STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

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Appeal from Spartanburg County
R. Lawton McIntosh, Circuit Court Judge

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THE STATE,

Respondent,

vs.

TIPHANI MARIE PARKHURST,

Appellant.

APPELATE CASE NO. 2013-000909

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**FINAL BRIEF OF RESPONDENT**

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## STATEMENT OF ISSUES ON APPEAL

I.

The trial court did not err in denying Appellant's pretrial motion to dismiss Appellant's charges because the empty pseudoephedrine blister packs, taken in conjunction with the chemist's testimony about how methamphetamine is produced, established the intent of Appellant and her codefendant to manufacture in excess of ten grams of methamphetamine based on the potential yield of the quantity of pseudoephedrine that came from the empty blister packs; and the issue should have been raised in a motion for directed verdict and not a pretrial motion, therefore, the issue is not preserved for review.

II.

Evidence supported Appellant's guilt where evidence established that Appellant had control over the premises where the meth lab was found, where Appellant and her codefendant claimed to live together in the bedroom of the residence, where Appellant and codefendant allowed their dog to roam the remainder of the premises, where Appellant and her codefendant barricaded the door to the bedroom when the meth lab was found elsewhere in the house, where they fled the scene in their car after pouring out the contents of a one pot in the early stages of meth production, and where evidence indicated that Appellant and codefendant were the only people living in the house.

## STATEMENT OF THE CASE

Appellant Parkhurst was indicted for trafficking methamphetamine. She was tried jointly with co-defendant Charles Allen Cain by jury before the Honorable R. Lawton McIntosh on February 28 and March 1, 2013. Neither Parkhurst nor Cain appeared at their jury trial. The jury found both defendants guilty.

The sentencing hearing was April 11, 2013. Judge McIntosh sentenced Parkhurst to five years' imprisonment suspended on three years' imprisonment and forty months' probation.

## STATEMENT OF FACTS

Appellant Parkhurst and co-defendant Charles Cain furtively fled away while law enforcement was executing a search warrant at the house where they claimed to reside. By the time law enforcement found the methamphetamine lab, Parkhurst and Cain had already pulled away in their car.

Deputy Kevan Kyle, accompanied by Deputy Wilbanks, was attempting to serve a family bench warrant on an individual by the name of Travis Kirby on January 17, 2012, at the trailer. Parkhurst and Cain were present at the residence when Deputy Kyle was trying to serve the warrant. Deputy Kyle testified he knocked on the back door because a car was parked in front of that door. Both Parkhurst and Cain came to the door. Both supplied their identification to Deputy Kyle upon his request. They claimed not to know Kirby. They also claimed to rent only one bedroom in the house, that was the only area they went in, and they had nothing to do with the rest of the house. Deputy Kyle testified that Parkhurst and Cain did not want him to look inside the remainder of the house. ROA. p. 35.

Deputy Kyle testified that he felt Parkhurst and Cain were acting nervous and noticed they made furtive gestures, so he thought maybe they were hiding Kirby. Deputy Kyle noticed a dog running around the house, which Parkhurst and Cain admitted was their dog. Deputy Kyle testified "[a]s we proceeded through the rest of the house, we actually found their dog that they had shut in the rest of the house shut off in their bedroom while we were talking to them." ROA. pp. 35-36 (direct quote, p. 36, lines 16-18); p. 43.

The deputies left the bedroom where the codefendants claimed to be staying and

proceeded into the hallway and through the rest of the house. Deputy Kyle found a meth lab in the far corner of the house. He saw a bottle resting on the counter in the bathroom with tubing coming out of the top of the bottle. The tubing extended through an open window. Deputy Kyle recognized this as an active meth lab at the gassing-out stage where noxious gas is vented to the outside. ROA. p. 37; State's Exhibits Nos. 3 and 4. In the living room were several bottles with multicolored pellets common for one pot methamphetamine manufacturing. Deputy Kyle also saw tin foil, batteries and coffee filters, the latter used to strain methamphetamine out of liquids in the meth lab. ROA. p. 38.

