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RENDERED: AUGUST 21, 2014
NOT TO BE PUBLISHED

Supreme Court of Kentucky

2012-SC-000241-MR

MANDY BAUER — APPELLANT

V.

ON APPEAL FROM ADAIR CIRCUIT COURT
HONORABLE DOUGLAS M. GEORGE, JUDGE
NO. 11-CR-00118

COMMONWEALTH OF KENTUCKY — APPELLEE

MEMORANDUM OPINION OF THE COURT

AFFIRMING IN PART, REVERSING IN PART, AND REMANDING

Appellant Mandy Bauer was convicted in Adair Circuit Court of manufacturing methamphetamine and possession of drug paraphernalia. On appeal she argues that there was insufficient evidence to support the verdict; the jury instruction on manufacturing methamphetamine created a unanimity problem; she was entitled to an instruction on a lesser included offense that the trial court did not give; and other evidentiary issues relating to the testimony of two police officers. This Court reverses her conviction for manufacturing methamphetamine but affirms the conviction for possession of drug paraphernalia.

I. Background

Following up on a complaint made by a neighbor, Deputy Sheriff Aaron Rainwater and Sheriff Harrison Moss went to the Appellant's home, where she lived with her husband, Thomas Price. The disgruntled neighbor had

complained that Price was mowing his lawn late at night and had mowed a part of the neighbor's lawn. The neighbor also stated that methamphetamine was being "cooked" at the Appellant's house.

The officers found Appellant, along with Price and his brother, at the home. They had an outstanding warrant for Price, whom they arrested, and questioned about making methamphetamine.

The officers also questioned Appellant, asking her if Price had made methamphetamine at the house. She claims that she denied this allegation and any personal involvement in making meth, and that she became very upset, which led to Rainwater threatening to lock her up "if she was going to keep lying."

The officers, however, claimed that Appellant made incriminating statements about her involvement in manufacturing and using methamphetamine. They also searched the house and found several items used in the illicit manufacturing of methamphetamine. As a result, Appellant and Price were charged with manufacturing methamphetamine and possession of drug paraphernalia. Price pleaded guilty, but Appellant went to trial.

At trial, Deputy Rainwater claimed that Appellant told him that Price had cooked methamphetamine in the house on June 23, 2011, but that she was clean that day because she was scheduled for a drug test at social services due to her effort to reunite with her children. However, Deputy Rainwater testified that Appellant also said that she and Price had smoked methamphetamine in the home the next day (June 24, 2011), and that she and Price had bought

pseudoephedrine (an ingredient used to make methamphetamine) over a week earlier, which they had used to make the methamphetamine they smoked.

Deputy Rainwater and Sheriff Moss searched the residence with Appellant's consent. They collected two canisters of salt, Liquid Fire drain opener, coffee filters, Crystal Heat drain opener, standard air-line tubing, sandwich storage bags, wire cutters, a funnel, a digital scale stored inside a Whoppers candy box, and three rolls of aluminum foil. Deputy Rainwater testified that while these items could be used for normal household functions, they were also used in the production of methamphetamine. However, the deputy also testified that he found no pseudoephedrine, one of the main ingredients in illicit methamphetamine, or completed methamphetamine, and that there was no methamphetamine residue on any of the other items.

But the deputy, using the National Precursor Log Exchange (NPLEx),[1] which he called the "meth check," verified that Appellant had purchased pseudoephedrine on June 14, 2011, and that Price had purchased pseudoephedrine just five minutes earlier the same day.

Sheriff Moss testified that he overheard Appellant's responses to Deputy Rainwater's questions about making methamphetamine. He essentially confirmed Deputy Rainwater's account of the exchange.

Another witness, Detective Tracy McCarroll, explained the process of manufacturing methamphetamine to the jury, and stated that seven of the

[1] NPLEx is a national database of pseudoephedrine purchases. It is used to identify possible purchases for the purpose of making methamphetamine.

seized items were used in the manufacturing process. He also admitted that some of the ingredients necessary to illicitly make methamphetamine, such as lithium batteries and ammonia nitrate, were not found.

Appellant's main defense was that she was not present in the home on June 23 when the methamphetamine was allegedly made, having quarreled with Price and gone to her mother's home where she stayed two nights. She claimed that her purchase of pseudoephedrine was due to her sinus congestion and hay fever, and that she used pseudoephedrine "all the time." She also denied making any statements to the police officers that she participated in making or using methamphetamine. She claimed that she did not hear Price make any statements about making methamphetamine, though she and Price were questioned separately. She denied participating in the making or using of methamphetmine with Price.

