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NOT TO BE PUBLISHED OPINION

THIS OPINION IS DESIGNATED "NOT TO BE PUBLISHED." PURSUANT TO THE RULES OF CIVIL PROCEDURE PROMULGATED BY THE SUPREME COURT, CR 76.28(4)(C), THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE CITED OR USED AS BINDING PRECEDENT IN ANY OTHER CASE IN ANY COURT OF THIS STATE; HOWEVER, UNPUBLISHED KENTUCKY APPELLATE DECISIONS, RENDERED AFTER JANUARY 1, 2003, MAY BE CITED FOR CONSIDERATION BY THE COURT IF THERE IS NO PUBLISHED OPINION THAT WOULD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 OPINIONS CITED FOR CONSIDERATION BY THE COURT SHALL BE SET OUT AS AN UNPUBLISHED DECISION IN THE FILED DOCUMENT AND A COPY OF THE ENTIRE DECISION SHALL BE TENDERED ALONG WITH THE DOCUMENT TO THE COURT AND ALL PARTIES TO THE ACTION.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: OCTOBER 29, 2015
NOT TO BE PUBLISHED

Supreme Court of Kentucky

2013-SC-000550-MR

JAMES R. THOMAS — APPELLANT

V.

ON APPEAL FROM OWEN CIRCUIT COURT
HONORABLE STEPHEN L. BATES, JUDGE
NO. 12-CR-00018

COMMONWEALTH OF KENTUCKY — APPELLEE

MEMORANDUM OPINION OF THE COURT

AFFIRMING

An Owen Circuit Court jury found Appellant, James R. Thomas, guilty of manufacturing methamphetamine, first-degree possession of a controlled substance, possession of drug paraphernalia, possession of marijuana, and found him to be a first-degree persistent felony offender (PFO). The jury recommended that Appellant be sentenced to twenty-three years' imprisonment and ordered to pay a $1,000 fine; the trial court sentenced him accordingly. Appellant now appeals as a matter of right, Ky. Const. § 110(2)(b), and asserts the following issues: (1) the trial erred in prohibiting Appellant from calling his wife as a defense witness; (2) the trial court erred in denying Appellant's motion to suppress evidence; (3) the trial court erred in allowing the Commonwealth to introduce evidence of other crimes, wrong, or acts committed by Appellant; (4) it was reversible error when a witness for the Commonwealth testified during

the guilt phase that Appellant was wanted on several charges, including PFO; and (5) the trial court erred when it used unreliable evidence to deny Appellant's competency evaluation and hearing. For the reasons that follow, we affirm Appellant's convictions and corresponding sentence.

I. BACKGROUND

Appellant, his wife, Brenda, and Brenda's son lived in a home on a farm Appellant inherited from his parents. The couple also ran a business, selling farm gates and cattle feeders to the public from the property. Appellant was ordered to vacate the home after a hearing on an Emergency Protective Order, but had gone back to remove some of his possessions. The couple began arguing and Brenda called the police. When Sheriff Zemer Hammond responded to the call, Appellant and Brenda were outside the house arguing. Sheriff Hammond and Appellant went back before the judge to discuss the issue of Appellant's belongings.

The judge told Sheriff Hammond to give James two hours to get his things, and the two returned to the home where Sheriff Hammond instructed Brenda to leave for a few hours. At that time, Sheriff Hammond took some photographs of the inside of the house and did not notice any drugs or drug paraphernalia. The officer eventually left and Appellant and a friend packed his belongings. When Sheriff Hammond came back a few hours later, Appellant told him he needed just a few minutes to finish packing. During this time, Brenda arrived back at the property and waited in her car until Appellant and his friend left.

Once Appellant was gone, Brenda realized she did not have the key to the barn where she wished to park her motorcycle, so Sheriff Hammond spoke with Appellant from Brenda's cell phone and asked him to come back to unlock the barn. While the two waited for Appellant to return, Trooper David Roberts, who had seen Sheriff Hammond's car from the road as he drove by, stopped to see if Sheriff Hammond needed any assistance. Trooper Roberts had responded to a domestic disturbance call at the farm a few days earlier and was familiar with the situation.

