THE SUPREME COURT, CR 76.28(4)(C), THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE CITED OR USED AS BINDING PRECEDENT IN ANY OTHER CASE IN ANY COURT OF THIS STATE; HOWEVER, UNPUBLISHED KENTUCKY APPELLATE DECISIONS, RENDERED AFTER JANUARY 1, 2003, MAY BE CITED FOR CONSIDERATION BY THE COURT IF THERE IS NO PUBLISHED OPINION THAT WOULD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 OPINIONS CITED FOR CONSIDERATION BY THE COURT SHALL BE SET OUT AS AN UNPUBLISHED DECISION IN THE FILED DOCUMENT AND A COPY OF THE ENTIRE DECISION SHALL BE TENDERED ALONG WITH THE DOCUMENT TO THE COURT AND ALL PARTIES TO THE ACTION.

RENDERED: AUGUST 21, 2014
NOT TO BE PUBLISHED

Supreme Court of Kentucky

2013-SC-000361-MR

KEVIN WAYNE JOHNSON — APPELLANT

V.

ON APPEAL FROM HANCOCK CIRCUIT COURT
HONORABLE RONNIE C. DORTCH, JUDGE
NO. 10-CR-00038

COMMONWEALTH OF KENTUCKY — APPELLEE

MEMORANDUM OPINION OF THE COURT

AFFIRMING

On August 31, 2010, Officer Brian Velotta of the Owensboro Police Department ("OPD") was alerted that an individual with outstanding warrants for his arrest was staying at the Days Inn Hotel in Owensboro, Kentucky. Officer Velotta was also told that this individual was in possession of drugs. Once on the scene, Officer Velotta immediately proceeded to room 234, which was rented by Appellant, Kevin Wayne Johnson. Appellant was arrested and taken to the OPD station for questioning. A search of Appellant's room revealed Xanax pills and a bag of marijuana. Appellant's girlfriend, Holly Gillespie, was also present in the hotel room. Gillespie was not arrested, but she was taken to the OPD station and questioned by Kentucky State Police Detective Matt Conley. During her interview, Gillespie indicated that Appellant

was operating a methamphetamine lab in neighboring Hancock County. Gillespie agreed to direct Detective Conley to the residence.

As Detective Conley approached the house, he instantly smelled anhydrous ammonia. Without delay, Detective Conley obtained a search warrant for the property. The resulting search uncovered numerous items consistent with the production of methamphetamine, including hydrogen chloride gas, approximately seven tanks of anhydrous ammonia, an eighty-page instruction manual on how to manufacture methamphetamine, and almost 2,000 pseudoephedrine tablets. Other items associated with the manufacturing of methamphetamine were also found, including small side cutters, stripped lithium batteries, rubber hoses, an aquarium check valve, coffee filters, digital scales, mason jars, glue sticks, scales, and baggies. Law enforcement also found a substantial amount of marijuana.

The deed to the residence lists Appellant's father, Freddie Johnson, as the owner. However, law enforcement concluded that Appellant was actually the individual occupying the residence and producing methamphetamine. This conclusion was based on information gathered from Gillespie and items found within the house. For example, Appellant's mail, vehicle tax registration, and a receipt with his initials were found in the home. Appellant's wallet and driver's license were also found in a Dodge Durango parked outside the residence. Furthermore, Detective Conley opined that Appellant was likely staying at the Days Inn Hotel while the hazardous "first round" of methamphetamine production was taking place.

After a two-day trial in February of 2013, a Hancock Circuit Court jury found Appellant guilty of manufacturing methamphetamine, unlawful possession of anhydrous ammonia with the intent to manufacture methamphetamine—subsequent offense, first-degree possession of a controlled substance, and being a first-degree persistent felony offender. The jury recommended separate twenty-year sentences for the charges of manufacturing of methamphetamine, unlawful possession of anhydrous ammonia, and being a first-degree persistent felony offender, each to run concurrently. The jury also recommended an additional three years, to be served consecutively, for the possession of a controlled substance charge. The trial court sentenced Appellant in conformity with the jury's recommended sentence of twenty-three years imprisonment. Appellant now appeals his conviction and sentence as a matter of right pursuant to § 110(2)(b) of the Kentucky Constitution.

404(b) Evidence

Appellant's first assignment of error concerns the trial court's admittance of his previous convictions. Prior to trial, the Commonwealth notified Appellant that it intended to introduce Kentucky Rules of Evidence ("KRE") 404(b) evidence in the form of Appellant's criminal convictions in the Daviess Circuit Court in case numbers 00-CR-00304, 02-CR-00272, 10-CR-00528, and 12-CR-00196, as well as a conviction in the Ohio Circuit Court in case number 10-CR-00013. The Commonwealth sought the introduction of these convictions in order to illustrate that Appellant had the intent to manufacture

methamphetamine and that he was knowledgeable of the manufacturing process.

