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NOT TO BE PUBLISHED OPINION

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RENDERED: OCTOBER 29, 2015
NOT TO BE PUBLISHED

Supreme Court of Kentucky

FINAL
DATE 11-19-15 Ella Gowitt, D.C.

2014-SC-000153-MR

HOWARD HILL ANDERSON ~~APPELLANT~~

V.

ON APPEAL FROM MCLEAN CIRCUIT COURT
HONORABLE BRIAN WIGGINS, JUDGE
NO. 13-CR-00027

COMMONWEALTH OF KENTUCKY APPELLEE

MEMORANDUM OPINION OF THE COURT

REVERSING AND REMANDING

Appellant, Howard Hill Anderson, appeals from a judgment of the McLean Circuit Court convicting him of manufacturing methamphetamine, misdemeanor possession of drug paraphernalia, and of being a first-degree persistent felony offender. Appellant was sentenced to a total of twenty years in prison. He appeals as a matter of right.

Appellant contends that the trial court erred (1) by permitting the Commonwealth to introduce under KRE 404(b) evidence of another crime committed by Appellant, which was then conflated in the jury instructions with the crime charged in the indictment, resulting in a unanimous verdict violation; and (2) by disallowing him to introduce a certified copy of a judgment of James McDaniels' prior criminal conviction for the purpose of showing bias.

Because we conclude that the use of the other crimes evidence resulted in a denial of Appellant's right to a unanimous verdict, we reverse the judgment

of the McLean Circuit Court and remand for a new trial. Appellant raised other issues; however, because of this disposition we address only the one that may arise upon re-trial.

I. FACTUAL AND PROCEDURAL BACKGROUND

In the late night hours of June 30, 2013, police officers discovered a methamphetamine lab at the home of Josh Drury in McLean County. They obtained a warrant to search the premises and seized evidence at the scene. After executing the warrant, they proceeded with a clean-up of the lab into the early morning hours of July 1, 2013. Later that morning, police returned to the Drury residence and found James McDaniels there, and they arrested him. McDaniels told police that Appellant was involved in making meth at the lab, that Appellant had methamphetamine at his home, and that he may have a tank of anhydrous ammonia in his possession. Anhydrous ammonia is a substance used in the manufacturing of methamphetamine. Police also determined that James Martin had been present at the Drury residence during the June 30 meth-making session. Martin had left the scene before the police arrived, but was later arrested. Martin also told police that Appellant was manufacturing meth at the Drury residence on June 30 and on other occasions.

After talking to McDaniels, police contacted Appellant's parole officer, Paul Newman, and asked him to accompany them to Appellant's residence. Under Newman's authority as Appellant's parole officer, on July 1, 2013, police searched Appellant's residence and found numerous items associated with

manufacturing and using methamphetamine. Appellant admitted to officers that he used methamphetamine. He also admitted that he manufactured methamphetamine but denied that he had done so at his own residence.

Appellant was indicted and charged with one count of manufacturing methamphetamine, KRS 218A.1432; possession of drug paraphernalia, KRS 218A.500; and of being a first-degree persistent felony offender, KRS 532.080. The indictment alleged that:

> on or about July 1, 2013 in McLean County, Kentucky [Appellant] committed the offenses of manufacturing methamphetamine when he manufactured methamphetamine or possessed two (2) or more of the chemicals or two (2) or more items of equipment for the manufacture of methamphetamine with the intent to use same to manufacture methamphetamine.

The indictment did not identify a specific location of the crime.

II. "OTHER CRIMES" EVIDENCE AND THE RIGHT TO A UNANIMOUS VERDICT

Prior to Appellant's trial, the Commonwealth filed a notice pursuant to KRE 404(c) that it intended to introduce "other crimes evidence" under KRE 404(b). Specifically, the Commonwealth announced that it would offer at trial:

> evidence of other crimes or wrongs on the part of the defendant, to include [testimony of James Martin] that on or about June 30, 2013, the defendant manufactured methamphetamine at the residence of Joshua Drury, McLean County, Kentucky. [ ] James Martin was present at the time of said manufacturing.