Deputies Kyle and Wilbanks decided that Kirby was not in the house and went back to the bedroom where they originally found Parkhurst and Cain. The door to the bedroom was now barricaded. Deputy Wilbanks forced the door open enough to determine that boards were propped against the door to prevent the deputies from entering the bedroom and to seal the deputies in the house. The deputies discovered Parkhurst and Cain were gone, as was the codefendants' car. ROA. pp. 39-40.

Outside the exterior door utilized by Parkhurst and Cain were the freshly poured contents of a one pot meth lab, multicolored pellets poured out on the grass and concrete were still fresh and wet. ROA. p. 39, lines 3-12; p. 42.

Deputy Wilbanks also testified. He went with Deputy Kyle to serve the bench warrant. ROA. p. 51. Deputy Wilbanks testified that the bedroom which Parkhurst and Cain claimed they stayed in did not have a kitchen or a bathroom attached. He did not notice any pots or pans, or any silverware in the room. ROA. p. 54. The deputies went

through the door of the bedroom to access the rest of the house. Actually, Cain opened the door to allow the deputies into the rest of the house. Deputy Wilbanks testified that Parkhurst and Cain would have access to the rest of the house. ROA. p. 54.

Deputy Wilbanks testified that when the dog, a pit bull, came running towards them, Deputy Wilbanks said he may have to shoot the dog, and Cain spoke up and said, "Don't shoot my dog, hold on, let me get him." ROA. p. 59, lines 13-17.

Deputy Wilbanks recalled only one bathroom in the house. ROA. p. 55. Although the power and water were not turned on at the house, Deputy Wilbanks testified that the toilets and sinks might have been able to run because Deputy Wilbanks observed drop cords and hose pipe from the trailer to the house. ROA. pp. 57-58

Deputy Wilbanks testified as follows on the issue of Cain and Parkhurst's access to the house:

> Q: Okay. Let's see. You told [prosecutor] that the defendants had access to the rest of the house.
>
> Is this based on an assumption because there was no kitchen or bath in the bedroom that you came into?
>
> A: No, I based it on when we asked to search the residence. Mr. Cain opened the door for us.
>
> Q: Okay.
>
> A: So, he gave us access to it. So, I know he would have access as well.

ROA. p. 58, lines 11-19.

After the deputies found the meth lab and determined there were no other people in the house, they headed back down the hallway and attempted to enter the door to the

bedroom, but it was barricaded. Deputy Wilbanks testified he was able to force it open to reenter the bedroom. ROA. pp. 55-56. When they made it back into the bedroom, they realized the vehicle was gone and so were Parkhurst and Cain. ROA. pp. 55-56. On the way back out of the house, they saw the spilled-out contents of the one pot bottle on the cement patio outside the bedroom door ROA. pp. 56-57. As Deputy Wilbanks explained, "That picture of the contents of the, of what Officer Kyle referred to as a one pot bottle was on the cement of the porch we had initially stood on to knock on that door." ROA. p. 56, lines 19-23.

Chemist Beth Stuart testified last for the State. She testified she has bachelor's degrees in chemistry and biochemistry from the College of Charleston and a master's degree in chemistry from the University of South Carolina. ROA. p. 67. She went to the police academy and trained with the Drug Enforcement Agency's forensic chemist school and their clandestine lab school. She is a member of the Clandestine Lab Investigating Chemists Association. She is certified by the American Board of Criminalistics in all areas of forensic science. She testified this is national certification that requires forty hours of continuing training in forensics each year. ROA. pp. 67-68. Stuart has testified as an expert thirty-four times. ROA. p. 68. She was qualified without objection as an expert in forensic chemistry and chemical analysis. ROA. p. 69.

Stuart went to the crime scene on January 17, 2012. She went straight to the bathroom and noted the tubing extending from the bathroom counter out the window. ROA. p. 75. She unscrewed the lid enough to use pH paper and determined the content was acidic, which she testified "is typical when someone is what we call in the gassing out

phase of the methamphetamine at the very end." ROA. p. 76, lines 1-14.

