

Commonwealth of Kentucky
Court of Appeals

NO. 2006-CA-002413-MR

MELISSA HEMBREE

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE KATHLEEN VOOR MONTANO, JUDGE
ACTION NO. 04-CR-003150

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** *

BEFORE: COMBS, CHIEF JUDGE; LAMBERT, JUDGE; KNOPF,¹ SENIOR JUDGE.

COMBS, CHIEF JUDGE: Melissa Hembree appeals from a jury verdict and judgment of the Jefferson Circuit Court finding her guilty of complicity to manufacture methamphetamine and sentencing her to eleven-years' imprisonment. After our review, we affirm.

On May 27, 2004, officers with the Louisville Metro Police Department executed a search warrant on the residence of Clayton Nagle as part of a

¹Senior Judge William L. Knopf sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

methamphetamine investigation. Upon arriving at the residence at approximately 10:22 p.m., they forced entry through the front door and proceeded into the living room. They observed Hembree removing Sudafed pills from their packs and placing them into a bowl. Sudafed contains pseudoephedrine, an ingredient known to be used in making methamphetamine. Multiple packs of the pills were on a coffee table in front of her and on a couch next to her; it appeared that several hundred pills had been placed into the bowl. The officers apprehended Nagle as he attempted to flee through a back door. He was arrested along with his girlfriend, Shirley Shmigel, and Hembree. Hembree's husband, Jerry Hembree, arrived at the residence some time later and was also arrested.

The police found numerous items used in the manufacture of methamphetamine in the residence, including iodine, "HEET," liquid fire, coffee filters, pipes, glass jars, funnels, lithium batteries, lye, Coleman fuel, approximately 1400 Sudafed pills, a glass flask with red phosphorous residue, and a cigar box full of matchbook strike plates. The police also located a suitcase that contained equipment for a mobile methamphetamine lab, baggies containing methamphetamine, liquid residue from "pill washes," a .22-caliber handgun, three sets of digital scales, and a drug ledger. Many of these items were found in the kitchen, which was directly adjacent to the living room. Others were found in bedrooms, on the rear deck of the house, and in a shed in the backyard.

On November 9, 2004, the Jefferson County Grand Jury indicted Hembree on charges of complicity to manufacture methamphetamine pursuant to Kentucky

Revised Statutes (KRS) 502.020 and 218A.1432; complicity to traffic in a controlled substance, first-degree, pursuant to KRS 502.020 and 218A.1412; and unlawful possession of a methamphetamine precursor pursuant to KRS 218A.1437. Hembree's case was tried before a Jefferson County jury in June 2006. The jury found Hembree guilty of complicity to manufacture methamphetamine and recommended that she serve a sentence of eleven -years' imprisonment. Hembree's post-trial motions were denied. On October 6, 2006, in accordance with the jury's verdict, the court entered an order finding Hembree guilty of complicity to manufacture methamphetamine. The court sentenced Hembree pursuant to the jury's recommendation but withheld imposition of the sentence and granted her conditional probation for a period of five years. This appeal followed.

Hembree first argues that the trial court erred in denying her motion for a directed verdict because the evidence presented at trial was insufficient to support her conviction for complicity to manufacture methamphetamine. Our standard of review as to a denial of a motion for directed verdict was set forth by the Supreme Court of Kentucky in *Commonwealth v. Benham*, 816 S.W.2d 186 (Ky. 1991):

On motion for directed verdict, the trial court must draw all fair and reasonable inferences from the evidence in favor of the Commonwealth. If the evidence is sufficient to induce a reasonable juror to believe beyond a reasonable doubt that the defendant is guilty, a directed verdict should not be given. For the purpose of ruling on the motion, the trial court must assume that the evidence for the Commonwealth is true, but reserving to the jury questions as to the credibility and weight to be given to such testimony.

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.

Id. at 187.

In order to obtain a complicity conviction pursuant to KRS 502.020(1), the Commonwealth must prove that the defendant intended to promote or to facilitate the underlying charged offense. *Harper v. Commonwealth*, 43 S.W.3d 261, 265 (Ky. 2001). In this case, the underlying offense was the possession of two or more chemicals or items of equipment used in the manufacture of methamphetamine with the intent that they be used for that purpose. *See* KRS 218A.1432(1)(b). The Commonwealth also has the burden of proving that another person committed the charged offense and that the defendant participated in that offense. *Harper*, 43 S.W.3d at 265; *see also Parks v. Commonwealth*, 192 S.W.3d 318, 327 (Ky. 2006); Robert G. Lawson & William H. Fortune, *Kentucky Criminal Law* § 3-3(d)(2), at 117 (1998).