The Commonwealth's notice further asserted: "Said evidence is offered to prove the defendant's motive, opportunity, intent, preparation, and knowledge and is 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 Commonwealth." The notice further specified that it would offer evidence that Appellant had manufactured meth on two other occasions during May and June of 2013.

As disclosed by the KRE 404(c) notice, the Commonwealth's theory of the crime charged in the indictment was that Appellant's offense of manufacturing meth occurred at his residence on July 1, 2013, based upon the chemicals and items found there in his possession. The June 30 event at the Drury residence was clearly identified as an "other crime" relevant to proving Appellant's guilt on July 1.

Appellant objected to the introduction of the "other crimes" evidence identified in the Commonwealth's notice. The trial court excluded evidence of Appellant's earlier meth-making (in May and June) but ruled that evidence of Appellant's meth-making on June 30 at the Drury residence was admissible. The trial court concluded that the evidence about the June 30 events at the Drury residence was inextricably intertwined with Appellant's possession of the meth-making ingredients at his home the following day.

As expected, Martin testified at trial that he was at the Drury residence on June 30 with James McDaniels, and that they were manufacturing methamphetamine at the location. Martin told the jury that Appellant and two other persons arrived at the Drury residence at about 3:30 p.m. with the tank of anhydrous ammonia and a slip of pseudoephedrine pills needed for the methamphetamine manufacturing process. The other ingredients and equipment needed were already there, having been supplied by McDaniels.

Martin testified that Appellant manufactured methamphetamine in the bathroom of the Drury residence and, after consuming a portion of the product and sharing it with others present, he left the scene taking the methamphetamine and tank with him.

Appellant challenges the trial court's ruling on the admissibility of that "other crimes" evidence. Upon review, we are convinced that Martin's testimony of Appellant's involvement in the June 30 events at the Drury residence was properly admitted. The requirements of KRE 404(b)(1) were satisfied because, at a minimum, the evidence had a great tendency to prove the motive and intent behind Appellant's possession of the chemicals and items found at his residence on July 1. Moreover, Martin's testimony about the June 30 event satisfied KRE 404(b)(2) because of its close temporal proximity to Appellant's possession the following day, and because the discovery of the Drury meth lab led directly to the search of Appellant's residence.

Determining the admissibility of KRE 404(b) "other crimes" evidence requires the use of a three-prong test: (1) whether the evidence is relevant; (2) the probative value of the evidence; and (3) whether its probative value is substantially outweighed by its prejudicial effect. *Bell v. Commonwealth*, 875 S.W.2d 882, 891 (Ky. 1994); KRE 403. As noted above, the relevance of the evidence is plain. The probative value of the evidence was great. As evidence of Appellant's knowledge and ability with respect to manufacturing methamphetamine, it tends to persuasively resolve any ambiguity about his purpose for possessing some of the items found at his home. And given his

admissions that he had used meth and previously made it, the prejudicial effect of the "other crime" was not significant.

Admitting the evidence of Appellant's "other crime," (the June 30 meth-making session at the Drury residence) was not problematic until the jury was instructed and closing arguments were made. The trial court instructed the jury on alternate theories of manufacturing methamphetamine; that Appellant could be found guilty if it believed that on or about July 1, 2013:

> A. He knowingly manufactured methamphetamine; OR
>
> B. He knowingly had in his possession with the intent to manufacture methamphetamine two (2) or more of the chemicals or two (2) or more items of equipment for its manufacture.

Then, during its closing argument the Commonwealth, referring to Martin's testimony about the June 30 event, argued to the jury that Appellant's conduct at the Drury residence on June 30 "*in and of itself* satisfies the manufacturing methamphetamine under [alternative A of the jury instruction] all by itself." The prosecutor added, "The whole point right now is did he do what he's charged with — *did he manufacture methamphetamine on June 30* at Drury's residence and I submit to you that the evidence is uncontroverted that he did."