When Appellant arrived, Sheriff Hammond and Trooper Roberts accompanied him to the barn. After unlocking the barn, Appellant immediately got back in his truck and left. On the way to the barn, Trooper Roberts walked beneath the tongue of a gooseneck trailer. However, he took a different route on his way back to his car—this time walking around the trailer rather than going under the tongue. It was then that Trooper Roberts observed several burnt battery halves and metal strips removed from batteries sitting atop trash in one of three 55-gallon barrels sitting between the barn and the garage in an area of the property which contained gates for sale to the public. From his training and experience as a narcotics officer, Trooper Roberts suspected that the burnt battery halves and metal strips were the result of the manufacture of methamphetamine.

Trooper Roberts questioned Brenda about the materials. She claimed no knowledge and consented to a search of the residence. The search turned up marijuana, pipes containing suspected methamphetamine residue, and a bong

containing suspected marijuana residue. Brenda's son arrived home around this time and told Trooper Roberts that chemicals and equipment used in the manufacture of methamphetamine were located in the garage. When Trooper Roberts discovered that the garage was locked and that Brenda did not have a key, he left the scene and obtained a search warrant for the garage and other outbuildings on the farm. When he returned and searched the garage, he found guns and chemicals and equipment used in the manufacture of methamphetamine.

When Appellant was arrested, he was in possession of marijuana. Appellant posted a property bond and was released from custody pending trial, but, after he failed a drug test (a condition of his release), the Owen Circuit Court issued a second arrest warrant. After multiple failed attempts at executing the warrant, Trooper Roberts obtained a search warrant for Appellant's home where he found drug paraphernalia containing methamphetamine. When Appellant was re-arrested, he was in possession of methamphetamine, marijuana, and drug paraphernalia.

More facts will be developed below as required for our analysis.

II. ANALYSIS

A. Testimonial Privileges

Appellant first argues that the trial court erred when it prohibited him from calling his wife as a defense witness. A week before trial, the Commonwealth asked if Appellant would invoke the spousal privilege to prevent his wife, Brenda, from testifying. Appellant indicated that not only did

he not plan to invoke the privilege, he intended to call Brenda as a defense witness. However, on the morning of the first day of trial, Appellant and the Commonwealth informed the trial court that Brenda's attorney had told both parties that she did not wish to testify for either side. Brenda's attorney notified the trial court that she wished to invoke two separate privileges not to testify: her privilege under the Fifth Amendment of the United States Constitution against self-incrimination and the husband-wife privilege she held pursuant to KRE 504. Appellant's attorney insisted that Brenda's testimony was indispensable to his right to a fair and impartial trial.

The trial court brought Brenda into court while the jury was out to lunch and pointed out that no matter how indispensable Brenda's testimony was to Appellant's defense, it did not abrogate her claim to the privileges. Brenda's attorney indicated that her truthful answers during trial could incriminate her. The Commonwealth confirmed that Brenda had outstanding charges against her and that it would not commit to refrain from bringing additional charges that may potentially arise from Brenda's testimony. In fact, the Commonwealth had previously proposed a plea deal to Brenda in exchange for her testimony in this matter. However, Brenda's decision to claim testimonial privileges nullified that deal. While Brenda's counsel had initially brought up both the husband-wife privilege and the Fifth Amendment privilege against self-incrimination, the discussion with Brenda in the courtroom centered only around her Fifth Amendment privilege. The trial court ruled that Brenda was privileged from testifying and precluded her as a witness for either party,

though it did not indicate upon which privilege it based this determination. Because this matter can be resolved completely by looking to Brenda's Fifth Amendment privilege, we will not discuss any potential spousal privilege under our Rules of Evidence.

