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(2006-CA-000518-D)

**Commonwealth Of Kentucky**

**Court Of Appeals**

NO. 2004-CA-002328-MR

JEFFREY BECKHAM

APPELLANT

v. APPEAL FROM HENDERSON CIRCUIT COURT  
HONORABLE STEPHEN A. HAYDEN, JUDGE  
ACTION NO. 04-CR-00105

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION  
AFFIRMING

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BEFORE: COMBS, CHIEF JUDGE; KNOPF, JUDGE; BUCKINGHAM, SENIOR JUDGE.<sup>1</sup>

KNOPF, JUDGE: Jeffrey Beckham appeals from a judgment of the Henderson Circuit Court, entered November 8, 2004, convicting him of manufacturing methamphetamine in violation of KRS 218A.1432 (1998). In accord with the jury's recommendation, the court sentenced Beckham to ten years' imprisonment. Beckham

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<sup>1</sup> Senior Judge David C. Buckingham sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

maintains that he was denied his rights to present a defense and to compel witnesses in his favor when the trial court erroneously granted Fifth-Amendment immunity to a codefendant Beckham desired to call as a witness. He further maintains that the court erred by excluding evidence concerning the codefendant's guilty plea. Because we agree with the trial court that the codefendant validly asserted her Fifth-Amendment privilege and because the other alleged error was not properly preserved for our review, we affirm.

Henderson County sheriffs arrested Beckham at about 3:00 a.m. on January 28, 2004, just outside a mobile home at 9380 Petersburg Road in Robards, one of three mobile homes belonging to, and on property belonging to, Ricky Wright. The officers had been dispatched to investigate a disturbance at 9384 Petersburg Road, another of the Wright mobile homes, between Beckham and Chris Greenwell. Greenwell was a former boyfriend of Wright's daughter Ashley, who lived at that address with her mother. When the officers arrived, Greenwell directed them to the neighboring mobile home, where, he said, Beckham and his girlfriend, Tara Wright, another of Ricky's daughters, had gone following the altercation. As they approached the 9380 mobile home, the officers smelled an overpowering odor of ether, one of the chemicals used in the manufacture of methamphetamine. One of the officers also noticed, in an open trash barrel on the

mobile home's porch, meth-manufacturing paraphernalia including a still-active soda-bottle hydrochloric-acid generator. The officer knocked on the door, but before anyone answered, Beckham called to him from the drive or yard in front of the mobile home and wondered if the officer was looking for him. The officer testified that Beckham, too, "reeked" of ether. The officer placed Beckham under arrest and secured him in a vehicle. A short time later, Tara Wright emerged from the mobile home, denied the officer's request to search it, slammed the door, and fled into a nearby field. Apparently the officers then enlisted the aid of Tara's mother, who soon persuaded Tara to turn herself in. Later that morning the officers searched the 9380 mobile home pursuant to a warrant and found inside a closed-circuit surveillance system capable of monitoring the area around the home, the full panoply of meth-manufacturing paraphernalia, and what apparently were four batches of the drug at different stages of the manufacturing process. A sample from one of the batches tested positive for methamphetamine.

Although separately indicted, Beckham and Tara were charged with the same offense arising from the same facts, and their trials were scheduled for the same day. On the eve of her trial, Tara pled guilty. At Beckham's trial the next day, one of the arresting officers described the events summarized above, and was then asked by the Commonwealth's Attorney whether Tara

had not pled guilty to manufacturing methamphetamine. He testified that she had. Beckham objected to that testimony, but not until the Commonwealth had already asked another question. The trial court deemed the objection untimely and provided no relief. During Beckham's defense, the Commonwealth again elicited testimony concerning Tara's guilty plea. And during its closing argument the Commonwealth yet again brought Tara's plea before the jury and argued that her plea provided substantive evidence of Beckham's guilt.

Apparently because the court had ruled that Tara's plea was admissible, Beckham offered no objection to these additional references to it, but sought instead to counter the effects of that evidence by questioning Tara. Tara, however, successfully asserted her Fifth-Amendment privilege not to give potentially self-incriminating testimony. Beckham then tried to ask Tara's mother about the terms of Tara's plea bargain. Again, the court upheld the Commonwealth's objection.