This abrupt shift in the theory of the crime is significant. Suddenly, the June 30 event was no longer just evidence relevant to Appellant's possession of chemicals and items at his home; it had become the very *corpus delicti* of the crime. Appellant objected to the argument and moved for a mistrial. The trial court responded by stating that the evidence regarding Appellant's

manufacturing meth at the Drury residence was part and parcel of the indictment-and was not a prior bad act.

Up until this point in the trial, the combination jury instruction employed by the trial court in this case did not present a potential unanimous verdict problem. However, after the June 30 event was recast as a possible *corpus delicti* of the crime charged in the jury instructions, under the jury instruction and verdict form provided, some jurors could have believed Appellant was guilty of manufacturing methamphetamine by making meth at Drury's on June 30, while other jurors believed Appellant was guilty of manufacturing methamphetamine only because he possessed at his home on July 1 two or more of the chemicals or items of equipment needed for making meth. The creation of this possibility runs afoul of our well-delineated unanimous verdict rules.

"Section 7 of the Kentucky Constitution requires a unanimous verdict." *Wells v. Commonwealth*, 561 S.W.2d 85, 87 (Ky. 1978). "A violation of this provision may occur in several ways; however, as relevant here and as we explained in *Johnson v. Commonwealth*, 405 S.W.3d 439, 449 (2013)], a general jury verdict based upon a single instruction convicting a criminal defendant of a crime when two or more separate instances of that single crime were presented at trial violates the requirement of a unanimous verdict." *Ruiz v. Commonwealth*, ___ S.W.3d ___, 2015 WL 2340406 at *2 (No. 2014-SC-000124 Ky. May 14, 2015).

In *Johnson*, the defendant was charged with a single count of criminal abuse of a child who had suffered two bone fractures at different times, either of which could have supported a conviction of first-degree criminal abuse. A unanimous verdict violation occurred because it was entirely possible that some jurors voted for a guilty verdict based upon one fracture, while other jurors voted for a guilty verdict upon the other. "The clear import of *Johnson* is that a verdict is not unanimous unless all of the jurors based their conviction of the defendant on the same criminal act; and that the instructions and verdict forms must be couched in language that eliminates any ambiguity regarding the jury's consensus." *Id.*

Here, as Appellant contends, the unanimous verdict rule described in *Johnson* and confirmed in *Ruiz* was violated. Once the trial court ruled that the elements of the manufacturing methamphetamine charge could be satisfied by either the June 30 Drury event or the July 1 search of Appellant's residence, some of the jurors may have convicted Appellant for his conduct at one time, while others convicted him based upon his conduct at a different time.

It is not immediately apparent that Appellant's objection to the Commonwealth's transition of the June 30 event and his subsequent motion for a mistrial qualify as preserving the unanimous verdict issue for appellate review. *Johnson*, however, makes clear that a unanimous verdict violation results in a manifest injustice under RCr 10.26:

> This Court concludes that this type of error, which violates a defendant's right to a unanimous verdict and also touches on the right to due process, is a fundamental error that is

> jurisprudentially intolerable. For that reason, the error in this case was palpable and requires reversal of Appellant's criminal-abuse conviction.

Johnson, 405 S.W.3d at 457. "Accordingly, we must regard the error as jurisprudentially intolerable." *Ruiz*, 2015 WL 2340406 at *4. Consequently, we reverse the judgment and remand the matter for a new trial.

Because it may arise as an issue in a retrial, we address Appellant's argument that the trial court improperly excluded evidence of McDaniels' criminal conviction.

