

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Spartanburg County

R. Lawton McIntosh, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

TIPHANI MARIE PARKHURST,

APPELLANT

APPELLATE CASE NO. 2013-000909

FINAL BRIEF OF APPELLANT

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STATEMENT OF ISSUES ON APPEAL

1.

Whether the court erred in denying Appellant's motion to dismiss where Appellant was charged with trafficking in methamphetamine between ten and twenty-eight grams under Section 44-53-375(C) and where under the plain meaning of the statute no "attempt to manufacture" could be established since no methamphetamine was found in the home and since the state relied solely on empty, discarded blister packs of pseudoephedrine to determine a theoretical yield to establish the statutorily required weight?

2.

Whether the court erred in denying Appellant's motion for a directed verdict where there was no direct evidence or substantial circumstantial evidence that Appellant knowingly engaged in manufacturing or trafficking methamphetamine and where the evidence indicated Appellant and Cain rented only a single bedroom and had no connection to the rest of the residence where methamphetamine had allegedly been or was being manufactured?

STATEMENT OF THE CASE

A Spartanburg County Grand Jury indicted Appellant at the May 3, 2012 term of General Sessions for trafficking in methamphetamine. R. 181 – R. 182. Her case was called to trial on February 28, 2013 before the Honorable R. Lawton McIntosh, and a jury. She was tried jointly with her co-defendant, Charles Allen Cain. The trial court assumed that all motions and objections raised by either defense counsel were made jointly by both defendants. R. 20, ll. 17-21. Neither defendant appeared and they were consequently tried in their absence. M. Claire Hall represented Appellant and Robert B. Hall represented Mr. Cain. Joseph Hayes Holliday was the assistant solicitor. R. 1.

At the conclusion of the trial on March 1, 2013, the jury found Appellant guilty as indicted. R. 170, l. 15 – 171, l. 12. Judge McIntosh sentenced Appellant to five years suspended upon the service of three years imprisonment and forty months probation. R. 178, ll. 12-22.

This appeal follows.

STATEMENT OF FACTS

On January 17, 2012, two patrol deputies from the Spartanburg County Sheriff's Office, Kevan Kyle and Chris Wilbanks, responded to a Spartanburg home in an attempt to serve a Family Court bench warrant for a Travis Kirby, an unrelated third party. The deputies chose to knock on one of the back doors of the residence because a vehicle was parked directly outside that door. R. 34, l. 6 – 35, l. 6; R. 51, ll. 16-21. Deputy Kyle testified that both Appellant and Cain came to the door, which led into a bedroom. The two denied knowing a Travis Kirby and explained to the deputies that they were renting a single bedroom from the owner of the residence and that “they had nothing to do with the rest of the house.” R. 35, l. 5-23; R. 53, ll. 18-22.

After checking Appellant and Cain's identification and presenting the bench warrant, the deputies searched the bedroom and then the remainder of the house. R. 36, ll. 7-18; R. 37, l. 8. They did not locate Travis Kirby. However, the officers did discover what Deputy Kyle described as a “meth lab.” In the bathroom located in “the far corner of the house,” Deputy Kyle testified that he observed a bottle with “tubing coming from the top. The tubing ran up to a window that was open at the top, and the opening of the tubing was actually out into the air, the outside . . .” R. 37, ll. 10-25. In the living room, Deputy Kyle testified that he also discovered several discarded bottles containing multicolored pellets, coffee filters, tin foil, and batteries. R. 38, ll. 5-10. Based on his training and experience, Deputy Kyle determined the home was being used to manufacture methamphetamine. R. 38, ll. 11-14. Deputy Wilbanks reached the same conclusion. R. 55, ll. 4-7.

After the officers determined that Travis Kirby was not in the house, they left the home back out the way they had entered, which was through Appellant and Cain's bedroom. According to the officers' testimony, they discovered that Appellant and Cain had left the residence in Appellant's vehicle after attempting to barricade the interior door of the bedroom leading to the rest of the house. R. 39, l. 13 – 40, l. 1; R. 55, l. 12 –56, l. 4. The deputies also observed "what appeared to be the contents of a one pot or meth lab," specifically liquid containing multicolored pellets, on the grass and concrete area outside the exterior door to Appellant and Cain's bedroom. Deputy Kyle testified that "it was fresh and it was wet." R. 39, ll. 3-12; R. 42, ll. 2-20; R. 56, l. 17 – 57, l. 4.

