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Commonwealth of Kentucky

Court of Appeals

NO. 2004-CA-002309-MR

JERRY LAYTON — APPELLANT

v.

APPEAL FROM BALLARD CIRCUIT COURT
HONORABLE WILLIAM L. SHADOAN, JUDGE
ACTION NO. 04-CR-00005

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING IN PART
AND
VACATING AND REMANDING IN PART

** ** ** ** **

BEFORE: COMBS, CHIEF JUDGE; MOORE AND NICKELL, JUDGES.

COMBS, CHIEF JUDGE: Jerry Layton appeals from a jury verdict and judgment of the Ballard Circuit Court that sentenced him to ten-years' imprisonment following his convictions for facilitation of the manufacture of methamphetamine and engaging in organized crime. After our review, we vacate and remand the judgment for consideration of probation and resentencing in compliance with Kentucky Revised Statutes (KRS) 533.010(2). We affirm as to all remaining issues.

In late October or early November 2003, Amy Wilson and James Swann, fugitives from Missouri, arrived in Kentucky. They resided at the home of Teresa Collier on Chestnut Street in LaCenter, Kentucky. Within hours of arriving, Swann agreed to show John Britt, Collier's son, how to manufacture methamphetamine. Swann and Britt asked Collier for permission to manufacture methamphetamine at her residence, and she agreed.

The resulting "meth lab" at the Collier residence remained in operation until it was shut down on December 9, 2003. According to testimony from Wilson and Swann, a number of different individuals – including Layton – regularly took turns purchasing the ingredients that were used to make methamphetamine at the residence. These individuals kept most of the methamphetamine for their personal use; they sold the remainder to purchase additional ingredients. According to Swann, in order to avoid suspicion, the group later began manufacturing methamphetamine at a house on Hazelwood Road in LaCenter. Layton was in the process of moving into the Hazelwood Road house. Wilson and Swann obtained the key to this house from Layton, Collier, or Britt whenever they wanted to make methamphetamine there.

On November 10, 2003, a manager at Rudy's Farm Service called the Ballard County Sheriff's Office to report the purchase of a product containing iodine by two females. The manager obtained the license plate number of the car used by the women; the police learned that it was registered to Collier. On December 8, 2003, the manager reported another suspicious purchase of iodine to the sheriff's office and again

obtained the license plate number of the car used by the buyers. Its identity revealed that the car belonged to Wilson. On the following day – December 9, 2003 – the pharmacist at a local drugstore contacted the sheriff's office regarding the suspicious purchase of a decongestant containing pseudoephedrine tablets. The pharmacist gave the police a physical description of the woman who made the purchase along with the license plate number of her car.

About twenty minutes later, Deputy Sheriff Jerry Jones located the car that had been at the drugstore and pulled it over. The driver – Teresa Summers – told Jones that she had delivered the pills to Collier's residence. Summers permitted Jones to search the car, and no pills were found. Jones then allowed Summers to leave, and he called the Ballard County Sheriff for further instructions. The sheriff directed Jones to go to Collier's residence, to attempt to secure the premises, and to wait for the sheriff to obtain a search warrant.

When Jones arrived at Collier's residence, Britt, Wilson, and Swann were present. Britt permitted Jones to enter the house. When he entered, he could hear noises coming from the bathroom; apparently Wilson and Swann were attempting to flush the pseudoephedrine pills down the toilet. Teresa Collier arrived a short time later and consented to a search of her house. Police seized a number of items relating to the manufacture of methamphetamine. Swann admitted that a group of people had been making methamphetamine at the Collier residence and at the house on Hazelwood Road. Consequently, a search warrant for the Hazelwood Road residence was sought and

obtained, and police found a number of items there relating to the manufacture of methamphetamine –including matchbooks minus their striker pads, which are used by methamphetamine manufacturers to extract red phosphorous.

On January 16, 2004, Layton was indicted by the Ballard County Grand Jury on two charges: (1) complicity to manufacture methamphetamine, first-degree, a violation of KRS 502.020; and (2) acting as an accomplice in a criminal syndication, a violation of KRS 506.120. On January 20, 2004, Layton appeared in open court with counsel and entered a plea of not guilty to the pending charges.