We review a trial court's decision on whether to preclude the testimony of a witness who asserts a testimonial privilege for an abuse of discretion. *Meyers v. Commonwealth*, 381 S.W.3d 280, 283 (Ky. 2012). "The test for abuse of discretion is whether the trial judge's decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles." *Commonwealth v. English*, 993 S.W.2d 941, 945 (Ky. 1999).

Brenda claimed she was privileged from testifying under the Fifth Amendment to the United States Constitution, which provides, in pertinent part: "[n]o person . . . shall be compelled in any criminal case to be a witness against himself . . . ." Appellant claims that the trial court erred in determining that Brenda was privileged from testifying. He insists that, pursuant to *Combs v. Commonwealth*, 74 S.W.3d 738, 745 (Ky. 2002), "a witness should not be precluded from testifying based on speculation about whether he or she would invoke a privilege." The Commonwealth points out that there was no speculation, as Brenda appeared in court with her attorney and indicated that she planned to invoke her Fifth Amendment privilege.

Kentucky Rules of Evidence 511(b) provides: "in jury cases, proceedings shall be conducted, to the extent practicable, so as to facilitate the assertion of claims of privilege without the knowledge of the jury." The trial court followed

this Rule by bringing Brenda in to discuss her claims of privilege while the jury was out to lunch. Brenda's attorney had already indicated that she would invoke her Fifth Amendment privilege, and Brenda did the same once she was in the courtroom. In fact, the privilege against self-incrimination was the only privilege discussed during the colloquy.

Brenda lived in and worked from the same residence as Appellant at the time of his arrest. In fact, she was arrested on related charges, which were still pending at the time of Appellant's trial. Clearly, any answers she provided could put her liberty in peril. As previously stated, the Commonwealth withdrew its offered plea agreement when Brenda claimed the privilege, and stated that it would use any additional information it gleaned from her potential testimony against her—possibly as the basis for new charges. Given Brenda's insistence that she would claim her privilege against self-incrimination, the trial court did not allow either side to call her as a witness, in spite of Appellant's claim that her testimony was indispensible to his defense.

In *Combs*, 74 S.W.3d at 745, this Court endorsed a sort of "dry run" of witness testimony in order for the trial court to determine on which questions the witness could properly invoke his or her Fifth Amendment rights. Appellant claims that the trial court erred by failing to conduct this dry run. In *Combs*, however, unlike the case at bar, the witness claimed the privilege only with regard to a collateral matter. Here, Brenda was charged with crimes

arising from the same course of conduct as Appellant and claimed she was privileged from answering *any* questions related to Appellant's charges.

We dealt with a similar matter in *Lemon v. Commonwealth*, No. 2006-SC-000636-MR, 2007 WL 4462365, at *3 (Ky. Dec. 20, 2007). There, we held:

> While the dry run approach set out in *Combs, supra,* is generally appropriate as a means of determining the scope of the questions and the impact of the claims of privilege, it was not necessary in this case. The [witnesses claiming the privilege] were convicted of offenses that arose during the same events upon which [the appellant] would seek to question them, not some unrelated collateral offenses. To have allowed [the appellant] to obtain answers concerning the events surrounding the [crime at issue], and then allow the [witnesses] to invoke their right against self-incrimination so as to preclude the Commonwealth from questioning them concerning the events discussed on direct examination, would have impaired the truth-seeking function of the court.

Just as in *Lemon*, it was unnecessary here for the trial court to conduct a dry run with Brenda. She made it clear that she would invoke her Fifth Amendment privilege as to all questions, thus, there was no need for the trial court to analyze each of them. Furthermore, in Kentucky, neither the prosecution nor the defense may "call a witness knowing that the witness will invoke the Fifth Amendment immunity." *Clayton v. Commonwealth*, 786 S.W.2d 866, 868 (Ky. 1990) (*citing Brown v. Commonwealth,* 619 S.W.2d 699 (Ky. 1981), overruled on other grounds by *Murphy v. Commonwealth,* 652 S.W.2d 69 (1983)).