It is, of course, a serious error for the Commonwealth to introduce evidence of a codefendant's guilty plea as substantive evidence of the defendant's guilt.<sup>2</sup> Such evidence deprives the defendant of his right "to have the question of his guilt determined upon the evidence against him, not on whether a

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<sup>2</sup> Norris v. Commonwealth, 89 S.W.3d 411 (Ky. 2002); Tipton v. Commonwealth, 640 S.W.2d 818 (Ky. 1982); Annotation, "Prejudicial Effect of Prosecuting Attorney's Argument or Disclosure During Trial that Another Defendant has been Convicted or has Pleaded Guilty," 48 ALR2d 1016 (Supp. 2005).

codefendant or government witness has been convicted of the same charge."<sup>3</sup> And it is highly prejudicial, the jury being apt to "regard the issue of the remaining defendant's guilt as settled and the trial as a mere formality."<sup>4</sup>

Nevertheless, Beckham concedes that the error was not properly preserved at trial and does not seek palpable-error review on appeal.<sup>5</sup> He relies instead on the doctrine of curative admissibility. Under that doctrine "the introduction of inadmissible evidence by one party allows an opponent, in the court's discretion, to introduce evidence on the same issue to rebut any false impression that might have resulted from the earlier admission."<sup>6</sup> He argues that while evidence of Tara's guilty plea should not have been introduced at all, once the Commonwealth introduced it he had a right to cure the admission by questioning Tara about her plea and about the events leading

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<sup>3</sup> United States v. Miranda, 593 F.2d 590, 594 (5<sup>th</sup> Cir. 1979).

<sup>4</sup> United States v. Eason, 920 F.2d 731, 734 (11<sup>th</sup> Cir. 1990) (quoting United States v. Griffin, 778 F.2d 707, 711 (11<sup>th</sup> Cir. 1985)). See also State v. Dansberry, 18 S.W.3d 518 (Mo.App. 2000); Tomlin v. State, 591 So.2d 550 (Ala.App. 1991). There are exceptions to the black letter rule excluding such evidence. It is admissible to impeach a codefendant testifying for the prosecution; Commonwealth v. Gaines, 13 S.W.3d 923 (Ky. 2000). And it is admissible where otherwise "the defendant permits the introduction of such evidence without objection for the purpose of trial strategy." St. Clair v. Commonwealth, 140 S.W.3d 510, 545 (Ky. 2004).

<sup>5</sup> "Assignments of error are made by appellants, not appellate courts." Thomas v. Commonwealth, 153 S.W.3d 772, 782 (Ky. 2004).

<sup>6</sup> Nguyen v. Southwest Leasing and Rental, Inc., 282 F.3d 1061, 1067 (9<sup>th</sup> Cir. 2002); Blair v. Commonwealth, 144 S.W.3d 801 (Ky. 2004); Norris v. Commonwealth, 89 S.W.3d 411 (Ky. 2002).

to her arrest in an attempt to show that her plea had more to do with her pregnancy and her fear of going to jail than with her admission of guilt.

Beckham concedes, as he must, that a valid assertion of Tara's Fifth-Amendment right not to incriminate herself would overcome his right to her testimony, even under the curative admissibility doctrine.<sup>7</sup> He contends, however, that her assertion of the privilege was not valid because of her guilty plea. The plea, he claims, completed her incrimination and so extinguished her privilege. As the Commonwealth notes, however, the United States Supreme Court rejected this proposition in Mitchell v. United States.<sup>8</sup> In ruling that the appellant in that case should have been allowed to assert the privilege at the sentencing hearing following her guilty plea, the Court held that

[i]t is true, as a general rule, that where there can be no further incrimination, there is no basis for the assertion of the privilege. We conclude that principle applies to cases in which the sentence has been fixed and the judgment of conviction has become final. If no adverse consequences can be visited upon the convicted person by reason of further

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<sup>7</sup> Combs v. Commonwealth, 74 S.W.3d 738 (Ky. 2002) (when they conflict, Fifth-Amendment right against self-incrimination trumps Sixth-Amendment right to compel testimony); United States v. Bowling, 239 F.3d 973 (8<sup>th</sup> Cir. 2001) (same); United States v. Abbas, 74 F.3d 506 (4<sup>th</sup> Cir. 1996) (same).