Deputy Wilbanks testified that the home had no running water or electricity. Nonetheless, Wilbanks explained that the residence appeared to be illegally obtaining both through a "drop cord" and a "hose pipe" running from the trailer next door to the home. R. 57, l. 22 – 58, l. 10; R. 62, ll. 17-25. The house also appeared to be under construction. R. 61, ll. 9-12. Deputy Wilbanks further testified, "I do remember seeing that it appeared [Appellant and Cain] had been living in the bedroom" and that there was food and drinks in the room. R. 65, ll. 8-21.

After clearing the residence, Deputy Kyle contacted dispatch who notified the narcotics division of the Spartanburg County Sheriff's Office to respond to the scene. The narcotics division in turn contacted their forensic chemist, Beth Stuart, to assist in cleaning up the residence. R. 57, ll. 12-15. There was no evidence in the record regarding whether the officers obtained a search warrant.

Beth Stuart testified that on January 17, 2012, she had eight and a half years of experience as a chemical analyst. She had a Bachelor of Science Degree in both

Chemistry and Biochemistry from the College of Charleston and a Master's Degree in Chemistry from the University of South Carolina. Stuart completed training at the federal Drug Enforcement Administration (DEA) including its "forensic chemist school" and its "clandestine lab school." She is a member of the Clandestine Lab Investigating Chemist Association and is certified by the American Board of Criminalistics in all areas of forensic science. R. 67, l. 6 – 68, l. 16. Stuart was qualified as an expert in forensic chemistry and chemical analysis without objection. R. 69, l. 1 – 70, l. 4.

Stuart explained that common household products can be used to manufacture methamphetamine. R. 70, l. 18-23. She described in detail the "one pot" method to manufacturing methamphetamine that she claimed was used by the individuals at the Spartanburg home and described photographs of the scene. See R. 80, l. 10 – 83, l. 9. Stuart further explained that manufacturing methamphetamine is a very dangerous process and thus the components found inside the home were not collected and placed into evidence. Instead, a company came out to the residence and disposed of the chemical waste. R. 72, l. 5 – 73, l. 6. Stuart testified that none of the components or discarded items found inside the home were fingerprinted due to the inherent danger of the chemicals. R. 73, ll. 7-24.

Stuart conceded that *no* methamphetamine or pseudoephedrine was found inside the house. R. 89, ll. 5-7; R. 103, l. 23 – 104, l. 1; R. 111, ll. 13-15. Instead, she testified she found *empty* blister packs in trash bags in the living room that previously contained tablets of pseudoephedrine, a main component in the manufacture of methamphetamine. Specifically, Stuart found twenty empty blister packs that each previously held twenty-four tablets, each with a weight of thirty milligrams of pseudoephedrine. She also found

another four blister packs that each previously held ten tablets, each with a weight of one hundred twenty milligrams of pseudoephedrine. R. 91, ll. 3-7; R. 111, ll. 6-12. Stuart concluded that when added altogether the blister packs found inside the home used to contain a total of 19.2 grams of pseudoephedrine. R. 91, ll. 7-9.

Based on this figure alone, Stuart testified she used an equation to determine how much methamphetamine one could manufacture with a one hundred percent yield. Before Stuart was able to testify as to the amount, defense counsel objected arguing such testimony was outside her area of expertise. After further voir dire, the court qualified Stuart as an expert "in the field of chemistry to be able to give her opinion in the area of theoretical yields" over defense counsel's objection. Stuart claimed that with 19.2 grams of pseudoephedrine, an individual could manufacture 17.67 grams of methamphetamine assuming a one hundred percent yield, 14.13 grams assuming an eighty percent yield, 13.25 grams assuming a seventy-five percent yield, and 11.48 grams assuming a sixty-five percent yield. R. 99, l. 16 – 100, l. 19.