Since the *Combs* dry run was unnecessary given the facts of this case and Brenda had a Fifth Amendment privilege that was properly invoked, the

trial court did not abuse its discretion in prohibiting Appellant from calling Brenda as a witness.

B. Suppression Motion

Next, Appellant argues that the trial court erred in denying his motion to suppress evidence seized following a search of his property. On the day in question, Trooper Roberts noticed Sheriff Hammond's patrol car near Appellant's residence and stopped to see if Sheriff Hammond needed any assistance. Trooper Roberts was familiar with the situation, as he had responded to a domestic call at the residence a few days before. When Sheriff Hammond asked Appellant to come back to the property to unlock the barn for Brenda, Trooper Roberts noted that Appellant appeared agitated and exited his cruiser and approached the barn with Appellant and Sheriff Hammond. As Trooper Roberts returned to his vehicle, he noticed three 55-gallon barrels sitting between the driveway and the barn. Trooper Roberts saw several burnt battery halves and what appeared to be metal strips removed from batteries atop one of the barrels. He believed this was evidence of the manufacture of methamphetamine. Trooper Roberts questioned Brenda about the materials and she denied any knowledge. Wishing to further his investigation, Trooper Roberts asked Brenda for permission to search, which she provided with no limitation.

Inside the house, Trooper Roberts found several pipes containing what he believed to be methamphetamine residue and a bong with apparent marijuana residue. He later found several guns in the garage along with

materials consistent with the manufacture of methamphetamine. Claiming that the barrels were inside the curtilage of his home, Appellant made a motion to the trial court that all evidence garnered from the search be suppressed, as it violated his Fourth Amendment protection against illegal searches and seizures and amounted to fruit of the poisonous tree. The trial court denied Appellant's motion on two grounds: first, it found that the barrels were outside the curtilage of Appellant's home; and, alternatively, it found that even if the barrels were inside the curtilage, Trooper Roberts was on the property for legitimate police business and his search of the barrels was valid under the plain view doctrine. We resolve this issue on the basis of the plain view doctrine, and see no reason to discuss whether the evidence in question was within the curtilage of Appellant's home.

This Court uses a two-step analysis to review a trial court's determination regarding a suppression hearing. "First, the factual findings of the trial court are conclusive if supported by substantial evidence. Second, if the findings are supported by substantial evidence, the appellate court conducts a *de novo* review to determine whether the trial court's ruling is correct as a matter of law." *Meskimen v. Commonwealth*, 435 S.W.3d 526, 531 (Ky. 2013) (citation omitted). We need not conduct the first portion of our typical analysis, as Appellant admits, "[t]he lower court's findings of fact from the suppression hearing were properly supported by substantial evidence . . . ."

The Fourth Amendment to the United States Constitution ensures the right to be free from unreasonable searches and seizures. Section 10 of the

Kentucky Constitution does likewise and "provides no greater protection than does the federal Fourth Amendment." *LaFollette v. Commonwealth*, 915 S.W.2d 747, 748 (Ky. 1996) (*abrogated on other grounds by Kyllo v. United States*, 533 U.S. 27 (2001). "Since *Katz v. United States*, 389 U.S. 347, . . . (1967), the touchstone of Fourth Amendment analysis has been the question whether a person has a 'constitutionally protected reasonable expectation of privacy.'" *Oliver v. United States*, 466 U.S. 170, 177 (1984) (*quoting Katz*, 389 U.S. at 360 (Harlan, J., concurring)).