On January 28, 2004, Layton filed a motion to suppress pursuant to Kentucky Rules of Criminal Procedure (RCr) 9.78. Following a hearing, the trial court entered an order on March 5, 2004, denying the motion. The court found that the search of the Collier residence "was within legally recognized exceptions to the warrant requirement, i.e., exigent circumstances and consent by the lessee of the premises." The court further found that the stop of Summers's vehicle was reasonable and that the search of the Hazelwood Road residence occurred pursuant to a valid search warrant.

Following a jury trial conducted on July 19 and 20, 2004, the jury returned a verdict finding Layton guilty of facilitation of the manufacture of methamphetamine, first-degree, a lesser-included offense of complicity, and guilty of engaging in organized crime. The jury recommended a one-year sentence on the facilitation charge and a ten-year sentence on the organized-crime charge. On October 1, 2004, the trial court entered

a judgment consistent with the jury's recommendations and ordered Layton's sentences to run concurrently. This appeal followed.

On appeal, Layton makes the following claims of error: (I) that he was improperly charged and convicted of engaging in a criminal syndicate because manufacturing methamphetamine is not a predicate offense for such a conviction; (II) that being charged both with complicity in the manufacture of methamphetamine and with being an accomplice in a criminal syndicate constituted a violation of double jeopardy principles; (III) that there was insufficient evidence to convict him; (IV) that the trial court erred in overruling his motion to suppress the search of the Chestnut Street and Hazelwood Road residences; (V) that the trial court abused its discretion when it failed to separate witnesses; and (VI) that the trial court improperly refused to exercise its discretion in sentencing him. A number of Layton's claims have already been addressed and rejected by the Supreme Court of Kentucky in *Britt v. Commonwealth*, No. 2004-SC-0956-MR, 2006 WL 141590 (Ky. Jan. 19, 2006) and *Collier v. Commonwealth*, No. 2004-SC-000955-MR, 2006 WL 2707445 (Ky. Sept. 21, 2006), which involved appeals brought by Teresa Collier and John Britt, Layton's alleged partners in the methamphetamine operation. Thus, where appropriate, we shall adopt the Supreme Court's rulings on these issues as our own.

I.

Layton first argues that he was improperly charged and convicted of engaging in a criminal syndicate because manufacturing methamphetamine is not a

predicate offense for such a conviction. Thus, he argues that he was entitled to a directed verdict on this charge. However, his argument has been considered and rejected by our Supreme Court in both *Collier* and *Britt*; therefore, we adopt its ruling on the matter as set forth in *Britt*:

> Appellant first claims the trial court improperly denied his motion for directed verdict on the organized crime charge. Appellant argues the Commonwealth failed to prove Appellant was involved in trafficking in a controlled substance, one of the statutory qualifiers of a criminal syndicate under KRS 506.120(3). The crux of Appellant's complaint concerns the definition of "traffic" found in KRS 218A.010(28):[1]
>
> Traffic, except as provided in KRS 218A.1431, means to manufacture, distribute, dispense, sell, transfer, or possess with intent to manufacture, distribute, dispense, or sell a controlled substance.
>
> Appellant asserts that KRS 218A.1431 provides an exception to the general definition of "traffic" applicable only to methamphetamine offenses, whereby "manufacture" is not included in the definition. If this interpretation is correct, Appellant could not be convicted of organized crime because he was not trafficking in a controlled substance; rather, he was aiding the manufacture of methamphetamine, which is not an enumerated criminal syndicate statutory qualifier.
>
> We disagree with Appellant's argument and find it unnecessary to conduct extensive statutory interpretation. "On appellate review, the test of a directed verdict is, 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). The organized crime statute does not require the Commonwealth to prove trafficking in a controlled substance actually occurred. *Hill v.*

[1] Appellant cites the former version KRS 218A.010; in 2005 the definitions were renumbered and subsection 28 is now subsection 34.

