RENDERED: APRIL 21, 2006; 2:00 p.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2003-CA-000797-MR

ROGER CRABTREE — APPELLANT

v.

APPEAL FROM CLINTON CIRCUIT COURT
HONORABLE EDDIE C. LOVELACE, JUDGE
ACTION NO. 02-CR-00056

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: COMBS, CHIEF JUDGE; BUCKINGHAM AND KNOPF, JUDGES.

COMBS, CHIEF JUDGE: Roger G. Crabtree appeals from the judgment of the Clinton Circuit Court sentencing him to serve five years in prison after a jury convicted him of unlawful possession of a methamphetamine precursor, pseudoephedrine. Crabtree alleges four errors that he has failed to preserve for our review: that the verdict was not supported by sufficient evidence; that the Commonwealth failed to present competent evidence that the substance he possessed was actually pseudoephedrine; that his rights under the Fifth Amendment were violated by mention of the fact that he had invoked his right to remain silent; and that

the Commonwealth improperly introduced evidence of a plea of guilty by William Abbott, his co-indictee. Finding no error, we affirm.

On August 3, 2002, the employees of the Family Dollar in Burkesville reported to police that two men had purchased multiple packs of Sudafed and had left in a Chevrolet Cavalier. The car was kept under surveillance by Burkesville police officers, who observed Crabtree and Abbott stopping at several other discount stores. The state police were notified, and state trooper Kevin Hunt pulled them over.

Abbott, who was driving his mother's car, consented to a search of the vehicle. Prior to the search, both men denied that they had purchased pseudoephedrine. Trooper Hunt placed Crabtree and Abbott in the back seat of his cruiser for security reasons while he conducted the search. He found numerous blister packs of Sudafed hidden in the console of the car as well as two glass jars on the back passenger floorboard. He returned to the cruiser and asked Abbott what he was doing with the glass jars and so many pills. Abbott replied that they had been planning to sell the pills to someone for $5.00 per package. Hunt then obtained Abbott's consent to search the trunk, where he found more blister packs of Sudafed tablets. A total of 791 Sudafed tablets (weighing 38.82 grams) were seized.

All of the tablets were still in their blister packs -- although the outer cartons had been removed and discarded.

Crabtree was initially indicted under KRS[1] 218A.1432 for manufacturing methamphetamine. By agreement of the parties, the indictment was amended immediately prior to trial to a charge of unlawful possession of a methamphetamine precursor, KRS 218A.1437. The version of the statute then in effect provided in relevant part as follows:

> (1) A person is guilty of unlawful possession of a methamphetamine precursor when he or she knowingly and unlawfully possesses a drug product or combination of drug products containing ephedrine, pseudoephedrine, or phenylpropanolamine, or their salts, isomers, or salts of isomers, with the intent to use the drug product or combination of drug products as a precursor to methamphetamine or other controlled substance.
>
> (2)(a) Except as provided in paragraph (b) of this subsection [an exclusion for retailers, pharmacists, health care professionals, chemists and common carriers], possession of a drug product or combination of drug products containing more than twenty-four (24) grams of ephedrine, pseudoephedrine, or phenylpropanolamine, or their salts, isomers, or salts of isomers, shall constitute prima facie evidence of the intent to use the drug product or combination of drug products as a precursor to methamphetamine or other controlled substance.

[1] Kentucky Revised Statutes.

Two days before Crabtree's trial, Abbott entered a plea of guilty to unlawful possession of a methamphetamine precursor. As a condition of his plea agreement, he agreed to testify against Crabtree. Testimony was also heard from the clerk and the assistant manager of Family Dollar Store who had reported the sale of Sudafed to the police, from law enforcement officers who had conducted surveillance of the two men, and from Trooper Hunt. The defense sought to portray Abbott as the main culprit who alone had been planning to sell the Sudafed for a profit, arguing that Crabtree was merely a passenger. Defense counsel questioned the statutory sufficiency of the quantity of Sudafed and suggested that some of it had already been in the car before the alleged purchases had taken place. Unpersuaded, the jury found Crabtree guilty. He received the maximum sentence of five-years' imprisonment. This appeal followed.

Crabtree first argues on appeal that the trial court erred in denying his motion for a directed verdict. At trial, defense counsel had argued that a directed verdict was warranted because the evidence failed to show that at least twenty-four grams of pseudophedrine had been purchased on the day in question, bolstering the defense theory that some of the tablets had been placed in the car on an earlier date. He has changed his argument on appeal and now contends that the Commonwealth failed to prove a necessary element of the offense: that

Crabtree possessed the requisite statutory intent to manufacture methamphetamine. As this issue was not properly preserved, it can only be reviewed pursuant to RCr 10.26 for palpable error. That rule provides as follows:

> A palpable error which affects the substantial rights of a party may be considered by the court on motion for a new trial or by an appellate court on appeal, even though insufficiently raised or preserved for review, and appropriate relief may be granted upon a determination that manifest injustice has resulted from the error.