Stuart acknowledged that there was no way to determine what percent yield the individuals in the Spartanburg home theoretically would have been able to obtain. She also acknowledged that the figures she came up with were produced in "laboratory conditions" meaning with the use of pure chemicals and "real glassware" and by a trained chemist. R. 101, l. 12 – 102, l. 6; R. 105, ll. 2-9. Stuart also agreed that it is possible to not get a one hundred percent conversion, meaning some of the ingredients, such as the pseudoephedrine, may not have reacted with the other ingredients, and thereby may have been wasted. R. 105, l. 10 – 106, l.

After presenting only three witnesses, the state rested relying solely on the testimony of the deputies who discovered the alleged methamphetamine manufacturing operation and the chemist. The state presented no physical evidence.

Defense counsel for Cain presented the testimony of Leon Fowler, Sr. R. 116, ll. 4-5. Mr. Fowler testified that he lived in the trailer located one hundred feet behind the residence in this case. R. 121, ll. 15-17. Fowler explained that the house and trailer are located on two separate lots and have two separate addresses, but that his son, Leon Fowler, Jr., owns both properties. R. 116, ll. 17 – 154, l. 8. Fowler testified that Appellant and Cain rented a single bedroom from his son and, as far as he knew, they were only “living in that one room.” R. 117, l. 23 – 119, l. 11. Fowler did not know how long Appellant and Cain had been living in the room “but it wasn’t very long . . . not over two or three weeks . . .” R. 119, ll. 8-11.

Fowler further testified that Appellant and Cain routinely came to his trailer to use the bathroom and to shower or bathe. As far as he knew, there was no running water in the house. R. 119, ll. 12-16; R. 120, ll. 8-11. Fowler stated that he did not know whether Appellant and Cain had a power cord running from his trailer to the house, but that his son often did so when he was working on the house. R. 119, l. 24 – 120, l. 7. Fowler testified that it “seemed like” there was a power cord hooked up when the police arrived, but he “wouldn’t swear to it.” *Id.* Fowler was never questioned by the police. R. 121, ll. 4-9.

The defense maintained at trial that Appellant and Cain were “merely present” and were not knowingly involved in the manufacture or trafficking of methamphetamine. To support their theory, defense counsel stressed the couple did not have access to or a

lease to the rest of the house and only lived in that single bedroom. Additionally, there was no running water in the home and Appellant and Cain relied on Mr. Fowler to use the bathroom and shower at his trailer indicating the couple had no reason to enter the rest of the house. R. 129, l. 19 – 130, l. 25. Defense counsel further emphasized that the blister packs found in the trash in the living room were empty and that there was no evidence regarding how long the trash had been there or how long Appellant and Cain had lived in the home. R. 136, l. 12-23. Defense counsel also stressed that the police failed to investigate the owner of the home, any other occupants, and whether Appellant and Cain had a lease to the entire house. R. 135, ll. 17-25.

ARGUMENT

1.

The court erred in denying Appellant's motion to dismiss where Appellant was charged with trafficking in methamphetamine between ten and twenty-eight grams under Section 44-53-375(C) and where under the plain meaning of the statute no "attempt to manufacture" could be established since no methamphetamine was found in the home and since the state relied solely on empty, discarded blister packs of pseudoephedrine to determine a theoretical yield to establish the statutorily required weight.

Motion to Dismiss

Prior to the jury being sworn, defense counsel for both Appellant and Cain moved to dismiss the respective indictments for trafficking in methamphetamine on the grounds that neither could be convicted of the charge under the plain meaning of the statute. R. 11, ll. 9-23; R. 21, ll. 7-8; R. 20, ll. 14-21. The court acknowledged "that the state intends to have a fairly novel approach to this case in that they're gonna establish trafficking through extrapolation from the aggregate components to say that a yield would have been more than the trafficking amount." R. 8, ll. 1-4. The court thus required the state to identify the plain language of South Carolina Code Section 44-53-375 that "allows the state to pursue this case in the method that it intends to." R. 13, ll. 6-8.

The state claimed it was relying on the language of Subsection (C) of the statute requiring an "attempt" to manufacture ten grams or more of methamphetamine. The solicitor said, "Judge, in this case we would argue that they are attempting to manufactur[e] methamphetamine" with "a theoretical yield of more than ten grams . . ." The solicitor concluded, "Their attempt to manufacture falls directly within the statute,

and if you take the statute based on the plain meaning, and apply that to the facts of this case, I believe that a charge of trafficking would be appropriate.” R. 13, l. 9 – 14, l. 1.