Hembree does not dispute that the underlying charged offense was committed by another person. Instead, she contends that the Commonwealth failed to prove complicity on her part because it failed to establish that **she** possessed two or more chemicals or items of equipment used in the manufacture of methamphetamine. Hembree admits that she was in possession of Sudafed pills, which are a critical component in the manufacture of methamphetamine. However, she argues that the Commonwealth failed to prove that she was in possession of any other items used for this purpose. In response, the Commonwealth contends that Hembree had “constructive

possession” of a number of other items contained in the house that are used in the manufacture of methamphetamine.

Constructive possession exists when a person does not have actual possession but instead knowingly has the power and intention at a given time to exercise dominion and control of an object, either directly or through others.

Johnson v. Commonwealth, 90 S.W.3d 39, 42 (Ky. 2002), quoting *United States v. Kitchen*, 57 F.3d 516, 520 (7th Cir. 1995). “To prove constructive possession, the Commonwealth must present evidence which establishes that the contraband was subject to the defendant's dominion and control.” *Pate v. Commonwealth*, 134 S.W.3d 593, 598-99 (Ky. 2004), quoting *Burnett v. Commonwealth*, 31 S.W.3d 878, 881 (Ky. 2000).

Hembree argues that the Commonwealth did not establish that she had constructive possession over any other items used to manufacture methamphetamine or that she had the intention to promote or facilitate the manufacture of methamphetamine. However, she admits that she cleaned Nagle's home and did laundry there two to three times per week; she had access to the kitchen, laundry room, and living room and to all the items contained located in those areas. She also acknowledges that many of items used in the manufacture of methamphetamine – Mason jars, aluminum foil, lithium batteries, coffee filters, plastic baggies, and funnels – were found in the kitchen, which is directly adjacent to the living room in which she was found with the Sudafed tablets. Since constructive possession is established when items are subject to a person's dominion and control, we cannot say that it was “clearly unreasonable” for the jury to have found that Hembree had constructive possession of these items. The *Benham* test,

which requires us to consider the evidence in the light most favorable to the Commonwealth, reinforces this conclusion. *Benham*, 816 S.W.2d at 187.

While Hembree testified at trial that she had no intention to assist in the manufacture of methamphetamine, she also admitted that she suspected that the Sudafed pills in her possession were going to be used for that purpose. She cooperated with Nagle and complied with his request to remove them from their packs and place them in a bowl. She testified that she believed that Nagle was helping one of his friends make methamphetamine and acknowledged that possession of that much Sudafed was illegal. In light of her testimony, coupled with the the “clearly unreasonable” standard governing our review of the denial of a motion for directed verdict, we conclude that the court did not err in submitting Hembree's charges to a jury. “Intent can be inferred from the actions of an accused and the surrounding circumstances. The jury has wide latitude in inferring intent from the evidence.” *Anastasi v. Commonwealth*, 754 S.W.2d 860, 862 (Ky. 1988).

Hembree last argues that the trial court erred by submitting an instruction to the jury that failed to include “intent” as a necessary element for a finding that she was guilty of complicity to manufacture methamphetamine. “Alleged errors regarding jury instructions are considered questions of law that we examine under a *de novo* standard of review.” *Hamilton v. CSX Transp., Inc.*, 208 S.W.3d 272, 275 (Ky.App. 2006). Hembree particularly challenges the following instruction:

**INSTRUCTION NO. 1 – MANUFACTURING
METHAMPHETAMINE – COMPLICITY**

You will find the Defendant, MELISSA DIANE HEMBREE, guilty under this Instruction if, and only if, you believe from the evidence beyond a reasonable doubt all of the following:

That in Jefferson County, Kentucky, on or about the 27th day of May, 2004, MELISSA DIANE HEMBREE, acting alone or in complicity with another, possessed the chemicals or equipment for the manufacture of methamphetamine with intent to manufacture it.

According to Hembree, this instruction is deficient “for its failure to specifically include *her* mental state – *her* intent to manufacture methamphetamine;” therefore, she contends that the trial court's judgment must be reversed because she was substantially prejudiced by the instruction. We disagree.

The instruction indisputably advises that the jury could find Hembree guilty only if it found that she, “acting alone or in complicity with another, possessed the chemicals or equipment for the manufacture of methamphetamine **with intent to manufacture it.**” (Emphasis added). Hembree also fails to point out that the definitional provision of the jury instructions expanded upon *complicity* as follows:

... that a person is guilty of an offense committed by another person when, **with the intention of promoting or facilitating the commission of the offense**, he solicits, commands, or engages in a conspiracy with such other person to commit the offense, or aids, counsels, or attempts to aid such person in planning or committing the offense.

(Emphasis added). The Supreme Court of Kentucky has held that such an instruction is in harmony with KRS 502.020 and satisfies the intent requirement for a complicity

charge. *Crawley v. Commonwealth*, 107 S.W.3d 197, 200 (Ky. 2003). We conclude that the trial court did not err in denying Hembree's claim of error.

The judgment of the Jefferson Circuit Court is affirmed.

ALL CONCUR.

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