This Court has held: "[t]he plain-view exception to the warrant requirement applies when the object seized is plainly visible, the officer is lawfully in a position to view the object, and the incriminating nature of the object is immediately apparent." *Chavies v. Com.*, 354 S.W.3d 103, 109 (Ky. 2011) (citing *Horton v. California*, 496 U.S. 128, 136–37 (1990)). In the case at bar, Trooper Roberts saw burnt battery halves and what he believed to be metal strips removed from batteries *atop* a barrel. These materials were in his plain view—there is no evidence that Trooper Roberts manipulated the barrel in any way in order to see them. Trooper Roberts was on Appellant's property conducting legitimate police business when he saw the burnt battery halves—and was, therefore, "lawfully in a position to view" the materials in question. *Id.* Lastly, the incriminating nature of the materials was immediately apparent to Trooper Roberts. Through his experience as a police officer, he knew that the burnt battery halves and strips of metal were evidence of the manufacture

of methamphetamine. As the items were in plain view, Appellant had no reasonable expectation of privacy in them.

For the aforementioned reasons, we hold that the materials in question were in plain view, and, therefore, Appellant had no reasonable expectation of privacy in them. Thus, we affirm the trial court's denial of Appellant's motion to suppress. While the trial court also found that the barrels were outside the curtilage of Appellant's home, we have resolved this issue pursuant to the plain view doctrine and need not address the trial court's additional findings.

C. Other Crimes, Wrongs, or Acts Evidence

Prior to trial, the Commonwealth filed a motion in limine to introduce certain evidence of Appellant's other crimes, wrongs, or acts at trial. Appellant's counsel filed a response arguing that the evidence would create such an unfair prejudice to Appellant that it would interfere with his right to a fair trial. After discussing the matter with the parties, the trial court granted the Commonwealth's motion to allow the introduction of the evidence under KRE 404(b) and entered a written order. Appellant now asserts that the trial court erred by failing to exclude the evidence under KRE 404(b). We review a trial court's evidentiary ruling for an abuse of discretion. *Goodyear Tire & Rubber Co. v. Thompson*, 11 S.W.3d 575, 577 (Ky. 2000).

We begin with the proposition that all properly admissible evidence must be relevant, KRE 402, that is, it must tend to make a material fact more or less probable, KRE 401. Furthermore, KRE 403 states: "[a]lthough relevant, evidence may be excluded if its probative value is substantially outweighed by

the danger of undue prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, or needless presentation of cumulative evidence." Kentucky Rules of Evidence 404 deals particularly with character evidence and evidence of other crimes. More specifically, KRE 404(b) provides:

> (b) Other crimes, wrongs, or acts. Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible:
>
> > (1) If offered for some other purpose, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident; or
> >
> > (2) 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 stated in *Bell v. Commonwealth*, 875 S.W.2d 882, 889 (Ky. 1994), that, "trial courts must apply [404(b)] cautiously, with an eye towards eliminating evidence which is relevant only as proof of an accused's propensity to commit a certain type of crime." We approved a three-prong test in *Bell* to determine if KRE 404(b) evidence should have been excluded at trial: (1) the first factor goes to relevance and asks, "[i]s the other crimes evidence relevant for some purpose other than to prove the criminal disposition of the accused?," *id.*; (2) the second factor goes to probativeness and asks, "[i]s evidence of the uncharged crime sufficiently probative of its commission by the accused to warrant its introduction into evidence?," *id.* at 890; and (3) the third factor goes

to prejudice and asks, "[d]oes the potential for prejudice from the use of other crimes evidence substantially outweigh its probative value?," *id.*

The following KRE 404(b) evidence (as paraphrased from the trial court's written order) was admitted at trial[1]:

1) The frequency of traffic, mostly at night, at Appellant's residence was consistent with the manufacturing, use or possession of methamphetamine;
2) That Appellant and others manufactured methamphetamine in his garage;
3) That Appellant and others used the following items in manufacturing methamphetamine: crushed pseudoephedrine pills, Coleman fuel, sea salt, plastic pop bottles, plastic tubing, coffee filters, and a fan;
4) That Appellant brought coffee filters into the house from the garage that he had used in the process of manufacturing methamphetamine and then made coffee using them, which he then drank;
5) That Appellant used methamphetamine in the house and on the property in question;
6) That Appellant had what appeared to be a marijuana joint in his pocket when the police arrested him for the first time on the charges related to this case;

[1] The trial court order also approved one other item of evidence, but we do not include it here, as it was not actually admitted at trial.