III. EXCLUSION OF MCDANIELS' CONVICTION

As noted above, after James McDaniels was arrested at the Drury residence, he tipped off the police that Appellant was using methamphetamine and may be in possession of anhydrous ammonia. That information led directly to the search of Appellant's residence later that day, and ultimately to Appellant's indictment and trial. McDaniels did not testify at Appellant's trial, but Appellant wanted to argue at trial that McDaniels was biased against Appellant by his desire to obtain lenient treatment in his own case, and that bias therefore motivated him to inform police about Appellant. To sustain that theory, Appellant sought to introduce a certified judgment showing that for his role in the Drury residence meth lab, McDaniels was charged only with facilitation to manufacture methamphetamine, rather than the more serious offense of manufacturing methamphetamine. The trial court denied Appellant's request on the grounds that the witness through whom Appellant sought to

introduce the evidence[1] of "special treatment" had no knowledge of the circumstances surrounding McDaniels' conviction, and thus could not say whether McDaniels received lenient treatment.

We affirm the trial court's exclusion of the proffered evidence because McDaniels' motivation for informing police about Appellant was not relevant to any fact in dispute at trial. Evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." KRE 401.

There is no dispute that the police were induced to search Appellant's residence because of what McDaniels told them. The only relevance of McDaniels' tip to police was that it explained why his parole officer and the police came to search Appellant's residence on July 1, 2013. McDaniels' bias against Appellant or his desire to win favorable treatment from police would be relevant to the issue of whether McDaniel's tip was truthful, but the truthfulness of the tip itself is irrelevant to the issues of Appellant's trial. It makes no difference whether McDaniels' tip was true or false; its only relevance is that it caused the police to visit Appellant's home. Neither the truthfulness of the tip, nor the motivation behind it, affects the validity of the search of Appellant's residence.

[1] Former sheriff's deputy Ken Frizzell.

Even if by informing on Appellant, McDaniels successfully curried favor with the police, the fact that he gained lenient treatment not otherwise available to him had no tendency to prove or disprove any issue being tried. Such leniency does not obviate the legality of the search of Appellant's residence and the evidence obtained as a result. Nor does it diminish or impeach any of the other evidence presented at trial in support of Appellant's guilt. Accordingly, the evidence was irrelevant, and the trial court properly excluded McDaniels' criminal conviction.

It is important to note that the situation we address is quite different from the situation where a witness facing pending charges testifies at trial and thus may be motivated to skew his testimony in favor of the prosecution so as to obtain some future benefit following his favorable testimony. Appellant cites to *Davis v. Alaska*, 415 U.S. 308 (1974) (partiality of witness is subject to exploration at trial and is always relevant as discrediting witness and affecting weight of his testimony); *Commonwealth v. Cox*, 837 S.W.2d 898, 900-901 (Ky. 1992) (impeachment evidence that state's witness was on probation for making obscene phone calls was admissible in rape prosecution to show witness' possible bias, and denial of cross-examination on the subject violated defendant's right to confront witnesses); and *Parsley v. Commonwealth*, 306 S.W.2d 284, 286 (Ky. 1957) (the interest of a witness, either friendly or unfriendly, in the prosecution or in a party, is not collateral and may be proved to enable the jury to estimate credibility). Those cases, however, as Appellant admits, stand for the principle that "[t]he bias of a *witness* in the prosecution

or a party is not collateral and may always be proved to enable a jury to properly assess credibility," (emphasis added) and the "[b]ias and interest of a *witness* may be proven by the witness' own testimony on cross-examination or by independent evidence." (emphasis added). The cited cases are not applicable to our review. As noted, McDaniel did not appear as a witness against Appellant, and the truthfulness of his tip and the bias that may have motivated it, have no tendency to prove any issue of fact in the case.

IV. CONCLUSION

For the foregoing reasons, the judgment of the McLean Circuit Court is vacated, and the proceeding is remanded for a new trial consistent with this opinion.

Minton, C.J., Barber, Keller, Noble and Venters, JJ., concur. Abramson, J., concurs in result only. Cunningham, J., respectfully dissents, pursuant to his analysis as put forth as to the unanimity issue in his concurring in part and dissenting in part in *Johnson v. Commonwealth*, 405 S.W.3d 439 (Ky. 2013).

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