Appellant objected to the introduction of virtually all of his convictions, with the exception of Daviess Circuit Court case number 10-CR-00528, which he conceded was admissible pursuant to 404(b)(2). In regards to case numbers 00-CR-00304 and 02-CR-00272, Appellant argued that the probative worth of the convictions under these indictments was significantly outweighed by their prejudicial effect, considering both occurred more than ten years before the trial date. With respect to case numbers 10-CR-00013 and 12-CR-00196, Appellant argued that both convictions under these indictments were more prejudicial than probative.

After several brief hearings, the trial court made the following rulings: (1) case numbers 00-CR-00304 and 02-CR-00272 were both inadmissible due to the age of the convictions; (2) case number 10-CR-00528 was inextricably intertwined with the case at bar so as to allow its admission; and (3) case numbers 10-CR-00013 and 12-CR-00196 were admissible. The trial court did not give a specific reason for allowing the admission of case numbers 10-CR-00013 and 12-CR-00196, but we can assume that the trial court believed that one of the exceptions listed in KRE 404(b)(1) applied.

Before addressing the admissibility of 10-CR-00528, 10-CR-00013, and 12-CR-00196, we will discuss the rule of law and our standard of review. KRE 404(b) provides that "[e]vidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in

conformity therewith." Even so, evidence of prior bad acts may be admissible to prove "motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." KRE 404(b)(1). In the event the evidence falls into a KRE 404(b)(1) exception, the balancing test of KRE 403—the probative value of the evidence outweighs its prejudicial effect—must still be satisfied. *Lanham v. Commonwealth*, 171 S.W.3d 14, 31 (Ky. 2005). In addition, the admissibility of KRE 404(b) evidence is within the sound discretion of the trial court. *Clark v. Commonwealth*, 223 S.W.3d 90, 95 (Ky. 2007). With these principles in mind, we will address each conviction in turn.

12-CR-00196

During the Commonwealth's case-in-chief, Detective Heath Stokes of the OPD discussed Daviess Circuit Court case number 12-CR-00196. Detective Stokes testified that, in December of 2011, while he was acting undercover in Daviess County, Appellant attempted to buy anhydrous ammonia from him for $700. A search incident to Appellant's arrest uncovered a large amount of cash and six grams of methamphetamine. Appellant ultimately pled guilty to attempted possession of anhydrous ammonia with the intent to manufacture methamphetamine (first-offense), trafficking in a controlled substance (first-offense), and possession of drug paraphernalia (first-offense).

We agree with the trial court that the convictions under this indictment were admissible. The fact that Appellant attempted to buy anhydrous ammonia, a known methamphetamine precursor, was probative of Appellant's intent, knowledge, preparation and plan to manufacture methamphetamine

and rebutted any claim of mistake or accident. *See Pate v. Commonwealth,* 243 S.W.3d 327, 333 (Ky. 2007) ("[P]rior possession of equipment and chemicals necessary to manufacture methamphetamine was relevant to prove intent and knowledge regarding methamphetamine manufacture."); *see also Fulcher v. Commonwealth,* 149 S.W.3d 363, 379 (Ky. 2004) (finding that evidence that the defendant was previously manufacturing methamphetamine was relevant to show that the chemicals and equipment that were found on his property were there with his knowledge). Also, evidence of trafficking in a controlled substance may be admissible to show a defendant's intent to manufacture that drug. *See Hayes v. Commonwealth,* 175 S.W.3d 574, 588-89 (Ky. 2005).

We also conclude that the admission of these convictions passes the KRE 403 balancing test. While testifying, Appellant was exceptionally candid about his addiction to methamphetamine. Appellant explained to the jury that he would often times obtain methamphetamine precursors, including anhydrous ammonia, and then trade the precursor for "good dope." As a result, we do not believe Appellant was overtly prejudiced when the jury heard that he attempted to buy anhydrous ammonia with methamphetamine on his person.

10-CR-00528

Appellant was convicted in Daviess Circuit Court case number 10-CR-00528 for trafficking in marijuana. This conviction arose from the search of the Days Inn Hotel room occupied by Appellant. As mentioned, the trial court admitted this conviction because it was inextricably intertwined with the case at bar. *See* KRE 404(b) (2)(evidence of other crimes is admissible if "so

inextricably intertwined with other evidence essential to the case that separation of the two (2) could not be accomplished without serious adverse effect on the offering party.").