> *Commonwealth*, 125 S.W.3d 221, 233 (Ky. 2004). Illegal trafficking is part of the definition of "criminal syndicate," and evidence of trafficking goes only to prove the group qualified as a criminal syndicate under KRS 506.120(3)(e). *Id.* Accordingly, Appellant violated the organized crime statute once he "provided material aid" to maintain the criminal syndicate, in contravention of KRS 506.120(1)(b). As a result, the testimony and evidence presented by the Commonwealth was sufficient to present this issue to the jury.

Britt, 2006 WL 141590 at *1-2.

II.

Layton next argues that conviction of complicity in the manufacture of methamphetamine and of being an accomplice in a criminal syndicate violates double jeopardy principles. His argument fails to acknowledge that he was actually convicted of **facilitation** of the manufacture of methamphetamine pursuant to KRS 506.080, which is a lesser-included offense of complicity. *Chumbler v. Commonwealth*, 905 S.W.2d 488, 499 (Ky. 1995). Therefore, our consideration of Layton's argument more properly focuses upon his facilitation and criminal syndicate convictions.

The jury found Layton guilty of "Facilitation to Manufacturing Methamphetamine" under "Instruction No. 4," which provided:

> [Y]ou will find Jerry Layton guilty of Facilitation to Manufacturing Methamphetamine under this Instruction if, and only if, you believe from the evidence beyond a reasonable doubt all of the following:
>
> A. That in Ballard County during the month of November until on or about the 9th of December, 2003, and before the finding of the Indictment herein, he intentionally facilitated

> Jamie Swann or others to Manufacture Methamphetamine by intentionally providing his house to Jamie Swann;
>
> AND
>
> B. When he did so, Jerry Layton knew that Jamie Swann or others had all of the ingredients or equipment necessary to make Methamphetamine, and he intended to Manufacture Methamphetamine.

The jury also found Layton guilty of "Engaging in Organized Crime" under "Instruction No. 5," which provided:

> You, the Jury, will find the Defendant, Jerry Layton, guilty of Engaging in Organized Crime under this Instruction if, and only if, you believe from the evidence beyond a reasonable doubt all of the following:
>
> A. That in this county during the month of November, 2003 until on or about the 9th day of December, 2003 and before the finding of the Indictment herein, he organized or participated with, provided material to, managed, supervised or directed any of the activities of to [sic] a group of five or more persons collaborating to promote or engage in the manufacture of methamphetamine;
>
> AND
>
> B. That when he did so, it was his intent to establish or maintain that group, or to facilitate any activities of that group constituting the manufacture of methamphetamine.

In *Commonwealth v. Burge*, 947 S.W.2d 805 (Ky. 1996), our Supreme Court reinstated the "*Blockburger* rule" as set forth in *Blockburger v. United States*, 284 U.S. 299, 52 S.Ct. 180, 76 L.Ed. 306 (1932), as "the sole basis for determining whether multiple convictions arising out of a single course of conduct constitutes double jeopardy." *Taylor v. Commonwealth*, 995 S.W.2d 355, 358 (Ky. 1999). In addressing a

double jeopardy claim, we must "determine whether the act or transaction complained of constitutes a violation of two distinct statutes, and, if it does, if each statute requires proof of a fact the other does not." *Burge*, 947 S.W.2d at 811; *see also* KRS 505.020(2).

In *Collier* and *Britt,* the Supreme Court rejected the appellants' arguments involving the doctrine of double jeopardy as a bar to their convictions for criminal complicity and organized crime. *See Collier*, 2006 WL 2707445 at *3; *Britt*, 2006 WL 141590 at *2. However, as noted above, Layton was convicted of criminal facilitation -- **not** criminal complicity. KRS 506.080(1) provides that a person is guilty of criminal facilitation:

> when, acting with knowledge that another person is committing or intends to commit a crime, he engages in conduct which knowingly provides such person with means or opportunity for the commission of the crime and which in fact aids such person to commit the crime.

KRS 506.120(1), on the other hand, prohibits a person from engaging in a number of activities "with the purpose to establish or maintain a criminal syndicate or to facilitate any of its activities …." "Criminal syndicate" is defined to mean "five (5) or more persons collaborating to promote or engage in" a number of illegal activities "on a continuing basis." KRS 506.120(3).