The jury found Appellant guilty of manufacturing methamphetamine and possession of drug paraphernalia (for the digital scale found in the home). Appellant was sentenced to 25 years in prison. Her appeal to the Court is thus a matter of right. *See* Ky. Const. § 110(2)(b).

II. Analysis

A. Appellant was not entitled to a directed verdict.

While Appellant moved for a directed verdict at the end of the Commonwealth's proof, she failed to renew her motion at the close of all the proof. Therefore, this claim of error is not preserved for review, *see Baker v.*

Commonwealth, 973 S.W.2d 54, 55 (Ky. 1998),[2] and may only be reviewed as palpable error, RCr 10.26. Such errors must affect the substantial rights of a party and result in a manifest injustice, *id.*, and must create the probability of a different result or be so fundamental an error that due process is denied before they can serve as the basis of a reversal, *see Martin v. Commonwealth*, 207 S.W.3d 1, 3 (Ky. 2006).

Appellant claims that the evidence was insufficient to support her conviction for manufacturing methamphetamine and possession of drug paraphernalia because no methamphetamine was found at the residence and all the items seized by the officers were simply standard household items with innocent uses. However, on a directed-verdict motion, the evidence produced by the Commonwealth must be taken as true. *Commonwealth v. Benham*, 816 S.W.2d 186, 187 (Ky. 1991). As such, the court was required to accept the testimony that Appellant had confessed to making and using methamphetamine. That alone would have been sufficient to present the manufacturing charge to the jury.

In addition to that testimony, there was testimony that the items seized *from her home* could be used to make methamphetamine, and that Appellant had purchased pseudoephedrine at or about the time the meth was allegedly made. While circumstantial, this additional evidence certainly presents a question of fact for the jury.

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[2] This rule is so well founded that the suggestion by Appellant's counsel in the brief that the error was preserved by the "defense's motion for a directed verdict at the close of the Commonwealth's case" is patently false and disingenuous.

As to the drug-paraphernalia charge, again the absence of methamphetamine at the scene or methamphetamine residue on the scales is not fatal. The deputy's testimony was sufficient to raise the question whether Appellant had been involved in making methamphetamine. That would raise the additional question whether the scale found at the scene had been used in conjunction with the methamphetamine, such as to weigh it for sale. The fact that the scale was found hidden in a candy box further suggests it had been used in an illicit fashion.

A directed verdict was not appropriate for either charge. Consequently, its denial cannot be palpable error.

B. The instruction given prevented a unanimous verdict.

However, the facts of this case, combined with the methamphetamine-manufacturing instructions given in this case, created a unanimity problem under *Johnson v. Commonwealth*, 405 S.W.3d 439 (Ky. 2013), and *Kingrey v. Commonwealth*, 396 S.W.3d 824 (Ky. 2013). Specifically, the instructions, which stated that the manufacturing occurred between June 23 and June 26, included at least two instances of the crime of manufacturing methamphetamine, not just two theories of the same crime.

In *Johnson* and *Kingrey*, this Court held that it is impermissible to use an instruction that includes two or more *instances* of a criminal offense. "[S]uch a scenario—a general jury verdict based on an instruction including two or more separate instances of a criminal offense, whether explicitly stated in the instruction or based on the proof—violates the requirement of a

unanimous verdict." *Johnson,* 405 S.W.3d at 449. As in *Johnson,* this case involves a single count that led to a single verdict covering one criminal act and a second criminal act that occurred later in time. This results in multiple crimes covered by a single verdict. As Justice Scalia wrote in his concurring opinion in *Schad v. Arizona,* 501 U.S. 624, 633 (1991), "We would not permit ... an indictment charging that the defendant assaulted either X on Tuesday or Y on Wednesday, despite the 'moral equivalence' of those two acts." Indeed, our criminal rules require that indictments include "a separate count for each offense." RCr 6.18.

To explain the unanimity problem in everyday terms, in *Johnson* we wrote that such an instruction

> is like giving directions to a McDonald's on the east side of town to half a group of travelers, and directions to one on the west side of town to the other half, despite a rule that requires all the travelers to go to the same restaurant. Both groups arrive at a McDonald's, but not all the travelers are in the same place.