In the living room were trash bags lying on the floor and also coffee filters. Inside one of the trash bags was a bottle containing pieces of strippings from batteries, face masks, and blister packs of cold medicine. There were unused strips of lithium, taken from lithium batteries, in the bottom of a bucket. Stuart also found two-liter bottles with pink and white pellets mixed together. ROA. pp. 77-80. Stuart explained what these pellets were and how they were used in the manufacturing process as follows:

> In the process of making methamphetamine, what you have to do in order to manufacture it is you take your pseudoephedrine and crush it up. Now, anybody that's taking cold medicine, the tablets are typically red when you pop them out of the blister packs. So, that's the pink pellets that you see in there. So, they crush that up and they put it down into the bottle. Then they take a cold pack, which I haven't showed you a picture of that yet, but we'll get to it in just a few minutes, the cold pack, you know the ones you go buy in the store that you pop them together and you put them on your booboos or whatever to make them feel better, they take those, but they don't need the water portion of that. They discard that.
>
> What's in . . . the other pack, the white little prills [sic] that you see is actually ammonia pellets, they need those to produce ammonia gas in their reaction to get the reaction to go So, they take the Pseudoephedrine, put it in the bottle, and then they pour what I call an organic solvent over the top, and all an organic solvent . . . like Coleman fuel, lighter fluid, something like that that they pour over the top of it

ROA. p. 80, line 10 - p. 81, line 6. Stuart further testified that the next part of the process is adding lithium strips from batteries and lye. This will start a reaction, but to further the reaction, water is added. The water gets the reaction going because the lithium is water reactive. ROA. p. 81-82.

The chemical reaction induced produces the meth base, which is not consumable. The liquid, which contains the methamphetamine, is poured off from the bottles and what is left in the bottles is the solid seen in the photographs. The solid remaining in the bottle is waste. ROA. pp. 80-82. Several bottles of this pink solid were found. ROA. p. 80, p. 82, p. 87, State's Exhibits Nos. 12 and 24.

The liquid is then used in an acid gas generator, the bottle with a tube running out. ROA. p. 82; State's Exhibits Nos. 3 and 4. Acid gas causes the methamphetamine to fall out into a white powder forming at the top of the solution. This is the gassing-out phase of production. The white powder becomes the consumable methamphetamine. ROA. pp. 82-83. Using a funnel and coffee filters, the white powder is filtered out from the liquid to produce useable methamphetamine. ROA. p. 84. None of the coffee filters that were found had meth residue. ROA pp. 84-85. State's Exhibit Number 24, found in the living room, is a bottle that Stuart determined was acidic and likewise in the last step of the manufacturing stage. ROA. p. 79.

State's Exhibit Number 7 shows a cold pack found in the hallway on the way from the living room to the bedroom. ROA. p. 83. Stuart testified about aluminum foil that was also found. Aluminum foil is used to make a more violent reaction during the manufacturing process. ROA. p. 84; State's Exhibit No. 9. She testified that syringes were also found. One way to consume methamphetamine is by shooting up the methamphetamine. ROA. p. 86; State's Exhibit No. 11.

Stuart determined the empty blister packs would have contained a total of 19.2 grams of pseudoephedrine. ROA. pp. 90-91. She testified that a hundred percent yield

from this much pseudoephedrine would produce 17.67 grams of methamphetamine. She testified as to how much methamphetamine would be produced under different yield rates. Notably, even a sixty-five percent yield would still produce 11.48 grams of methamphetamine. ROA. pp. 99-100.

In her brief, Parkhurst suggests the owner of the house was unknown to the jury. However, defense witness Leon Fowler testified that he lived in the trailer "behind my house that everyone's talking about." ROA. p. 116, lines 13-24. He subsequently clarified that his son owned both the house and trailer. ROA. p. 117. Fowler testified that he thought the defendants were living in just one room, but he was not sure. But he was unaware of anyone else living in the house. ROA. p. 118. Fowler testified that he does not go in the house at all. ROA. p. 119. In the State's case-in-chief, Deputy Wilbanks testified he was familiar with the address and familiar with Leon Fowler, Sr., who Wilbanks thought was the property owner. ROA. p. 53.