Defense counsel for Cain argued that the plain meaning of “attempt” in this context means one has the “components” to manufacture methamphetamine, but has not actually manufactured any. He stated, “[G]iven the Sudafed they have, given the other components, they could have manufactured this much. That would be attempt.” Defense counsel argued that is not what the state found in this case. He stated, “This is a theoretical yield saying we have the empty blister packs, we have these other things in the trash that, if you look at all that, they could have manufactured this much.” R. 15, l. 22 – 16, l. 6. In essence, defense counsel maintained that because the state only found discarded items in the trash, specifically empty blister packs, and did not actually find any pseudoephedrine or methamphetamine, under the plain meaning of the word “attempt” the statute did not apply in this case.

The court repeatedly took the issue under advisement, but ultimately ruled that the state could proceed with its case and refused to dismiss the indictments based on the plain language of the statute and the “persuasive authority that was handed in by Mr. Holliday.” R. 20, ll. 7-8; R. 24, ll. 19-25; R. 125, ll. 4-14. The court stated “it’s not necessarily a question of law as much as it is a question of fact for the jury if they believe your theoretical yield theory yields more than ten, less than twenty-eight grams, then I guess they can find him guilty of trafficking.” R. 25, ll. 11-16. Subject to defense counsel’s objection, the parties agreed to send a special interrogatory to the jury to determine whether the state proved beyond a reasonable doubt that the theoretical yield

was ten grams or more but less than twenty-eight grams. R. 125, l. 15 – 126, l. 11; R. 162, ll. 10-25.

Discussion

The circuit court erred in denying Appellant’s motion to dismiss because under the plain meaning of Section 44-53-375(C), Appellant could not be convicted of trafficking in methamphetamine under the facts of the case.

The primary rule of statutory construction is to ascertain and give effect to the intent of the legislature. Bryant v. State, 384 S.C. 525, 683 S.E.2d 280 (2009). As such, a court must abide by the plain meaning of the words of a statute. State v. Jacobs, 393 S.C. 584, 713 S.E.2d 621 (2011). Also, penal statutes must be strictly construed against the state and in favor of the defendant. Hair v. State, 305 S.C. 77, 78, 406 S.E.2d 332, 334 (1991); State v. Cutler, 274 S.C. 376, 378, 264 S.E.2d 420, 420-421 (1980); State v. Muldrow, 348 S.C. 264, 559 S.E.2d 847 (2002).

When Section 44-53-375(C) is strictly construed against the state it does not apply to this case. The narrow inquiry is whether the evidence constituted an “attempt” to “manufacture” ten grams or more, but less than twenty-eight grams of methamphetamine under the statute. Manufacture is defined in S.C. Code Section 44-53-110 as “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, and includes any packaging or repackaging of the substance or labeling or relabeling of its container . . .” “Attempt” is not defined.

Under the plain language of the statute the state cannot prove an attempt to produce, prepare, propagate, compound, convert or process methamphetamine by means of chemical synthesis without first proving possession of either pseudoephedrine, the main component, or methamphetamine, the end product. Because neither were found by law enforcement in this case, the state should not have been permitted to proceed with the trafficking charge.

The state at trial relied on Iowa v. Knapp, 778 N.W.2d 218 (Iowa App. 2009), an unpublished disposition that is easily distinguishable from the case at hand. In Knapp, the defendant was tried for conspiracy to manufacture more than five grams of methamphetamine among other charges after *a bag containing 16.8 grams of pure pseudoephedrine*, which has a theoretical yield of 15.4 grams of pure methamphetamine, was *found on his person*. Knapp argued on appeal that the trial court erred in denying his motion for a judgment of acquittal. However, the Court of Appeals of Iowa held “the State can rely on evidence of the potential yield to prove the amount of methamphetamine conspired to be produced.” Because the amount of crushed pseudoephedrine found on Knapp’s person had the potential to yield more than five grams of methamphetamine, the court held there was sufficient evidence for a factfinder to infer a conspiracy to manufacture more than five grams of methamphetamine.” Id. Here, there was no pseudoephedrine found in the house or on Appellant’s person and Appellant was charged with trafficking not “conspiracy to manufacture.”