In applying the *Blockburger* test, we must examine the proof necessary to prove the statutory elements of each offense rather than the evidence presented at trial. *Mack v. Commonwealth*, 136 S.W.3d 434, 438 (Ky. 2004); *Illinois v. Vitale*, 447 U.S. 410, 416, 100 S.Ct. 2260, 2265, 65 L.Ed.2d 228, 235 (1980). Because KRS 506.120 is a

multi-purpose statute containing numerous alternative grounds for conviction, we must "construct from the alternative elements within the statute the particular formulation that applies to the case at hand" in considering a double jeopardy claim. *Mack*, 136 S.W.3d at 438, quoting *Pandelli v. U.S.*, 635 F.2d 533, 537 (6th Cir. 1980). In doing so, we must eliminate any inapplicable elements and treat the statute as if it were several separate statutes. *Id.* at 439. We then apply *Blockburger* to determine whether two distinct offenses were committed or whether one offense was improperly prosecuted twice.

In reviewing the instructions as to the criminal syndicate charge, the jury was asked to determine if Layton "organized or participated with, provided material to, managed, supervised or directed any of the activities" of a criminal syndicate. These elements are covered by KRS 506.120(1)(a)-(c), which prohibit a person from organizing or participating in organizing a criminal syndicate or any of its activities; providing material aid to a criminal syndicate or any of its activities (whether such aid is in the form of money, other property, or credit); or managing, supervising, or directing any of the activities of a criminal syndicate at any level of responsibility with the purpose of establishing or maintaining a criminal syndicate or facilitating any of its activities. Other prohibited activities contained in KRS 506.120(1) are inapplicable here.

KRS 506.120 clearly requires proof of a number of facts not required by KRS 506.080. For example, KRS 506.120(1) requires a person to have "the purpose to establish or maintain a criminal syndicate or to facilitate any of its activities," a requirement not contained within KRS 506.080. KRS 506.080 also requires proof of a

fact which KRS 506.120 does not. According to KRS 506.080(1), if a person engages in conduct to provide someone with the means or the opportunity to commit a crime, his conduct must actually aid that party in committing the crime. In other words, the crime allegedly being facilitated must **actually be consummated and committed**. *See* KRS 506.080 (LRC Commentary). No consummation requirement is contained within any of the prohibited acts contained within KRS 506.120(1)(a)-(c). Thus, "each statute requires proof of a fact the other does not." *Burge*, 947 S.W.2d at 811.

We also note that there was sufficient evidence to convict Layton of being an accomplice in a criminal syndicate without considering the evidence required to convict him of criminal facilitation. *See Dishman v. Commonwealth*, 906 S.W.2d 335, 341 (Ky. 1995). The criminal facilitation conviction required proof that Layton had provided his house to Swann and others in the group with the knowledge that they would be producing methamphetamine there. However, both Wilson and Swann testified that Layton also bought ingredients that were used by the group in the manufacturing of methamphetamine. That conduct alone of providing materials supported a criminal syndicate conviction. Therefore, Layton's double jeopardy argument must fail.

III.

Layton next argues that there was insufficient evidence to convict him and that he was entitled to a directed verdict. In reviewing the propriety of a directed verdict, we apply the rule of *Benham*: "the test of a directed verdict is, if under the evidence as a

whole, it would be clearly unreasonable for a jury to find guilt ….” *Benham*, 816 S.W.2d at 187. In support of his general argument, Layton raises a number of more specific contentions.