Fowler also testified that Cain and Parkhurst had not lived in the house very long, only two or three weeks. ROA. p. 119. Fowler did not know them, but he knew they were his son's friends. ROA. p. 119. On cross-examination, he testified he "didn't want to know [what was going on in the house]." ROA. p. 122, lines 18-19. Fowler testified that he did not know there was a meth lab in the house. ROA. p. 122, lines 24-25.

## ARGUMENT

### I.

**The trial court did not err in denying Appellant's pretrial motion to dismiss Appellant's charges because the empty pseudoephedrine blister packs, taken in conjunction with the chemist's testimony about how methamphetamine is produced, established the intent of Appellant and her codefendant to manufacture in excess of ten grams of methamphetamine based on the potential yield of the quantity of pseudoephedrine that came from the empty blister packs; and the issue should have been raised in a motion for directed verdict and not a pretrial motion, therefore, the issue is not preserved for review.**

Parkhurst was convicted of trafficking methamphetamine based on a theory that she and Cain attempted to manufacture more than ten grams of methamphetamine.[1] The evidence supporting the element of weight for this offense was based on the theoretical yield of methamphetamine produced from pseudoephedrine that would have been contained in the empty blister packs recovered from the house. Parkhurst argues that theoretical yield should not be calculated based on empty blister packs, but may only be calculated from actual pseudoephedrine recovered (no intact pills were recovered).

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1 Under S.C. Code § 44-53-375(C):

> A person who knowingly . . . manufactures, . . . or otherwise aids, abets, attempts, or conspires to . . . manufacture, . . . ten grams or more of methamphetamine . . . in violation of the provisions of Section 44-53-370, is guilty of a felony which is known as "trafficking in methamphetamine . . ."

Under S.C. Code § 44-53-375(D): "Possession of equipment or paraphernalia used in the manufacture of . . . methamphetamine is prima facie evidence of intent to manufacture."

Parkhurst ignores the pink mush visible in State's Exhibits Numbers 12-15 and 23-24.

At trial, Cain and Parkhurst argued in a pretrial motion that the charge of trafficking methamphetamine should be dismissed because according to counsel, "I don't think there's anything in this statute or in South Carolina law that says you can take a theoretical yield based on the evidence found and make it into a trafficking case." ROA. p. 11. In the instant case, the State provided abundant evidence of materials gathered for the production of methamphetamine and also evidence of ongoing manufacturing in the meth lab. Part of this evidence was the presence of empty blister packs found in the home. The State's expert, Stuart, was able to determine a theoretical yield based on the amount of pseudoephedrine that would be in the empty blister packs.

The procedural stance upon which Parkhurst raised this issue is odd. The issue was not raised as a directed verdict motion, which would be more appropriate. Parkhurst failed to raise the perceived deficiency of proof in her motion for directed verdict.

Perhaps Parkhurst seeks a *per se* rule that theoretical yield could not be calculated based on empty blister pack containers of pseudoephedrine. This argument ignores the obvious inference that the pseudoephedrine originally in the empty blister packs was consumed in the manufacturing process that was still ongoing at the time law enforcement happened upon the meth lab. The surrounding circumstances persuasively point toward this conclusion.

"It is undisputed in the scientific community that chemical processes exist whereby pseudoephedrine can be converted into methamphetamine." People v. Wilke, 854 N.E.2d 275, 281 (Ill. App. Ct. 2006) (finding expert testimony that 3,908 pills containing 124.7

grams of pseudoephedrine could yield 114 7 grams of methamphetamine was a scientifically sound conclusion). Wilke found that not only could an expert testify as to the potential yield of methamphetamine from precursor substances such as pseudophedrine, but that analysis under Frye v. United States, 293 F. 1013 (D.C. Cir. 1923) is unnecessary to elicit such testimony. Wilke, at 281. Parkhurst does not challenge the fact that pseudoephedrine is the primary ingredient in the manufacture of methamphetamine or that potential yield calculations are improper to determine how much methamphetamine is produced from a given quantity of pseudoephedrine. The crux of Parkhurst's argument seems to be that no inference is allowable from the existence of a multitude of empty pseudoephedrine blister packs.