Crabtree argues that all of the evidence presented at trial supported the view that he and Abbott were planning to **sell** the Sudafed rather than to manufacture methamphetamine themselves. Trooper Hunt had testified that Abbott admitted to planning to sell the Sudafed for five dollars per package; Abbott testified that Crabtree had given him the name of Ray Wheat as a prospective buyer. Crabtree claims that he should have been charged with unlawful distribution of a methamphetamine precursor because the relevant statute provides that a person may be found guilty of unlawful distribution of a methamphetamine precursor:

> when he or she knowingly and unlawfully sells, transfers, distributes, dispenses, or **possesses with the intent to sell,** transfer, distribute, or dispense any drug product or combination of drug products containing ephedrine, pseudoephedrine, or

> phenylpropanolamine, or any of their salts, isomers, or salts or isomers[.]

KRS 218A.1438 (emphasis supplied).

In reviewing the denial of a motion for a directed verdict, we are governed by the following test:

> if under the evidence as a whole, it would be clearly unreasonable for a jury to find guilt, only then the defendant is entitled to a directed verdict of acquittal.

Commonwealth v. Benham, 816 S.W.2d 186, 187 (Ky. 1991) citing Commonwealth v. Sawhill, 660 S.W.2d 3 (Ky. 1983). Even though Crabtree failed to preserve his argument for a directed verdict, we have undertaken a review with this standard in mind.

The relevant statute presumes that possession of more than twenty-four grams of pseudoephedrine is *prima facie* evidence of the intent to manufacture. KRS 218A.1437.[2] In the context of KRS 218A.1423, which pertains to marijuana cultivation, the Supreme Court provided reasoning analogous to the case before us:

> [T]he legal effect of the statutory presumption . . . is to provide a guide for the trial court in evaluating a motion for directed verdict. When the presumption applies, there is a prima facie case of an intent to sell, thus constituting a question of fact for the jury based upon all the evidence.

[2] KRS 218A.1437 was revised in 2005, lowering the amount required to meet the presumption to nine (9) grams.

Commonwealth v. Collins, 821 S.W.2d 488, 490 (Ky. 1991). Trooper Hunt's testimony and the admission into evidence of more than thirty-eight grams of Sudafed constituted sufficient evidence to overcome a motion for a directed verdict. Thus, we find no error in the denial of the motion for a directed verdict.

Crabtree's next claim of error is that the Commonwealth failed to prove that the tablets were actually pseudophedrine. Again, this issue is unpreserved and can only be reviewed for palpable error. RCr 10.26.

We find no palpable error to justify a review of this issue. At trial, rather than challenging the entry of the tablets into evidence, the defense stipulated as to their admissibility. This challenge is thus improperly raised for the first time on appeal.

As palpable error, Crabtree offers the fact that Trooper Hunt's testimony was the only evidence as to the chemical composition of the tablets. When asked about the identity of the tablets as Sudafed or pseudophedrine, Trooper Hunt replied, "It's printed on the back the pack." No expert witness or chemical analysis was offered into evidence by the defense. We cannot agree that any error occurred -- much less palpable error.

Crabtree alleges as error the violation of his right to remain silent. He cites to the testimony of Trooper Hunt upon direct examination. After he searched the vehicle and found the Sudafed tablets, Trooper Hunt testified that he tried to question Abbott and Crabtree and that they "both invoked their right to an attorney." On re-direct, the following exchange occurred:

> Prosecutor: Okay – did Mr. Abbott talk to you at the scene?
>
> A. Yes, he did.
>
> Q. He – briefly – and Mr. Crabtree didn't make any statements?
>
> A. I think he denied any involvement. The best I can remember – my memory is vague on that part. He may actually have said that they were selling it, but I can't remember.
>
> Q. You can't remember.
>
> A. I can't remember.
>
> Q. Okay – and, **neither one of them made any statements to you after you found the Sudafed?**
>
> A. **Correct.**
>
> (Emphasis supplied.)

In his closing argument, the prosecutor made the following remarks:

> We also know that Mr. Crabtree didn't cooperate. . . . Trooper Hunt testified that both Mr. Abbott and Mr. Crabtree, at that time [when they were pulled over by

> Hunt], they just denied it – didn't know anything about it. . . . **Mr. Abbott has got up on the stand. He's took responsibility for his actions, and he's willing to do his debt to society.**
> (Emphasis supplied.)

Again, this issue was not preserved for appeal and must therefore be reviewed under the palpable error standard. RCr 10.26. Crabtree has raised a serious issue as the right to remain silent cannot be violated with impunity by a careless prosecutor. However, not every comment rises to the level of a Fifth-Amendment violation. The commentary must be deliberately calculated to focus the attention of the jury on the silence of the defendant in derogation of his right to remain silent.

> A prosecutor's comment on the failure of a defendant to testify must be manifestly intended to reflect on the accused's silence or of such a character that the jury would naturally and necessarily take it as such to constitute prejudice.

Byrd v. Commonwealth, 825 S.W.2d 272, 275 (Ky. 1992) citing Bagby v. Sowders, 894 F.2d 792 (6th Cir. 1990).