Layton first argues that the trial court erred by permitting the Commonwealth to amend the indictment against him. He contends that the amendment allowed the Commonwealth to improperly introduce evidence of “other bad acts.” The original indictment referenced only the events of December 9, 2003; the amended indictment addressed the events of November through December 9, 2003. Once again, our Supreme Court rejected this very argument in *Collier* and *Britt*; therefore, we are compelled to do the same:

> Appellant next claims the trial court erred by allowing the Commonwealth to amend the date of occurrence listed on the indictment. Appellant argues “other bad acts” evidence was admitted because the original indictment listed only December 9, 2003, while the amended indictment included the month of November through December 9, 2003.
>
> We disagree with Appellant’s assertion. The trial court may allow amendment of the indictment if no new offense is charged, and the defendant is not substantially prejudiced. RCr 6.16. We do not find Appellant was substantially prejudiced by the amendment. The Commonwealth did not present evidence of uncharged offenses committed during the revised time period; rather, the evidence introduced at trial was offered to prove elements of the charged crimes.
>
> Furthermore, in *Gilbert v. Commonwealth*, 838 S.W.2d 376, 378 (Ky. 1992), we upheld the amendment of an indictment altering the year the offense occurred. This Court noted, “[the defendants] were not surprised or misled by the indictment or its amendment.” *Id.* In this case, we are

> likewise compelled to find the trial court did not abuse its discretion by allowing amendment of the indictment.

Britt, 2006 WL 141590 at *2-3.

Layton also argues that he was entitled to a directed verdict pursuant to *Kotila v. Commonwealth*, 114 S.W.3d 226 (Ky. 2003). *Kotila* requires that a person must have possessed either all of the chemicals or all of the equipment necessary to manufacture methamphetamine and that he must have intended to manufacture methamphetamine in order to be convicted. Accordingly, Layton contends that he should not have been convicted of facilitation of the manufacture of methamphetamine because insufficient evidence was introduced to establish that his cohorts possessed all of the chemicals or all of the equipment necessary to manufacture methamphetamine. Again, however, our Supreme Court rejected his reliance on *Kotila* in *Collier* and *Britt*, and we must do the same.

> The Commonwealth introduced ample evidence for a jury to convict Appellant of complicity to manufacture methamphetamine. While our decision in *Matheney* [*v. Commonwealth*, 191 S.W.3d 599 (Ky. 2006)] relaxed the quantum of proof required, even if *Kotila* were still the law, the Commonwealth met its burden. Therefore, the trial court did not err by denying Appellant's motion for a directed verdict of acquittal.

Collier, 2006 WL 2707445 at *4; *see also Britt*, 2006 WL 141590 at *3.

Both Wilson and Swann testified that Layton provided his house on Hazelwood Road to the group for production of methamphetamine after the group became concerned that local police were becoming suspicious of its activities. Therefore,

sufficient evidence was introduced at trial from which a jury could have concluded that Layton facilitated the manufacture of methamphetamine. Wilson and Swann also testified that Layton purchased items used by the group in manufacturing and selling methamphetamine. Therefore, sufficient evidence was introduced at trial from which a jury could have concluded that Layton was an accomplice in a criminal syndicate. Layton questions the reliability of the testimony of Wilson and Swann. However, issues as to witness credibility are matters wholly entrusted to the purview of the jury. *Pate v. Commonwealth*, 134 S.W.3d 593, 599 (Ky. 2004). Thus, we cannot agree that Layton was entitled to a directed verdict.

IV.

Layton next argues that the trial court erred in failing to suppress the evidence found at the Chestnut Street and Hazelwood Road residences as it resulted from an unconstitutional search and seizure. Our Supreme Court addressed and rejected this very same contention in *Britt*. Thus, we adopt its ruling as our own:

> Appellant next alleges the trial court erred by denying Appellant's motion to suppress evidence received from an unconstitutional search and seizure.
>
> Employees of Sutton's Drugs notified the Ballard County Sheriff's Department regarding a suspicious woman who purchased pseudoephedrine tablets on repeated occasions. The employees described the woman as well as the car she was driving. Acting on this information, Deputy Jones initiated a traffic stop of the vehicle, driven by Teresa Summers. After an initial denial, Summers admitted to purchasing the pills and delivering them to the Collier residence. Deputy Jones did not further detain Teresa Summers. After advising his superiors of the situation, he

drove to the Collier residence with intent to secure the premises, concerned that Teresa Summers would "tip off" the occupants to destroy evidence because the police were suspicious.