While the record is unclear, it appears the state also presented and relied on the case of U.S. v. Spencer, 439 F.3d 905 (8th Cir. 2006).¹ See R. 114, ll. 21-25. Spencer is also easily distinguishable from the facts of this case. In Spencer, law enforcement *seized bottles of pseudoephedrine* from Spencer's home that "could have produced a theoretical yield of 79.1 grams and a practical yield of forty-two to sixty-four grams of actual (pure) methamphetamine" and the jury found him guilty of "attempting to manufacture five grams or more of actual (pure) methamphetamine" among other drug related offenses. Id. at 911-912. The Eight Circuit held that there was sufficient evidence to support Spencer's conviction because "although Spencer may not have possessed a fully working methamphetamine lab, Spencer had ordered, received, and *possessed chemicals* and equipment necessary to manufacture methamphetamine." Id. at 916.

In both Knapp and Spencer, law enforcement actually seized a quantity of pseudoephedrine. Because pseudoephedrine is the main component in the manufacture of methamphetamine a jury could assume in both those cases that the defendant intended to attempt to manufacture methamphetamine or assist another in attempting to manufacture methamphetamine. However, in Appellant's case, law enforcement found *no* methamphetamine or pseudoephedrine in the Spartanburg home. In fact, there was no evidence that 19.2 grams of pseudoephedrine was ever in the Spartanburg home or was ever in Appellant's possession. R. 91, ll. 7-9. Furthermore, there was no testimony regarding how long the empty blister packs had been in the residence or how they got there. Without the actual main component to manufacture methamphetamine and without

¹ The case is cited on the record as "United States of America versus Joseph Nelson." As best as can be ascertained by undersigned counsel, the case referred to is U.S. v. Joseph Nelson Spencer, 439 F.3d 905 (8th Cir. 2006).

any actual methamphetamine, Section 44-53-375(C) does not apply. Thus, the trial court erred in denying Appellant's motion to dismiss.

The court erred in denying Appellant's motion for a directed verdict where there was no direct evidence or substantial circumstantial evidence that Appellant knowingly engaged in manufacturing or trafficking methamphetamine and where the evidence indicated Appellant and Cain rented only a single bedroom and had no connection to the rest of the residence where methamphetamine had allegedly been or was being manufactured.

Motion for Directed Verdict

At the conclusion of the state's case, defense counsel moved for a directed verdict on the grounds that the state failed to provide sufficient evidence of trafficking to present the case to the jury. The defense argued that "merely being in the proximity of something that appears to be a meth lab is not enough." Defense counsel noted that there was no evidence of who actually owned the property or whether Appellant and Cain had a lease to the entire house. Rather, the testimony indicated that Appellant and Cain rented only a single bedroom in the residence. Defense counsel also noted that there was no evidence of methamphetamine production found within the bedroom and there was no nexus connecting Appellant and Cain to the rest of the house. Defense counsel for Appellant argued that the evidence presented by the state "does not rise to the level of enough evidence to present to the jury that these clients *knowingly* engaged in manufacturing or trafficking methamphetamine . . ." R. 112, l. 23 – 114, l. 20.

Defense counsel for both Appellant and Cain renewed their motions for a directed verdict at the close of the testimony and, after the jury's verdict, both motioned for a new trial based on a lack of substantial circumstantial evidence to support the jury's verdict.