Johnson, 405 S.W.3d at 455. In other words, the instructions allow individual jurors to vote to convict for different instances of the crime and to combine those votes into a single general verdict.

According to the testimony of Deputy Aaron Rainwater, Appellant admitted that she and her husband had purchased pseudoephedrine about a week before her arrest with the intention of manufacturing methamphetamine, and that she had successfully manufactured methamphetamine on June 23, 2011. She also admitted to Deputy Rainwater that she had smoked the methamphetamine on June 24, 2011, and that the meth she smoked on that

date had been made from pseudoephedrine she and her husband had purchased a week earlier. This is evidence of one crime of manufacturing methamphetamine, as defined in KRS 218A.1432, because the possession of the pseudoephedrine and other items with intent to manufacture merged with the actual manufacture of methamphetamine using those items to create a single offense of manufacturing methamphetamine.

But there is testimony that Appellant also committed a separate, second instance of the offense when she had chemicals and equipment for the manufacture of methamphetamine in her possession *after* she and her husband had successfully manufactured and used the methamphetamine on June 23–24.

Deputy Rainwater testified that when Appellant was arrested, she had possession of two chemicals used in manufacturing methamphetamine: salt and drain cleaners. He also testified that she had equipment in her possession used to manufacture methamphetamine: plastic air-line tubing, coffee filters, plastic storage bags, a funnel, black wire cutters, and three boxes of aluminum foil. While these items are normal household items, there was testimony from a police detective about how the items can also be used in methamphetamine production.

KRS 218A.1432, the statute criminalizing manufacturing methamphetamine, provides two ways by which a person can be guilty of manufacturing methamphetamine. First, a person is guilty if he actually has made methamphetamine. *See* KRS 218A.1432(1)(a). Secondly, a person is

guilty if, with the intent to manufacture methamphetamine, he possesses two or more chemicals *or* two or more items of equipment used in the manufacture of methamphetamine. *See* KRS 218A.1432(1)(b).

Under this statute, it is clear that Appellant could be found guilty of two offenses of manufacturing methamphetamine based on the testimony of the deputy and the detective. The first offense arises from her successful manufacture of the drug on June 23. The second offense consisted of her possession of chemicals and equipment with intent to manufacture after the manufacturing on June 23.

The instruction given by the trial court followed the statute and included both methods of committing the offense (i.e., manufacturing and possession of chemicals and equipment with the intent to manufacture). The instruction, however, failed to differentiate between the first instance of the crime (the successful manufacture) and the second (the subsequent possession of chemicals and equipment with intent to manufacture). The instruction contained the date range of June 23–26. This time frame included the actual manufacture and the subsequent possession of chemicals and equipment with intent to manufacture methamphetamine. Thus, the jurors could have voted for the successful manufacture on June 23 or the subsequent possession of materials with the intent to manufacture again in the future. The jury returned a general verdict on one offense under this instruction.

This is precisely the sort of combination instruction that fails on unanimity grounds under *Johnson* and *Kingrey*. This instruction does not

provide for alternative grounds to arrive at a conviction for a single crime because members of the jury could have voted to convict on different criminal acts. Because it is impossible to know which criminal act the jury members voted for, it is impossible to have a unanimous verdict.[3]

For the instructions to be appropriate under evidence showing two crimes, the trial court had to give one instruction for the facts relating to the successful making of methamphetamine, and a second instruction for the facts relating to possession with intent to manufacture because she possessed chemicals and equipment to make methamphetamine after June 23. When the indictment includes only one count, as it did here, then the Commonwealth should elect which instance of the offense to try, and the judge is required to limit the instruction to one of the offenses. *See Johnson,* 405 S.W.3d at 456.

But neither the Commonwealth nor the trial court did this. Instead, a single instruction covering two separate instances of the offense of manufacturing methamphetamine was given, and hence we have no assurance that the verdict is unanimous. And, while this error was not preserved, it is clearly palpable, as it was in *Johnson,* because this is a fundamental error that

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[3] However, an example of when an alternative instruction would be appropriate relates to the second instance of the offense. Because the statute states that possession with intent to manufacture methamphetamine occurs when the defendant possesses two chemicals *or* two pieces of equipment, the trial court could have properly given an alternative-theory instruction on possession with intent to manufacture because there was evidence that Appellant possessed *both* chemicals and equipment, and two of either would have been sufficient to convict on a single crime of possession with intent to manufacture. But a separate instruction was not given here on the crime of manufacturing methamphetamine by possession of chemicals or equipment with intent to manufacture.

affects the substantial rights of the Appellant, and results in a manifest injustice.