Appellant responded to Deputy Jones' knock on the front door. Appellant moved aside and allowed Deputy Jones to pass through the doorway into the house. At this time Deputy Jones heard a toilet flush. The toilet was located behind a doorway that was covered by a hanging blanket. Deputy Jones ordered the occupants out of the bathroom. After no response, Deputy Jones removed the blanket, finding co-defendants Swann and Wilson flushing pseudoephedrine pills down the toilet. Deputy Jones did not search the dwelling further, but gathered the occupants in the front room and phoned the county attorney to secure a search warrant. At that time, Teresa Collier, the lessee of the house, arrived. Collier voluntarily consented to a search of the premises and executed a written consent form. Thereafter, additional officers entered the home and searched for evidence of manufacturing methamphetamine. After Swann was in custody, he admitted to flushing the pills and made other incriminating statements regarding manufacturing methamphetamine at the Collier residence and at the Hazelwood house.

It is fundamental that police cannot conduct a warrantless search of a private home absent exigent circumstances. *Commonwealth v. McManus*, 107 S.W.3d 175, 177 (Ky. 2003). On a motion to suppress, the trial court's findings of fact are conclusive if supported by substantial evidence. RCr 9.78. In this case the trial court found the warrantless search constitutional on grounds that Deputy Jones entered the Collier home under exigent circumstances, and the subsequent search of the premises was conducted pursuant to written consent of the lessee.

We find there is substantial evidence to support the findings of the trial court. The Collier home had been under police surveillance for three weeks on suspicion the occupants were operating a methamphetamine lab. Additionally, the police had received information that Swann

> and Wilson, fugitives from Missouri, were staying at the Collier residence. The police had also witnessed Teresa Summers at the Collier house on numerous occasions, thereby corroborating the information obtained during the traffic stop conducted by Deputy Jones. Furthermore, the police knew the occupants of the Collier home purchased high-grade iodine (an ingredient in "red phosphorous" methamphetamine) from a local farm supply store the day before the traffic stop. Accordingly, as a matter of law we are bound by the findings of the trial court because we find no abuse of discretion or clear error.
>
> We also note, however, it may be unnecessary to rely on the exigent circumstances exception in this case. Deputy Jones was allowed entry to the Collier home by Appellant, who is Collier's son. Therefore, it appears Deputy Jones lawfully entered the Collier home with Appellant's consent and secured the premises until Teresa Collier arrived and gave consent to a full search.

Britt, 2006 WL 141590 at *3-4. Our Supreme Court concluded that the search of the Chestnut Street residence was constitutional at least under two exceptions to the warrant requirement. The search of the Hazelwood Road residence was constitutional as well – particularly since a valid search warrant was obtained after Swann admitted that methamphetamine was being produced at that address. Therefore, this argument must fail.

V.

Layton next contends that the trial court abused its discretion when it failed to grant his request to separate witnesses. Kentucky Rules of Evidence (KRE) 615 provides, in part, that "[a]t the request of a party the court **shall** order witnesses excluded so that they cannot hear the testimony of other witnesses and it may make the order on its

own motion." (Emphasis added.) The rule seeks to prevent witnesses from altering their own testimony based on what they may hear from other witnesses. *Epperson v. Commonwealth*, 197 S.W.3d 46, 58 (Ky. 2006). The use of the mandatory auxiliary verb *shall* in KRE 615 removes the matter of witness separation from the discretion of the trial judge "in the absence of one of the enumerated exceptions."[2] *Mills v. Commonwealth*, 95 S.W.3d 838, 841 (Ky. 2003). Upon making a timely request, a party has a right to demand separation of witnesses. *Id.*

As Layton admits in his brief, he did not request a separation of witnesses until after two witnesses had already testified. The first witness testified as to chain-of-custody matters while the second testified about having performed a laboratory analysis on some of the evidence. The trial court subsequently denied the request for separation, correctly reasoning that demand should have been made before any of the witnesses had testified. However, when Layton made the motion to separate before the trial commenced on the second day, the court granted that motion to separate witnesses Wilson and Swann and to exclude them from the courtroom.