This Court finds no error in the trial court's ruling. We have previously explained that "'KRE 404(b)(2) allows the Commonwealth to present a complete, unfragmented picture of the crime and investigation[,]' including a 'picture of the circumstances surrounding how the crime was discovered.'" *Kerr v. Commonwealth,* 400 S.W.3d 250, 261 (Ky. 2013) (quoting *Adkins v. Commonwealth,* 96 S.W.3d 779, 793 (Ky. 2003) and *Clark v. Commonwealth,* 267 S.W.3d 668, 681 (Ky. 2008)). Furthermore, we conclude that the probative worth of this conviction outweighs the resulting prejudice, if any, from its admission. Once again, we point to Appellant's testimony wherein he admitted to the jury that he would occasionally sell marijuana to support his methamphetamine addiction. Appellant even divulged that, on the day in question, he planned on selling marijuana. Consequently, there was no error in admitting evidence of Appellant's conviction for trafficking in marijuana.

10-CR-00013

The Commonwealth also provided the jury with testimony from Kentucky State Police Trooper Allen Lacey regarding Ohio Circuit Court case number 10-CR-00013. Trooper Lacey stated that, in January of 2010, he pulled Appellant over for speeding in Ohio County. As he approached Appellant's vehicle, Trooper Lacey noticed a pipe in the vehicle's cup holder. A subsequent search of the vehicle revealed six grams of methamphetamine and more than $2,000

in cash. Appellant pled guilty to possession of methamphetamine and possession of drug paraphernalia.

This Court finds no error in the trial court's admittance of the convictions under this indictment, as we believe they are probative of Appellant's intent and motive. *See Fulcher*, 149 S.W.3d at 379 ("Evidence that Appellant had ingested methamphetamine was relevant to prove a motive to manufacture it.") (citing *United States v. Cunningham,* 103 F.3d 553, 557 (7th Cir. 1996)). Similar to Appellant's other admissible convictions, we do not believe that their prejudicial effect outweighs their probativeness. Considering that Appellant candidly admitted to the jury that he is, and has long been, addicted to methamphetamine, he likely suffered little to no prejudice when the jury learned that he had also been convicted of possessing methamphetamine and drug paraphernalia.

For the aforementioned reasons, the trial court did not abuse its discretion in allowing the introduction of Appellant's convictions under indictment numbers 12-CR-00196, 10-CR-00528, and 10-CR-00013.

Mistrial

Appellant also claims that he was entitled to a mistrial when the Commonwealth interjected improper 404(b) evidence. While Appellant was on the stand, the Commonwealth attempted to inform the jury of Daviess Circuit Court case number 02-CR-00272, in which Appellant pled guilty to attempting to manufacture methamphetamine, unlawful possession of anhydrous ammonia with the intent to manufacture methamphetamine, and first-degree

possession of a controlled substance. As previously discussed, the trial court ruled that the convictions under this indictment were inadmissible due to the length of time between the convictions and the charges at issue.

While testifying, Appellant was asked if he knew how to manufacture methamphetamine. Appellant stated, "I could *probably* manufacture meth, yes." On cross-examination, the following exchange took place:

Commonwealth: "And, he asked you about cooking meth. You know how to cook meth don't you?"

Appellant: "Yes, I do."

Commonwealth: "Not 'probably,' as you told this jury, but you know how to cook it?"

Appellant: "Oh, yeah."

Commonwealth: "And, frankly, back in 2002, didn't you admit to being in possession of anhydrous ammonia with the intent to manufacture methamphetamine?"

Appellant: "Yes."

Commonwealth: "And you also admitted that you were attempting to manufacture methamphetamine at the time, correct?"

At that point, Appellant's counsel objected and moved for a mistrial. The trial court denied Appellant's motion and directed the prosecutor to proceed with his questioning. Case number 02-CR-00272 was not discussed any further.

A trial court has wide discretion in determining whether a mistrial is proper. *Maxie v. Commonwealth,* 82 S.W.3d 860, 863 (Ky. 2002) (citing *Gould v. Charlton Co., Inc.*, 929 S.W.2d 734 (Ky. 1996)). Generally, the harmful event

must be "of such magnitude that a litigant would be denied a fair and impartial trial and the prejudicial effect could be removed in no other way." *Id.* at 863 (citing *Gould*, 929 S.W.2d at 738).