R. 164, l. 16 – 165, l. 12; R. 172, ll. 2-9.

Discussion

A defendant is entitled to a directed verdict when the prosecution fails to provide evidence of the offense charged. State v. Brown, 103S.C. 437, 88 S.E.2d 21 (1916); State v. Weston, 367 S.C. 279, 292, 625 S.E.2d 641, 648 (2006); State v. McHoney, 344 S.C. 85, 97 544 S.E.2d 30, 36 (2001). “If there is any direct evidence or any substantial circumstantial evidence reasonably tending to prove the guilt of the accused,” the trial judge may deny the motion for directed verdict. State v. Lollis, 343 S.C. 580, 584, 541 S.E.2d 254, 256 (2001); State v. Pinckney, 339 S.C. 346, 349, 529 S.E.2d 526, 527 (2000); State v. Martin, 340 S.C. 597, 533 S.E.2d 572 (2000). When the prosecution relies exclusively on circumstantial evidence, the trial judge must direct a verdict in the defendant’s favor unless there is any *substantial circumstantial evidence* which reasonably tends to prove the guilt of the defendant or from which his guilt may be fairly and logically deduced. State v. Bostick, 392 S.C. 134, 139, 708 S.E.2d 774, 776 (2011); State v. Mitchell, 341 S.C. 406, 535 S.E.2d 126 (2000).

Likewise, a directed verdict is appropriate when the evidence produced “merely raises a suspicion the accused is guilty.” Lollis, 343 S.C. at 584, 541 S.E.2d at 256; State v. Arnold, 361 S.C. 386, 389-390, 605 S.E.2d 529, 531 (2004); State v. Schrock, 283 S.C. 129, 132, 322 S.E.2d 450, 451-452 (1984); State v. Muhammed, 338 S.C. 22, 524 S.E.2d 637 (Ct. App. 1999). Our courts define suspicion as “a belief or opinion as to guilt based upon facts or circumstances which do not amount to proof.” Lollis, 343 S.C. at 584, 541 S.E.2d at 256; State v. Hyder, 242 S.C. 372, 131 S.E.2d 96 (1963).

In this case, the court erred in denying Appellant’s motion for a directed verdict where there was no direct evidence or substantial circumstantial evidence that Appellant

knowingly engaged in manufacturing or trafficking methamphetamine and where the evidence indicated Appellant and Cain rented only a single bedroom and had no connection to the rest of the residence where methamphetamine had allegedly been or was being manufactured.

In Mitchell, 341 S.C. at 409, 535 S.E.2d at 127, the South Carolina Supreme Court held the lower court erred in failing to direct a verdict where the only evidence presented against the defendant was his fingerprint at the scene of the burglary. Likewise, in Lollis the Court directed a verdict of acquittal in the defendant's favor where the state presented no direct evidence that Lollis was involved in setting fire to his home. The only circumstantial evidence against Lollis was that his wife admitted to the arson, he had placed valuables in storage prior to the fire, he possessed a key to the storage unit, and he allegedly had financial troubles. Our Supreme Court found this evidence insufficient to survive a directed verdict motion. Lollis, 343 S.C. at 581-586, 541 S.E.2d at 256-257.

In State v. Odems, 395 S.C 582, 720 S.E.2d 48 (2011), our Supreme Court held the defendant was entitled to a directed verdict based upon a lack of substantial circumstantial evidence that the defendant was involved in the burglary. The evidence presented against the defendant was (1) that less than ninety minutes after the burglary, police located the defendant in the getaway car with the admitted burglars and the stolen goods; (2) the defendant fled from law enforcement, and (3) the defendant asked an uninvolved person to lie for him. Id. at 585-588, 720 S.E.2d at 49-51. Even with this evidence, our Supreme Court held that the state failed to provide substantial circumstantial evidence that Odems was present during the home invasion. Id. at 592, 720 S.E.2d at 53.

In State v. Bostick, 392 S.C. 134, 141, 708 S.E.2d 774, 778 (2011), our Supreme Court held the prosecution failed to present substantial circumstantial evidence of Bostick's guilt. Rather, according to the Court, the state's evidence was capable of producing only a suspicion of the defendant's guilt. Id. The state accused Bostick of killing his neighbor and burning down her home. The state presented the following circumstantial evidence at trial: (1) the neighbor's personal items were found in a burn pile located on the Bostick family property; (2) Bostick's shoes contained a pattern that matched gasoline, and gasoline was the accelerant used to start the house fire; and (3) investigators found blood on the clothes Bostick was wearing the day of the murder, but that evidence could not be matched to the neighbor's DNA. Id. at 142, 708 S.E.2d at 778. This Court held that this evidence was insufficient to survive a directed verdict motion.