7) That Appellant tested positive for the use of amphetamine and methamphetamine when drug tested as a condition of his release on bond pending trial;

8) That while searching for Appellant on his second arrest warrant, Trooper Roberts found a pipe containing methamphetamine residue in Appellant's bedroom;

9) That Appellant absconded and/or fled after being released on bond pending trial and was re-arrested in Kenton County, Kentucky; and

10) That when Appellant was re-arrested, the car he was operating contained methamphetamine, suspected marijuana, and drug paraphernalia.

Appellant claims that all of the evidence outlined above was irrelevant to his charges and highly prejudicial to his defense. Rather, he insists that it merely showed his propensity to commit crimes and use drugs. He argues that neither the trial court nor the Commonwealth explained how the evidence was relevant and probative of "motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." KRE 404(b). Appellant claims that the repeated introduction of his other crimes, wrongs, or acts resulted in a trial that was so fundamentally unfair that it violated his due process rights and asks that we reverse his conviction and remand for a new trial on these grounds. We disagree.

The evidence in question was properly admitted at trial. In order for the Commonwealth to convict Appellant of the charged crimes, it had to prove that Appellant: *knowingly* possessed two or more chemicals with the *intent* to

manufacture methamphetamine; was *knowingly* in possession of marijuana and methamphetamine; and *knowingly* possessed drug paraphernalia with the *intent* to use the items ingest methamphetamine or marijuana. Thus, Appellant's knowledge and intent were squarely at issue and in dispute—particularly since Appellant's defense at trial was that the chemicals seized from his garage were only used for lawful purposes and that he did not possess the knowledge to manufacture methamphetamine. The evidence was not used to prove that Appellant had a propensity for committing crimes or using drugs, but, rather, to prove his knowledge, intent, motive, and plan—all of which are permissible reasons under KRE 404(b).

For example, evidence that Appellant had previously manufactured methamphetamine was used to prove his knowledge and intent that the chemicals and equipment in his possession were for the manufacture of methamphetamine. Therefore, items 1, 2, 3, and 4 from the list of evidence above demonstrated Appellant's knowledge of the items found in his garage and his intent to use them to manufacture methamphetamine. This Court has previously held that the evidence regarding an individual's "methamphetamine manufacturing during the preceding months was admissible to show that [he] had knowledge of this process." *Young v. Com.*, 25 S.W.3d 66, 71 (Ky. 2000). We went on state in *Young*, "we find evidence concerning [the appellant's] knowledge highly probative of his intent." *Id.* We reaffirm that holding today.

Furthermore, the items 5, 7, 8, and 10 above—related to Appellant's prior use of methamphetamine—tended to prove his motive for manufacturing

the drug. In fact, this Court has previously held that, "[e]vidence that [an appellant] had ingested methamphetamine was relevant to prove a motive to manufacture it." *Fulcher v. Commonwealth*, 149 S.W.3d 363, 379 (Ky. 2004).

Item 6 above, relating to Appellant's possession of marijuana at the time of his arrest, was admissible to prove Appellant's knowledge and intent to possess marijuana. And, finally, item 9, the fact that Appellant fled after his release on bond, demonstrates consciousness of guilt. *Rodriguez v. Commonwealth*, 107 S.W.3d 215, 218 (Ky. 2003) ("It has long been held that proof of flight to elude capture or to prevent discovery is admissible because 'flight is always some evidence of a sense of guilt.'") (*quoting Hord v. Commonwealth*, 13 S.W.2d 244, 246 (1928)).