We agree with Appellant that he suffered prejudice when the jury learned that, back in 2002, he was in possession of anhydrous ammonia with the intent to manufacture methamphetamine. However, the prejudicial effect of this testimony would have been cured by a simple admonition directing the jury to disregard the Commonwealth's question and Appellant's answer. *See Jacobsen v. Commonwealth,* 376 S.W.3d 600, 610 (Ky. 2012) (ruling that mistrial was improper since admonition, had it been requested, would have cured the improper reference to defendant's prior bad acts); *Graves v. Commonwealth,* 17 S.W.3d 858, 865 (Ky. 2000) (holding that testimony presented at trial stating that the defendant was a convicted felon was an evidentiary error that could have been cured by an admonition to disregard the testimony). Appellant, however, failed to request an admonition. Therefore, in order for Appellant to be entitled to a mistrial, he must demonstrate that the jury would have ignored the admonition, if given. *See Johnson v. Commonwealth,* 105 S.W.3d 430, 441-42 (Ky. 2003). Since the law presumes that a jury will follow an admonition, the following two situations are the only ones in which the "efficacy of an admonition falters":

> (1) when there is an overwhelming probability that the jury will be unable to follow the court's admonition *and* there is a strong likelihood that the effect of the inadmissible evidence would be devastating to the defendant; or (2) when the question was asked

> without a factual basis *and* was "inflammatory" or "highly prejudicial."

Id. (internal citation omitted) (emphasis in original) (citing *Derossett v. Commonwealth,* 867 S.W.2d 195, 198 (Ky. 1993); *Bowler v. Commonwealth,* 558 S.W.2d 169, 171 (Ky. 1977)).

We are not presented with either of those situations. The evidence, while prejudicial, was not "highly prejudicial," nor was it "devastating" to Appellant. The jury had already learned that Appellant had been convicted of possession of anhydrous ammonia with the intent to manufacture methamphetamine in Daviess Circuit Court case number 12-CR-00196. Furthermore, as we have repeatedly mentioned, Appellant, in his own testimony, admitted to the jury that he would obtain anhydrous ammonia in order to support his methamphetamine addiction. Thus, the trial court did not abuse its discretion in ruling that a mistrial was unwarranted because, had Appellant requested an admonition, any prejudicial effect would have been cured.

Comments on Appellant's Right to Remain Silent

Appellant also maintains that Officer Velotta and Detective Conley improperly commented on the exercise of his constitutional right to remain silent at the time of his arrest. Appellant failed to object to the testimony of either officer. Therefore, we will review for palpable error.

In his brief, Appellant complains of Officer Velotta's and Detective Conley's testimony in general, as opposed to informing this Court of a particular statement he deems improper. As a result, this Court reviewed the

entirety of the testimony of both officers and we could not find any statement that amounted to an improper comment on Appellant's right to remain silent.

Officer Velotta merely testified that he escorted Appellant to the OPD station after his arrest and then contacted detectives to question him. Officer Velotta did not state or imply that Appellant refused to speak or to answer questions. In regards to Detective Conley, we can only assume that Appellant is complaining of his testimony that he "attempted to conduct two interviews, but ended up only making one interview." This statement was made in response to the Commonwealth's question regarding what occurred once Detective Conley arrived at the OPD station. Detective Conley never revealed that Appellant refused to answer questions, nor did he state that only one interview was conducted because Appellant had invoked his right to remain silent. Accordingly, we cannot conclude that Detective Conley's statement improperly informed the jury of Appellant's post-arrest silence. *Green v. Commonwealth,* 815 S.W.2d 398, 399 (Ky. 1991) (finding that it was error for the prosecutor to remark: "[The defendant] never said a word. He never denied that was his [cocaine]."); *Hall v. Commonwealth,* 862 S.W.2d 321, 323 (Ky. 1993) (ruling it error for the testifying officer to state that defendant refused to make a statement after his rights were read to him).

Bolstering of Gillespie's Testimony

Appellant's next assignment of error is somewhat confusing. Appellant claims that Gillespie was the individual who provided the initial tip to Officer Velotta. Therefore, Appellant claims that Gillespie's testimony that he was

operating a methamphetamine lab was impermissibly bolstered by Officer Velotta's testimony that he had received information that Appellant was at the Days Inn Hotel. As Appellant states in his brief, "if Holly Gillespie . . . was, in fact, the provider of the tip leading police to the hotel, and she was right, she had to be right when she told police that Appellant was the individual manufacturing methamphetamine in Hawesville." This argument was not presented to the trial court. However, Appellant requests palpable error review.

We disagree that the anonymous tip Officer Velotta received bolstered Gillespie's statements. At no point was there evidence presented at trial indicating that Gillespie was the individual who notified law enforcement that Appellant was staying at the Days Inn Hotel. Therefore, it is nonsensical to believe that Officer Velotta in any way bolstered Gillespie's testimony.