Other jurisdictions have determined yield calculations based on empty precursor containers to be allowable evidence sufficient to support factual findings for the intended quantity of methamphetamine production. In United States v. Engler, 521 F.3d 965 (8th Cir. 2008), one of the defendants argued that evidence was insufficient to support a verdict for attempted manufacture of more than five grams of methamphetamine. However, the Eighth Circuit found evidence was sufficient based on evidence including the recovery of "empty blister packs amounting to 2016 pseudoephedrine pills which could theoretically yield 55 grams of methamphetamine." Id. at 974.

In another case, the Eighth Circuit noted: "A chemist's testimony at trial substantiates a finding that the [meth] lab was capable of producing a maximum theoretical yield of 510 grams of actual methamphetamine, based on empty precursor containers." United States v. Titlbach, 339 F.3d 692, 696 (8th Cir. 2003).

Similarly, the Ninth Circuit found reliance for sentencing purposes on an expert's yield calculations of methamphetamine based on two empty one-pound containers of ephedrine was not clearly erroneous. United States v. Basinger, 60 F.3d 1400, 1409 (9th Cir. 1995).

In Varble v. Commonwealth, 125 S.W.3d 246 (Ky. 2004), the Kentucky Supreme Court rejected the argument that Varble could not be convicted of manufacturing methamphetamine because no anhydrous ammonia or coffee filters were recovered. The court noted testimony about the odor of anhydrous ammonia from two air tanks and disclosure of brass fittings likely caused by anhydrous ammonia as circumstantial evidence of possession of the precursor. In rejecting Varble's argument, the Kentucky Supreme Court commented: "Appellant's argument is akin to claiming that his possession of twenty-two Sudafed blister packs would not support his conviction because the blister packs were empty." Id. at 254.

As these cases demonstrate, the logical conclusion in the instant case is that the pseudoephedrine once contained in the empty blister packs was utilized in the meth lab where the blister packs were found. The issue was a question of fact appropriate for the jury's determination, and not a question of law for the trial court to determine before evidence was even presented.

Further, missing from Parkhurst's analysis is discussion of the evidence of used up pseudoephedrine. Several one pot bottles were found with a pink mush, which is the byproduct of methamphetamine production. See State's Exhibits Nos. 12 and 23. Referencing the photograph admitted as State's Exhibit Number 23, Stuart directed the

jurors' attention to "pink little pellets and white pellets all mixed into the bottom together, and you can see little black specs in there too." ROA. p. 80, lines 3-9. She explained: "In the process of making methamphetamine, what you have to do in order to manufacture it is you take your pseudoephedrine and crush it up. . . .[T]he tablets are typically red when you pop them out of the blister packs. So that's the pink pellets you see in there." ROA. p. 80, lines 10-15. State's Exhibit Number 12 depicts three more one pots. Stuart noted "they're very pink from that, where the Pseudoephedrine was crushed up in them." ROA. p. 87. So there is the evidence of what became of the missing pseudoephedrine pills Parkhurst argues are necessary for her conviction.

The empty blister packs, in conjunction with remnants of pseudoephedrine pills found in the one pot bottles and discarded outside the co-defendants' bedroom door, create a reasonable inference that the 19.2 grams of pseudoephedrine originally in the blister packs was utilized in the methamphetamine manufacturing process. Whether or not the pseudoephedrine was so utilized was a question for the jury. Jackson v. Virginia, 443 U.S. 307, 319 (1979) (noting the responsibility of the trier of fact "to resolve conflicts in testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts"). Accordingly, the trial court did not err in denying the pretrial motion to dimsiss.