Layton complains that Wilson was allowed to sit in the courtroom during the first day of trial and to listen to the testimony of Steve Rudy, an assistant manager of Rudy's Farm Service. Rudy testified that he could not recall seeing Layton in his store purchasing iodine. In a statement given prior to trial, Wilson said that Layton had purchased iodine from Rudy's store. When Wilson was asked during cross-examination on day two about Rudy's testimony that he had not seen Layton in his store, Wilson

[2] None of these exceptions is applicable here.

surmised that many people probably went into the store on a daily basis and Rudy could not remember them all. According to Layton, "[h]ad Wilson not been in the courtroom the day before, she would not have been able to weasel an excuse about the inconsistencies between her testimony and Steve Rudy's."

Although KRE 615 is mandatory, the trial court's denial of Layton's motion to separate must be evaluated in light of the untimeliness of the motion. *See Justice v. Commonwealth*, 987 S.W.2d 306, 315 (Ky. 1998). The Commonwealth argues that even if the judge's denial of Layton's motion to separate was in error, any error was harmless. We agree. RCr 9.24 requires us to disregard errors that do not bear upon the substantial rights of the parties. "The test for harmless error is whether there is any reasonable possibility that, absent the error, the verdict would have been different." *Taylor*, 995 S.W.2d at 361. Even assuming that the trial court erred in failing to separate Wilson as a witness, we cannot conclude that her isolated and speculative bit of testimony upon cross-examination would have changed the result of the trial. There was additional evidence directly linking Layton to the subject methamphetamine operation. Thus, any error committed by the trial court in this respect was harmless and does not require reversal.

VI.

Layton last argues that the trial court failed to properly exercise its discretion in considering the prospect of probation. Although this claim of error was not preserved, we have been asked to review it for palpable error pursuant to RCr 10.26, which provides:

> 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.

Following its deliberations, the jury recommended that Layton serve ten years for criminal syndication and one year for facilitation. Upon receiving this verdict, the trial judge told the jury that it was "sending a message" by its verdicts and that none of the defendants would be probated. He further noted that he would hear the defendants' motions for probation but that he would not consider them. The judge reiterated this sentiment at the sentencing of Teresa Collier:

> If they enter pleas, they're asking me to exercise my discretion. When they go through a jury trial, they're asking the people of Ballard County what their opinion is, and evidently twelve people have said they think she ought to go to the penitentiary.

Layton contends that these comments indicate an inappropriate and prejudiced refusal by the trial court to exercise its discretion in considering probation.

KRS 533.010(2) provides that "[b]efore imposition of a sentence of imprisonment, the court **shall consider** probation, probation with an alternative sentencing plan, or conditional discharge." (Emphasis added.) Whether or not a court actually grants probation or conditional discharge is a matter resting within its discretion; however, "the statute requires that probation or conditional discharge be given consideration." *Brewer v. Commonwealth*, 550 S.W.2d 474, 477 (Ky. 1977).

> In view of this rule, the record of the proceedings leading up to the entry of the judgment should clearly reflect the fact that the consideration required by KRS 533.010 had been afforded the convicted person before judgment was finally entered.

Id. at 478.

In considering the record as it stands before us, it is clear that the trial court did not give proper consideration to the subject of probation as mandated by KRS 533.010(2). We agree that the court committed palpable error in bodaciously announcing its clear and deliberate intention to disregard its statutory duty. Therefore, we vacate the judgment and remand this case for consideration of probation and resentencing in compliance with the statute. *See Mishler v. Commonwealth*, 556 S.W.2d 676, 681 (Ky. 1977); *Patterson v. Commonwealth*, 555 S.W.2d 607, 610 (Ky.App. 1977). It is very likely that upon remand, the trial court may reach the same result. Regardless of the ultimate outcome on the probation issue, the court must reconsider the issue and exercise its discretion anew as to whether to grant probation.

In summary, we vacate and remand the judgment of the Ballard Circuit Court for consideration of probation and resentencing in compliance with KRS 533.010(2). We affirm as to all remaining issues.

ALL CONCUR.

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