Going back to the *Bell* factors, we hold that: (1) the evidence was relevant for some purpose other than to prove Appellant's criminal disposition; (2) that the evidence was sufficiently probative of Appellant's commission of the charged crimes as to warrant its introduction into evidence; and (3) the potential for prejudice from the use of the evidence substantially outweighed its probative value. We point to our holding in *Tipton v. Commonwealth*, No. 2009-SC-000119-MR, 2010 WL 1005899, at *4 (Ky. Mar. 18, 2010), where we stated:

> we believe that the evidence here was highly relevant to whether Appellant knew how to manufacture methamphetamine and that the nature of the evidence, when taken with his own admission, was extremely probative of his intent to manufacture methamphetamine. Given its clear probative value, we do not believe the trial court erred in concluding that its probative value was not substantially outweighed by the risk of undue prejudice.

Thus, we affirm the trial court on this issue.

D. Persistent Felony Offender

Appellant's next allegation of error is that reversible error occurred when Officer Jay Zerhusen, a witness for the Commonwealth, told the jury during the guilt phase of Appellant's trial that he was wanted on several charges, including PFO. Appellant's counsel renewed his 404(b) objection prior to the start of Officer Zerhusen's testimony, and the trial court assured counsel that his KRE 404(b) objection was preserved and he did not need to object each time such evidence was about to be presented. Trial counsel did not, however, raise a contemporaneous objection when Officer Zerhusen mentioned that Appellant was wanted on a PFO charge.

As we have previously held, "RCr 9.22 requires a contemporaneous objection to exclude evidence, unless the court has ruled upon a fact-specific, detailed motion in limine that fairly and adequately apprised the court of the specific evidence—not just the class of evidence—to be excluded and the basis for the objection." *Meece v. Commonwealth*, 348 S.W.3d 627, 656 (Ky. 2011) (citations omitted). Since there was no prior fact-specific motion that apprised the court of the specific evidence at issue, Appellant failed to adequately preserve this issue for appellate review. However, Appellant requests palpable error review of this issue pursuant to RCr 10.26.

"Palpable error affects the substantial rights of the party and results in manifest injustice. Furthermore, an appellant claiming palpable error must show that the error was more likely than ordinary error to have affected the jury." *Boyd v. Commonwealth*, 439 S.W.3d 126, 129-30 (Ky. 2014). "In

determining whether an error is palpable, 'an appellate court must consider whether on the whole case there is a substantial possibility that the result would have been any different.'" *Commonwealth v. Pace*, 82 S.W.3d 894, 895 (Ky. 2002) (citing *Commonwealth v. McIntosh*, 646 S.W.2d 43. 45 (Ky. 1983)).

Kentucky Revised Statutes 532.080(1) provides, in pertinent part: "When a defendant is charged with being a persistent felony offender, the determination of whether or not he is such an offender and the punishment to be imposed . . . shall be determined in a separate proceeding from that proceeding which resulted in his last conviction." This Court has stated, "[t]he two-stage proceeding in persistent felony-offender cases was designed for the specific purpose of obviating the prejudice that necessarily results from a jury's knowledge of previous convictions while it is weighing the guilt or innocence of a defendant on another charge." *Hubbard v. Commonwealth*, 633 S.W.2d 67, 68 (Ky. 1982). While Officer Zerhusen's statement regarding Appellant's PFO charge should not have come in during the guilt phase of his trial, Appellant's counsel failed to raise an objection, which could have given the trial court the opportunity to cure any error by admonishing the jury. *See West v. Commonwealth*, 780 S.W.2d 600, 602 (Ky. 1989) (a "party must timely inform the court of the error and request the relief to which he considers himself entitled).

Therefore, absent a contemporaneous objection, we will only review this issue to determine whether any error resulted in a manifest injustice. In the case at bar, Officer Zerhusen was testifying as to his reasoning for arresting

Appellant when he mentioned that Appellant was wanted on several charges, including PFO. The Commonwealth did not follow up on Officer Zerhusen's brief comment that Appellant was wanted on a PFO charge when he arrested him. It amounted to one brief isolated statement which could have been cured by an admonition by the trial court had Appellant raised a contemporaneous objection. Considering all the evidence presented to the jury, including Appellant's knowledge of manufacturing methamphetamine, the jury already had evidence (which it could choose to believe or disbelieve) that Appellant had committed past crimes—whether or not he had actually been convicted of them. Any error here does not rise to the level of manifest injustice required for a conviction to be reversed on the grounds of unpreserved error.