Parkhurst's argument is in actuality a challenge to the sufficiency of the evidence, and the proper vehicle for challenging the sufficiency of evidence is a motion for directed verdict. State v. Green, 350 S.C. 580, 586, 567 S.E.2d 505, 508 (Ct. App. 2002) ("A motion for directed verdict . . . contests the *sufficiency* of the State's *properly admitted*

evidence." (emphasis in the original)). Note Parkhurst fails to challenge on appeal the admission of the expert testimony concerning potential yield. Its admission is the law of the case as it is unchallenged on appeal. Burton v. County of Abbeville, 312 S.C. 359, 363, 440 S.E.2d 396, 398 (Ct. App. 1994) (finding circuit court ruling that was not mentioned or challenged in appellant's brief was the law of the case); State v. Sampson, 317 S.C. 423, 427, 454 S.E.2d 721, 723 (Ct. App. 1995) (finding unchallenged rulings were the law of the case).

Further, Parkhurst waived a challenge to the sufficiency of this evidence when Parkhurst failed to raise the issue in a motion for directed verdict. Issues not raised to the trial court in support of the directed verdict motion are not preserved for appellate review. State v. Russell, 345 S.C. 128, 132, 546 S.E.2d 202, 204 (Ct. App. 2001); State v. Jordan, 255 S.C. 86, 177 S.E.2d 464 (1970).

Regardless, evidence was sufficient to support the verdict. When considering a motion for directed verdict, the trial court is concerned with the existence of evidence, not its weight. State v. Walker, 349 S.C. 49, 53, 562 S.E.2d 313, 315 (2002). In reviewing the denial of a motion for a directed verdict, the reviewing court must view the evidence in the light most favorable to the State. Id. If there is any direct evidence or any substantial circumstantial evidence reasonably tending to prove the guilt of the accused, an appellate court must find that the case was properly submitted to the jury. State v. McGowan, 347 S.C. 618, 622, 557 S.E.2d 657, 659 (2001). In the instant case, the obvious inference is that the empty blister packs contained pseudoephedrine in sufficient amounts to produce more than ten grams of methamphetamine and Parkhurst and Cain were attempting to do

just that based on the meth lab in the bathroom that was in the gassing-out phase of production and the empty one pots found in the house, as well as other ingredients, instruments, and remnants of methamphetamine production.

## II.

**Evidence supported Appellant's guilt where evidence established that Appellant had control over the premises where the meth lab was found, where Appellant and her codefendant claimed to live together in the bedroom of the residence, where Appellant and codefendant allowed their dog to roam the remainder of the premises, where Appellant and her codefendant barricaded the door to the bedroom when the meth lab was found elsewhere in the house, where they fled the scene in their car after pouring out the contents of a one pot in the early stages of meth production, and where evidence indicated that Appellant and codefendant were the only people living in the house.**

Parkhurst argues the evidence failed to establish her intent to traffic methamphetamine. Parkhurst hangs on to her and Cain's self-serving contention that they stayed in only one room of the house and did not have access to the other parts of the house where the meth lab, meth ingredients, and paraphernalia of meth production were found. This argument ignores: (1) Parkhurst and Cain's guilty conduct in fleeing the scene before law enforcement discovered the meth lab, (2) Parkhurst and Cain's demonstration of access and control over the premises by shutting their dog out of their bedroom and into the remainder of the house, and (3) evidence indicating that Parkhurst and Cain lived alone in the house. The State provided more than sufficient evidence of trafficking for the trial court to submit the case to the jury.

When considering a motion for directed verdict, the trial court is concerned with the existence of evidence, not its weight. State v. Walker, 349 S.C. 49, 53, 562 S.E.2d 313, 315 (2002). In reviewing the denial of a motion for a directed verdict, the reviewing court must view the evidence in the light most favorable to the State. Id. If there is any

direct evidence or any substantial circumstantial evidence reasonably tending to prove the guilt of the accused, an appellate court must find that the case was properly submitted to the jury. State v. McGowan, 347 S.C. 618, 622, 557 S.E.2d 657, 659 (2001).

Ultimately, the question is whether, in view of the evidence in the light most favorable to the State, a rational trier of fact could find all the elements beyond a reasonable doubt. State v. Robinson, 310 S.C. 535, 539, 426 S.E.2d 317, 318 (1992) (finding any rational trier of fact could have found all the elements of the crime beyond a reasonable doubt in affirming the denial of a motion for directed verdict and citing Jackson v. Virginia, 443 U.S. 307 (1979)).