> The test concerning indirect comments is whether the comment is reasonably certain to direct the jury's attention to the defendant's exercise of his right to remain silent.

Sholler v. Commonwealth, 969 S.W.2d 706, 711 (Ky. 1998) (citations omitted).

In this case, the prosecutor deliberately elicited testimony from Trooper Hunt to underscore Crabtree's silence in not offering an explanation for the presence of the Sudafed tablets in the car. In his closing remarks, the prosecutor was more daring in stressing Abbott's willingness to testify and to take "responsibility for his actions" -- highlighting by contrast Crabtree's refusal to testify.

In the context of the case as a whole, however, we are not persuaded that this error was fatal.

> Palpable error under RCr 10.26 is one that "affects the substantial rights of a party" and will result in "manifest injustice" if not considered by the court, and what it really boils down to is that if upon a consideration of the whole case this court does not believe there is a substantial possibility that the result would have been any different, the irregularity will be held non-prejudicial.

Schoenbachler v. Commonwealth, 95 S.W.3d 830 (Ky. 2003). We cannot find a substantial possibility that the result would have been different if the prosecutor had refrained from his improper commentary on Crabtree's silence. Graves v. Commonwealth, 17 S.W.3d 858, 864 (Ky. 2000).

Crabtree last argues that the trial court erred in permitting the Commonwealth to introduce evidence of Abbott's guilty plea. As no contemporaneous objection was raised, the

alleged error is unpreserved and may only be reviewed under RCr 10.26.

Abbott's plea was first mentioned in the prosecutor's opening statement to the jury:

> You will hear from Scotty Abbott in this case – he was a defendant. He entered a plea in this case. He pled guilty. He's going to testify on behalf of the Commonwealth. You will hear that he got with Roger Crabtree on that day, and they were going to go buy these Sudafed packs for a dollar and resell them for five. They were going to go to Somerset, Kentucky. And, Mr. Abbott can tell you the gentleman's name that Mr. Crabtree told him that they were going to sell the Sudafed to.

In his opening statement, defense counsel also referred to Abbott's plea to Crabtree's advantage, implying that Abbott was the guilty party and that Crabtree was an innocent passenger:

> [e]vidence will also show that Scotty cut a deal with the Commonwealth to testify against Roger. That deal was pre-trial diversion, probation, got sent home. That is what the evidence will show.

Abbott was the Commonwealth's first witness. He testified that he had pled guilty to unlawful possession of a precursor for methamphetamine and that he received a sentence of three years, probated for five years. He testified that one of the conditions of the plea was to testify truthfully; he added that he was completing one year of supervised probation and remained subject to random drug and alcohol testing.

Defense counsel cross-examined Abbott as to the favorable terms of his plea agreement -- especially as to the effect of pre-trial diversion. Abbott testified that the charge against him would be dismissed in five years and that he was not serving any of his sentence in prison. Both the prosecution and the defense alluded to Abbott's plea agreement during closing arguments.

As a general proposition, the introduction of evidence that a co-indictee entered a guilty plea is highly prejudicial and may constitute reversible error. Brock v. Commonwealth, 627 S.W.2d 42, 44 (Ky.App. 1981). "However, an exception to the rule occurs when the defendant permits the introduction of such evidence without objection for the purpose of trial strategy." Tamme v. Commonwealth, 973 S.W.2d 13, 33 (Ky. 1998). This trial strategy generally consists of using the guilty plea to impeach the co-indictee. See Parido v. Commonwealth, 547 S.W.2d 125, 127 (Ky. 1977).

Defense counsel not only did not object to the introduction of evidence of Abbott's guilty plea but appeared to acquiesce in its use in order to be able to utilize it himself to impeach Abbott. **Both** the prosecutor and defense counsel referred to the plea in opening statements, explored it on direct and cross examination, and revisited it in closing arguments.

It is clear from the conduct of the case that Crabtree's counsel co-opted the evidence of Abbott's plea and incorporated it into his own trial strategy. However, Crabtree now relies on Salinas v. Commonwealth, 84 S.W.3d 913 (Ky. 2002), for the proposition that defense counsel's cross-examination on the terms of the guilty plea agreement neither waived the objection nor placed the error beyond our review.

Salinas is highly distinguishable. In Salinas, the error was preserved. Salinas's defense counsel immediately objected to the introduction of evidence regarding the co-indictee's guilty plea. His objection was overruled, and he attempted to salvage the situation by impeaching the co-indictee as to the favorable terms of the plea agreement. On appeal, the Supreme Court held that Salinas could not be penalized under these circumstances:

> any party against whom evidence was improperly admitted would be required to forego cross-examination and enhance the risk of losing at trial, or attempt to cross-examine in an effort to mitigate the prejudicial effect of the evidence and thereby be deemed to have acquiesced in the error.

Id. at 919. Salinas is not applicable to the facts of this case.

Having found no error on any of the grounds alleged, we affirm the judgment and sentence of the Clinton Circuit Court.

ALL CONCUR.

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