The prosecution in this case failed to present substantial circumstantial evidence that Appellant was knowingly engaged in trafficking methamphetamine. Specifically, the state failed to produce sufficient circumstantial evidence to establish Appellant and Cain had knowledge of the alleged manufacturing operation or any connection to it. Deputy Kyle testified Appellant and Cain stated they rented only a single bedroom and "had nothing to do with the rest of the house." R. 35, ll. 19-23. Additionally, Deputy Wilbanks testified that it appeared Appellant and Cain were living in the bedroom and had food and drinks in the bedroom. R. 65, ll. 8-21. There was also no testimony that any of Appellant or Cain's possessions were found in any area of the house besides the bedroom. Moreover, no evidence of methamphetamine production was found inside the bedroom.

Additionally, the state failed to present any evidence regarding whether Appellant and Cain had a lease to the entire house or a right to use the entire house. The police

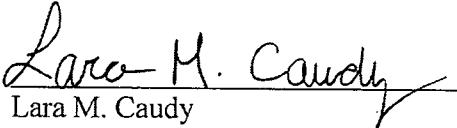
failed to question the homeowner of the residence or investigate whether the homeowner was responsible for the alleged manufacturing operation. The police also failed to question neighbors, including Mr. Leon Fowler, Sr., or attempt to locate Travis Kirby who law enforcement believed lived at the home since they came looking for him at that location with a bench warrant. In short, nothing linked Appellant to the rest of the residence and the state failed to investigate other parties who may have been responsible for the alleged manufacturing operation or who may have had more information about who had possession of the remainder of the house or access to it.

The state's evidence merely raised a suspicion that Appellant and Cain were involved in the manufacture or trafficking of methamphetamine and thus Appellant's conviction should be reversed and her case remanded for a new trial.

CONCLUSION

By reason of the foregoing arguments, Appellant's conviction should be reversed and this case remanded to the Spartanburg County Court of General Sessions for a new trial.

Respectfully submitted,


Lara M. Caudy
Appellate Defender

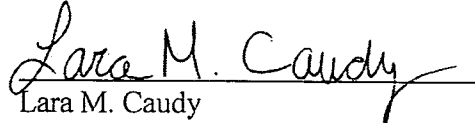
ATTORNEY FOR APPELLANT

This 12th day of May, 2014.

CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of my ability this Final Brief of Appellant complies with Rule 211(b), SCACR, and the April 15, 2014, order from the South Carolina Supreme Court entitled "Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings."

May 12, 2014


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STATE OF SOUTH CAROLINA
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Appeal from Spartanburg County
R. Lawton McIntosh, Circuit Court Judge

THE STATE,

RESPONDENT,

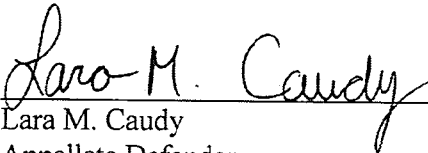
V.

TIPHANI MARIE PARKHURST,

APPELLANT

CERTIFICATE OF SERVICE

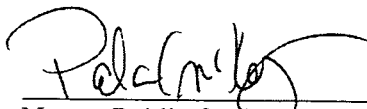
The undersigned attorney hereby certifies that a true copy of the Final Brief of Appellant in the above referenced case has been served upon David Spencer, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, this 12th day of May, 2014.



Lara M. Caudy
Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 12th day of May, 2014.



(L.S.)
Notary Public for South Carolina
My Commission Expires: July 24, 2022.

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

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

THE STATE,

Respondent,

vs.

TIPHANI MARIE PARKHURST,

Appellant.

APPELLATE CASE NO. 2013-000909

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 boobos 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).

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 pseudoephedrine, 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 dismiss.

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

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

THE STATE,

Respondent,

vs.

TIPHANI MARIE PARKHURST,

Appellant.

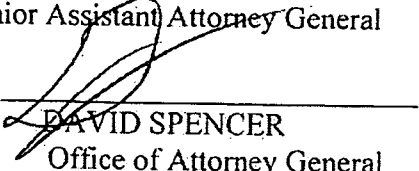
CERTIFICATE OF COUNSEL

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

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PROOF OF SERVICE

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.

This 16TH day of May, 2014.


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