The United States Supreme Court noted the following:

> [T]he relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. . . . This familiar standard gives full play to the responsibility of the trier of fact fairly to resolve conflicts in the testimony, to weigh the evidence, **and to draw reasonable inferences from basic facts to ultimate facts**.

Jackson, at 319 (second emphasis added).

Our Supreme Court recently articulated the following concerning the standard of review:

> The trial court should grant the directed verdict motion when the evidence merely raises a suspicion that the accused is guilty as suspicion implies a belief or opinion as to the guilt based upon facts or circumstances which do not amount to proof. On the other hand, a trial judge is not required to find that the evidence infers guilt to the exclusion of any other reasonable hypothesis.

State v. Hepburn, 406 S.C. 416, 753 S.E.2d 402, 409 (2013) (quoting State v. Cherry, 361 S.C. 588, 593, 606 S.E.2d 475, 478 (2004) (citations and internal quotations omitted)). This is consistent with the United States Supreme Court's observation concerning circumstantial evidence:

> Admittedly, circumstantial evidence may in some cases point to a wholly incorrect result. Yet this is equally true of testimonial evidence. In both instances, a jury is asked to weigh the chances that the evidence correctly points to guilt against the possibility of inaccuracy or ambiguous inference. In both, the jury must use its experience with people and events in weighing the probabilities. If the jury is convinced beyond a reasonable doubt we can require no more.

Holland v. United States, 348 U.S. 121, 137-38 (1955) *cited with approval in* Jackson, at 317 n.9.

Parkhurst was convicted of trafficking based on the conduct of attempting or aiding and abetting in the manufacture of methamphetamine. See S.C. Code § 44-53-375(C). "'Manufacture' means the production, preparation, propagation, compounding, conversion, or processing of a controlled substance, either directly or indirectly by extraction from substances of natural origin, or independently by means of chemical synthesis, or by a combination of extraction and chemical synthesis, . . . ." S.C. Code § 44-53-110. "'Methamphetamine' includes any salt, isomer, or salt of an isomer, or any mixture of compound containing amphetamine or methamphetamine. . . ." Id.

Attempt crimes are specific intent crimes that require the State to prove the defendant's specific intent coupled with an overt act, beyond mere preparation and in furtherance of that intent, and the actual or present ability to complete the crime. State v.

Nesbitt, 346 S.C. 226, 231, 550 S.E.2d 864, 866 (Ct. App. 2001). The overt act is sufficient if it goes "far enough toward accomplishment of the crime to amount to the commencement of its consummation." State v. Quick, 199 S.C. 256, 259, 19 S E.2d 101, 102 (1942).

"The intent with which an act is done denotes a state of mind and can be proved only by expressions or conduct considered in the light of the given circumstances. Intent is seldom susceptible to proof by direct evidence and must ordinarily be proven by circumstantial evidence, that is, by facts and circumstances from which intent may be inferred." State v. Tuckness, 257 S.C. 295, 299, 185 S.E.2d 607, 608 (1971). Proof of intent necessarily rests on the inferences that can be made from a person's conduct. McMillian v State, 383 S.C. 480, 487-88, 680 S.E.2d 905, 908-09 (2009).

"Possession of equipment or paraphernalia used in the manufacture of . . methamphetamine is prima facie evidence of intent to manufacture" S.C. Code § 44-53-375(D).

In the instant case, evidence supporting the conviction on trafficking relies on the premise that Parkhurst and Cain were in constructive possession of an ongoing meth lab. Constructive possession is proven by showing that the accused has dominion and control, or the right to exercise dominion and control, over the contraband. State v. Hudson, 277 S.C. 200, 202, 284 S.E.2d 773, 774-75 (1981). Constructive possession may be established by circumstantial as well as direct evidence and possession may be shared. Id., 277 S.C. at 202, 284 S.E.2d at 775. Multiple individuals can be in constructive possession of the same item simultaneously. State v. Halyard, 274 S.C. 397, 400, 264

S.E.2d 841, 842 (1980).