Also in line with the proof in this case, Appellant did admit to possession of methamphetamine, but also gave testimony that she had left the residence for a period of time and that she had not participated in the actual making of the methamphetamine. An argument could be made that as to the second instance of manufacturing methamphetamine—possessing chemicals and equipment with the intent to manufacture methamphetamine after June 23—that she lacked the necessary intent to manufacture because she did not know the materials remained for that purpose. If the jury believed this, she could still have been convicted of possession of methamphetamine, and was entitled to an instruction on possession of the drug as a lesser included offense of the alleged manufacturing.

Consequently, Appellant's conviction for manufacturing methamphetamine must be reversed and remanded for a new trial.

Because several of Appellant's claims relate only to the manufacturing conviction and we are reversing on the unanimity issue, her other claims of error will be addressed only to the extent they are capable of repetition on retrial or could affect her remaining conviction for possession of drug paraphernalia.

C. The deputy's use of the term "meth check" for the National Precursor Log Exchange did not usurp the role of the jury.

Appellant claims that Deputy Rainwater's use of the term "meth check" for the National Precursor Log Exchange invaded the province of the jury. This argument is unpreserved, and therefore can only be reviewed as palpable error.

After using the term "meth check," Deputy Rainwater explained what NPLEx system was and how it was used by law enforcement, namely, to "determine when and where pseudoephedrine is being purchased and by whom." Presumably, this system uses the electronic data that pharmacies are required to keep under KRS 218A.1446(2)–(3). And such a system is necessary since, despite Appellant's claim that her purchase of pseudoephedrine was legal,[4] the purchase of pseudoephedrine is heavily regulated and limited, *see, e.g.*, KRS 218A.1446(5)–(6), specifically to make the manufacture of methamphetamine more difficult. And while the full name of the log includes the term "precursor" rather than "meth," it is a simple matter for a jury to comprehend what the system is used for and what the drugs covered by the NPLEx system are a precursor to.

There is no probability whatsoever that the use of the term "meth check" usurped the jury's power to fully weigh all the evidence in the case and reach an independent conclusion. If the same testimony is elicited on retrial, any prejudice that might arise from the use of the term should be alleviated by

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[4] Mere possession of pseudoephedrine by a person convicted of a methamphetamine offense is a crime after July 12, 2013. *See* KRS 218A.1440. A person like Appellant, who has a prior methamphetamine conviction, would thus violate the law by having pseudoephedrine in her possession after July 13, 2013.

testimony about the NPLEx system's purpose and use by law enforcement. And, as it relates to Appellant's remaining conviction for possession of drug paraphernalia, the use of the term certainly did not rise to the level of palpable error.

D. Sheriff Moss's testimony did not invade the province of the jury.

Appellant also complains that Sheriff Moss testified "We asked him [Price] where the meth was, because we were sure they had made it, and he said that they used it." She claims this testimony also invaded the jury's province because it conveyed the opinions of the sheriff and the deputy that she was guilty. Again, this allegation of error is unpreserved.

Such passing comment is not error. First, the statement at most conveyed an opinion about Price's guilt, not Appellant's. Second, the statement has been taken out of context. The sheriff testified that when he asked Price where the methamphetamine was, Price had already admitted to having made it. Thus, the sheriff's "opinion" simply reflected what Price had just told him. There was no error, palpable or otherwise, in this testimony.

E. Introduction of Price's guilty plea was error, but not palpable error.

Appellant testified in her own defense at trial. The Commonwealth was permitted to ask her whether Price had pleaded guilty to manufacturing methamphetamine. Appellant, however, now complains that this was error, arguing that whether Price had pleaded guilty was irrelevant. The Commonwealth now admits that was error, but claims that it was not palpable error. The Commonwealth is correct that this was error. *See Tipton v.*

Commonwealth, 640 S.W.2d 818, 820 (Ky. 1982) (barring such questions unless used to impeach the person whose conviction is asked about).

But the record indicates that this issue was waived. Whether this question was permissible was raised by the Commonwealth at a bench conference. Appellant's counsel was specifically asked about it and stated that he had no objection to the question. This waived the claim of error, which bars even palpable-error review. *See Chavies v. Commonwealth*, 354 S.W.3d 103, 113 (Ky. 2011) ("But palpable error review will not be granted when a defendant ... affirmatively waived the objection in the trial court."). Thus, the alleged error cannot be used to reverse Appellant's remaining conviction.