<sup>8</sup> 526 U.S. 314, 119 S.Ct. 1307, 143 L.Ed.2d 424 (1999).

testimony, then there is no further incrimination to be feared.<sup>9</sup>

Here, of course, Tara's conviction was far from final. Had her plea been rejected or withdrawn she was apt to face a trial at which any incriminating testimony she had given in Beckham's trial could have been used against her. The trial court correctly ruled, therefore, that Tara's guilty plea did not extinguish her Fifth-Amendment privilege.

Nor did the court give the privilege too broad a scope. At a hearing outside the presence of the jury, Beckham advised the court, Tara, and Tara's attorney that he wished to ask Tara about the events leading up to their arrests, about whether he had had anything to do with the methamphetamine lab discovered in the mobile home, and about the reasons for Tara's guilty plea. Upon the advice of counsel, Tara indicated that she would invoke her Fifth-Amendment privilege and refuse to answer any question about those matters. The trial court ruled that her refusal would be valid under the Fifth Amendment and so, pursuant to Varble v. Commonwealth,<sup>10</sup> in which our Supreme Court reiterated the rule that it is impermissible to call a witness knowing that the witness will validly invoke the Fifth Amendment, disallowed Tara's being called as a witness. Beckham

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<sup>9</sup> 526 U.S. at 326 (citation omitted).

<sup>10</sup> 125 S.W.3d 246 (Ky. 2004).

maintains that the court erred by permitting a blanket refusal to answer questions when there may have been individual questions Tara could have answered without risking incrimination. We disagree.

As the Supreme Court explained in Ohio v. Reiner:<sup>11</sup>

The Fifth Amendment provides that “[n]o person . . . shall be compelled in any criminal case to be a witness against himself.” U.S. Const., Amdt. 5. . . . [T]his privilege not only extends “to answers that would in themselves support a conviction . . . but likewise embraces those which would furnish a link in the chain of evidence needed to prosecute the claimant.” “[I]t need only be evident from the implications of the question, in the setting in which it is asked, that a responsive answer to the question or an explanation of why it cannot be answered might be dangerous because injurious disclosure could result.”<sup>12</sup>

It is true, as Beckham notes, that dangers of “imaginary and unsubstantial character” do not justify assertion of the privilege.<sup>13</sup> Our Supreme Court, moreover, has cautioned trial courts to be protective of the defendant’s Sixth-Amendment right to present evidence by requiring a witness to testify when the witness’s invocation of the Fifth Amendment pertains only to collateral matters that can be excluded from both direct and cross-examination without unduly impinging on the opponent’s

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<sup>11</sup> 532 U.S. 17, 121 S.Ct. 1252, 149 L.Ed.2d 158 (2001).

<sup>12</sup> *Id.* at 20-21 (citations omitted).

<sup>13</sup> *Id.* at 21 (citation and internal quotation marks omitted).

right to test the witness.<sup>14</sup> Here, however, Tara's invocation of her privilege did not pertain to collateral matters, but to the heart of Beckham's proposed questions. It is evident, furthermore, that responsive answers to any of those questions and to proper cross-examination posed a real and substantial risk of implicating Tara in methamphetamine production. The trial court did not err, therefore, by deeming valid Tara's blanket invocation of the Fifth Amendment.

Finally, Beckham contends that if he could not compel Tara's testimony he should at least have been permitted under the curative admissibility doctrine to ask Tara's mother about the terms of and reasons for Tara's guilty plea. When he asked her whether Tara would be probated, however, the trial court sustained the Commonwealth's objection, and he did not pursue the subject. Nor did he question the mother by avowal. Without an avowal, this Court may not review trial-court rulings excluding evidence.<sup>15</sup> In effect, without an avowal the alleged error is presumed to be harmless.

Because the exclusion of the mother's testimony, even if erroneous, thus could not be deemed reversible error and because Tara validly exercised her Fifth-Amendment privilege not to testify, Beckham has failed to identify any ground for

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<sup>14</sup> Combs v. Commonwealth, 74 S.W.3d 738 (Ky. 2002).

<sup>15</sup> Caldwell v. Commonwealth, 133 S.W.3d 445 (Ky. 2004) (citing Commonwealth v. Ferrell, 17 S.W.3d 520 (Ky. 2000)).

relief. Accordingly, we affirm the November 8, 2004, judgment of the Henderson Circuit Court.

ALL CONCUR.

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