Finding no palpable error, we affirm the trial court on this issue.

E. Competency Evaluation

Appellant had initially entered a guilty plea in this case, but withdrew his plea before trial. During the hearing on Appellant's withdrawal of his plea, his counsel requested a competency hearing for Appellant, which the Commonwealth opposed. Ultimately, Appellant's counsel filed a motion to withdraw. The trial court granted counsel's motion to withdraw and, at the hearing on the motion, counsel stated that no motion for a competency evaluation had been filed. New counsel was appointed the following day. At a later hearing, new defense counsel raised the unresolved issue of the competency evaluation. At another hearing, almost a month later, Appellant's new counsel pointed out that no formal motion had ever been filed with the

court stating Appellant was incompetent, and that disagreements between Thomas and his previous counsel did not make him incompetent. However, in spite of these statements, Appellant's counsel indicated that they may as well take evidence on the issue.

Even though Appellant's counsel suggested they take evidence on Appellant's competency, Appellant presented none. The only evidence was presented by the Commonwealth in the form of testimony from the Carroll County Jailer. He was familiar with Appellant, as Appellant had been in his jail for the preceding five months and at numerous other times in the past. Following the hearing, the trial court entered an order denying Appellant's oral motion for a competency hearing, stating that it found "absolutely no basis to indicate the Defendant is not competent." Appellant now argues that the trial court erred in relying on the Jailer's testimony in denying him a competency evaluation. That argument is without merit.

We took up the issue of competency hearings in *Padgett v. Commonwealth*, 312 S.W.3d 336, 348 (Ky. 2010), where we held:

> If there is substantial evidence that a defendant is incompetent, and thus the constitutional right to a hearing attaches, the trial court must conduct a competency hearing (at trial or retrospectively) even if both counsel and the defendant expressly waive it. Waiver alone cannot satisfy due process. But, if there are not substantial grounds to believe the defendant is incompetent, only the statutory right has attached. And because any statutory right can be waived, there would be no error if the trial court declined to hold a hearing upon a valid waiver . . . .
>
> To illustrate, a record where there is no history of prior mental problems, the defendant comports himself well in court, and the report indicates he is competent, would not give rise to a due process hearing requirement, as there is not substantial

> evidence to support a finding of incompetency. On this record, a defendant could waive his competency hearing, and the trial court would be justified in not holding one. To illustrate further, if there is no evidence of incompetence but the trial court orders an evaluation anyway, the court's order and an evaluation indicating he is competent, standing alone, would not be substantial evidence triggering the constitutional right to a hearing.

Here, there was no reason for the trial court to believe Appellant was incompetent to stand trial apart from a request from his former counsel indicating the need for a competency hearing after the two had obviously disagreed on the issue of whether Appellant should withdraw his guilty plea. Appellant's new counsel did not pursue the issue—even noting that a formal motion had not been filed. However, in an abundance of caution, the trial court allowed the Commonwealth to present testimony regarding Appellant's competency. Appellant presented no evidence at all—and the trial court cannot be faulted with this strategy. The trial court did not order a competency examination or report be filed, as Appellant presented no history of prior mental problems and comported himself well in court. Appellant failed to assert any basis at all for a competency evaluation, apart from his statement months earlier when he was represented by his former counsel that he was experiencing stress. Under these circumstances, the trial court did not abuse its discretion in denying Appellant's motion for a competency hearing.

III. CONCLUSION

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

All sitting. All concur.

COUNSEL FOR APPELLANT:

Steven Jared Buck, Assistant Public Advocate

COUNSEL FOR APPELLEE:

Jack Conway, Attorney General of Kentucky
Taylor Allen Payne, Assistant Attorney General