However, since the manufacturing conviction is being reversed and will likely be retried, this Court directs that the question not be asked on retrial, unless the circumstances would allow it under *Tipton*.

III. Conclusion

For the reasons set forth above, the Appellant's conviction for manufacturing methamphetamine is reversed and remanded to the trial court, and the conviction for possession of drug paraphernalia is affirmed.

Minton, C.J.; Abramson, Noble and Venters, JJ., concur. Keller, J., dissents by separate opinion in which Cunningham and Scott, JJ., join.

KELLER, J., DISSENTING: I respectfully dissent from the majority's holding that the jury instructions regarding manufacturing methamphetamine created a reversible "unanimity problem" for two reasons. First, as the majority states, Bauer was charged with one count of committing one crime -

manufacturing methamphetamine. A person can violate the manufacturing methamphetamine statute by actually manufacturing methamphetamine or by possessing two or more pieces of equipment or two or more chemicals necessary to manufacture methamphetamine with the intent to do so. As the majority noted, in order to actually manufacture methamphetamine a person must have the equipment, the chemicals, and the intent to do so.

There was evidence that, prior to June 23, Bauer and Price purchased pseudoephedrine with the intent to manufacture methamphetamine; that Bauer purchased several of the pieces of equipment and other chemicals necessary to manufacture methamphetamine; and that Price manufactured methamphetamine in their home on June 23. Thus, on June 23, Bauer possessed the equipment and chemicals necessary to manufacture methamphetamine and, by her admission to Detective Rainwater, the intent to do so.

It is undisputed that Bauer, who was present in the home on June 26, had possession of equipment and chemicals necessary to manufacture methamphetamine on that day. Furthermore, as noted above, there was evidence that Bauer had purchased pseudoephedrine with the intent to manufacture methamphetamine. Therefore, there was sufficient evidence for the jury to determine that Bauer possessed the equipment and chemicals necessary to manufacture methamphetamine with the intent to do so on June 26.

Furthermore, there was evidence that, between June 23 and June 26, Bauer had the continuing intent to manufacture methamphetamine and that she, at least constructively, possessed some of the equipment and chemicals necessary to do so. I recognize that Bauer testified that she was not present in the home on June 23 and that she did not return to the home until June 26. Even if that testimony is accepted as true, Bauer, by virtue of her ownership interest in the home and evidence that she had purchased most of the equipment and chemicals, had constructive possession of those items at all relevant times. *See Houston v. Commonwealth*, 975 S.W.2d 925, 927 (Ky. 1998) ("Since as early as 1972, Kentucky courts have utilized the concept of constructive possession to connect defendants to controlled substances."); and *Rupard v. Commonwealth*, 475 S.W.2d 473, 475 (Ky. 1971) ("[T]he term 'possession' need not always be actual physical possession and . . . a defendant may be shown to have had constructive possession by establishing that the contraband involved was subject to his dominion or control.") Because Bauer possessed the requisite equipment, chemicals, and intent to manufacture methamphetamine during the entire period in question, there was only one "instance" of manufacturing methamphetamine. Therefore, there was no unanimity problem with the instructions.

I also dissent because, even if there was a unanimity problem with the instructions, any error that may have occurred was not palpable. "A party claiming palpable error must show a probability of a different result or error so fundamental as to threaten a defendant's entitlement to due process of law."

Chavies v. Commonwealth, 374 S.W.3d 313, 322-23 (Ky. 2012). As Justice Cunningham stated in his dissent in *Johnson v. Commonwealth*, 405 S.W.3d 439, 461 (Ky. 2013): "We are watering down our palpable error standard with holdings such as this to the point that it behooves the defense lawyer not to object on jury instructions and just allow the trial court to walk—unwarned—onto the unanimity land mine." A watering down process that I believe we should stop, if not reverse.

The worst case scenario here is that half of the jurors believed Bauer committed the offense on June 23, and the other half believed she committed it on June 26. Regardless of which day the individual jurors believed Bauer committed the offense, they unanimously believed that she committed it. As Justice Cunningham stated in *Johnson,* "Surely this is not 'palpable error' as we have traditionally envisioned." 405 S.W. 3d at 462. Therefore, I would affirm.

Cunningham and Scott, JJ., join.

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