Closing Arguments

Appellant also contends that his constitutional right to a fair trial was violated when the prosecutor utilized a "send a message to the community" argument during his closing statements at the guilt stage of the trial. More specifically, the Commonwealth stated that "the epidemic of methamphetamine in this community is rampant, and if we don't address it, it's gonna get worse."

This Court has long held that counsel has wide latitude when making closing statements. *See, e.g., Wheeler v. Commonwealth,* 121 S.W.3d 173, 180 (Ky. 2003) (citing *Slaughter v. Commonwealth,* 744 S.W.2d 407 (Ky. 1987)). We have also recently stated that, since deterrence is an appropriate consideration for sentencing, a "send a message" argument is not necessarily

barred during closing argument by the Commonwealth at the sentencing stage of the trial. *Cantrell v. Commonwealth,* 288 S.W.3d 291, 297–98 (Ky. 2009). However, this Court has always expressed its rejection of "send a message to the community" arguments during the guilt stage. This might cause the jury to feel compelled to render a guilty verdict "to satisfy the community expectation." *Ordway v. Commonwealth,* 391 S.W.3d 762, 797 (Ky. 2013).

Appellant did not object to the Commonwealth's statement, nor did he move for a mistrial or request an admonition. *See Hayes v. Commonwealth,* 698 S.W.2d 827, 829 (Ky. 1985). Thus, the Commonwealth's statement can only be grounds for reversal if it caused Appellant to endure a manifest injustice. *See Brown v. Commonwealth,* 313 S.W.3d 577, 627 (Ky. 2010).

Although we disapprove of the Commonwealth's statement, we do not believe that it is any more troublesome than those we recently found to not constitute palpable error. *See, e.g., Young v. Commonwealth,* 25 S.W.3d 66, 73-74 (Ky. 2000) (holding that it was not palpable error for the prosecutor to explain that appellant's sentence would "send a message throughout th[e] community [that if] you start manufacturing methamphetamine in Muhlenberg County . . . you're gonna receive the maximum punishment that we can give you . . . ."); *Brewer v. Commonwealth,* 206 S.W.3d 343, 349 (Ky. 2006) (finding that it was not palpable error for the prosecutor to comment that other criminals need "to understand the way the community feels about this type of conduct. So, your sentence here tonight is going to send a message. . . . And, they're going to hear about the way an Owen County jury views all of this

. . . ."). As a result, we do not believe the Commonwealth's statement exceeded the manifest injustice threshold.

Constitutionality of KRS 250.991

Lastly, Appellant urges this Court to find Kentucky Revised Statute ("KRS") 250.991 unconstitutional. This statute delineates the penalties for violating the anhydrous ammonia provisions of KRS 250.482 through KRS 250.488. Appellant takes aim at the statute's classification of unlawful possession of anhydrous ammonia with the intent to manufacture methamphetamine—subsequent offense, as a Class A felony. Due to this categorization, Appellant was subjected to the harsh penalties and parole eligibility guidelines found in KRS 439.3401, the violent offender statute. Appellant believes this is in direct conflict with House Bill 463, which attempts to reduce the amount of time non-violent drug offenders are incarcerated. While Appellant puts forth an interesting argument, this issue was not properly preserved for our review.

KRS 418.075(1) states that "[i]n any proceeding which involves the validity of a statute, the Attorney General of the state shall, before judgment is entered, be served with a copy of the petition, and shall be entitled to be heard[.]" This Court has held that the notification requirement of KRS 418.075(1) is mandatory. *Adventist Health Sys./Sunbelt Health Care Corp. v. Trude,* 880 S.W.2d 539, 542 (Ky. 1994) (overruled on other grounds by *Sisters of Charity Health Sys., Inc. v. Raikes*, 984 S.W.2d 464 (Ky. 1998)). In other words, raising a constitutional argument for the first time on appeal is

insufficient. *Benet v. Commonwealth,* 253 S.W.3d 528, 532 (Ky. 2008) ("[W]e reject any contention that merely filing an appellate brief, which necessarily occurs post-judgment, satisfies the clear requirements of KRS 418.075."). Accordingly, we will not address Appellant's constitutional argument.

Conclusion

For the forgoing reasons, the judgment of the Hancock Circuit Court is hereby affirmed.

All sitting. All concur.

COUNSEL FOR APPELLANT:

Frank Mascagni, III
Leslie Katherine Smith

COUNSEL FOR APPELLEE:

Jack Conway
Attorney General

Susan Roncarti Lenz
Assistant Attorney General