Acts, declarations, or conduct of the accused may create an inference that the accused knew of the existence of the contraband. State v. Mollison, 319 S.C. 41, 459 S.E.2d 88 (Ct. App. 1995). "The State must show the defendant had dominion or control over the thing allegedly possessed or had the right to exercise dominion or control over it." State v. Stanley, 365 S.C 24, 43, 615 S E.2d 455, 465 (Ct. App. 2005). Possession of a controlled substance may be inferred from the circumstances of a particular case and may be imputed to a person with both the power and the intent to control the disposition and use of the drugs. State v. Brown, 319 S.C. 400, 404, 461 S.E.2d 828, 830 (Ct. App. 1995). "When contraband materials are found on premises under the control of the accused, this fact in and of itself gives rise to an inference of knowledge and possession which may be sufficient to carry the case to the jury." Hudson, 277 S.C. at 203, 284 S.E.2d at 775.

In Hudson, appellant and his wife were both convicted of possession of heroin that was found in their home At the time law enforcement executed a search, the wife was home but Hudson was away from the house. Before entering, law enforcement heard individuals scurrying around inside the house. The officer found the wife standing by the bathroom door and found three bags of white powder inside the toilet. The wife was arrested. Meanwhile, Hudson's daughter, who was also in the house, called Hudson's phone in his van to tell him what happened. Hudson did not go home or to the police station to see his wife. He was arrested three hours later on the interstate near the exit to the airport. When stopped by police, he told them he was "just driving around." Hudson, 277 S.C. at 202, 284 S.E.2d at 774.

The Supreme Court affirmed the denial of directed verdict, explaining, "where appellants shared control of the premises, we hold there was sufficient evidence from which a reasonable trier of fact could conclude beyond a reasonable doubt appellant Robert Hudson constructively possessed heroin with intent to distribute." Id., 277 S.C. at 203, 284 S.E.2d at 775.

In the instant case, law enforcement happened on a crime in progress – an active methamphetamine lab with a batch of methamphetamine in the gassing-out phase. The record indicates that only Cain and Parkhurst resided in the house. Although they claimed to only occupy one room of the house, their dog roamed free in the house and the jury could reasonably assume they had unfettered access to the rest of the house. Further, the two defendants were nervous enough to convince law enforcement to continue searching the rest of the house for the individual who they intended to arrest on a bench warrant. The deputies were unable to speak with the two defendants because they left before law enforcement realized they had walked into a meth lab. Further, the defendants barricaded the door to their bedroom to impede pursuit by law enforcement. State v. Crawford, 362 S.C. 627, 635-36, 608 S.E.2d 886, 890-91 (Ct. App. 2005) (noting flight may be considered evidence of guilt). Finally, officers found the freshly poured-out contents of a one pot outside the door through which the officers originally entered the house. Those contents were not there when law enforcement originally entered the house and codefendants were the only ones in the house. The logical inference is that the contents were spilled out by the defendants while in flight from law enforcement. State v McDowell, 266 S.C. 508, 515, 224 S.E.2d 889, 892 (1976) ("As a general rule, any guilty act, conduct, or statements

on the part of the accused are admissible as some evidence of consciousness of guilt.").

Accordingly, sufficient evidence establishes that Parkhurst and her co-defendant were operating a methamphetamine lab in an attempt to manufacture methamphetamine as they had dominion and control over the entire house and their actions were indicative of guilt.

## CONCLUSION

For all of the foregoing reasons, it is respectfully submitted that the judgment and conviction of the lower court be affirmed.

Respectfully submitted,

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May 16, 2014

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

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Appeal From Spartanburg County
R. Lawton McIntosh, Circuit Court Judge

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THE STATE,

Respondent,

vs.

TIPHANI MARIE PARKHURST,

Appellant.

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**CERTIFICATE OF COUNSEL**

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The undersigned hereby certifies that this Final Brief of Respondent complies with Rule 211(b), SCACR


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**PROOF OF SERVICE**

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I, Norma Bigbee, certify that I have served the within Final Brief of Respondent on Appellant by depositing two copies of the same in the United States mail, postage prepaid, addressed to:

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I further certify that all parties required by Rule to be served have been served.

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