STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Laurens County
Eugene C. Griffith, Jr., Circuit Court Judge

THE STATE,

Respondent,

vs.

JAMES CLYDE DILL, JR.,

Appellant.

FINAL BRIEF OF RESPONDENT

ALAN WILSON
Attorney General

DAVID SPENCER
Senior Assistant Attorney General

Post Office Box 11549
Columbia, SC 29211
(803) 734-3727

DAVID M. STUMBO
Solicitor, Eighth Judicial Circuit

P. O. Box 516
Greenwood, SC 29649-0516
(864) 942-8800

ATTORNEYS FOR RESPONDENT

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Laurens County
Eugene C. Griffith, Jr., Circuit Court Judge

THE STATE,

Respondent,

vs.

JAMES CLYDE DILL, JR.,

Appellant.

FINAL BRIEF OF RESPONDENT

ALAN WILSON
Attorney General

DAVID SPENCER
Senior Assistant Attorney General

Post Office Box 11549
Columbia, SC 29211
(803) 734-3727

DAVID M. STUMBO
Solicitor, Eighth Judicial Circuit

P. O. Box 516
Greenwood, SC 29649-0516
(864) 942-8800

ATTORNEYS FOR RESPONDENT

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Other Authorities:

STATEMENT OF ISSUES ON APPEAL

I.

The trial court did not err in failing to suppress evidence seized from the execution of the search warrant where the search warrant affidavit, supplemented with law enforcement's oral testimony, established the credibility of the informant and the basis of the informant's knowledge which was sufficient to support probable cause.

II.

The trial court did not err in denying the motion to suppress the search warrant because the inaccurate portion of the search warrant was not the result of an intentional or reckless disregard for the truth and the search warrant still would support probable cause without the misstatement. The issue is not preserved for review.

III.

Where the confidential informant was a mere tipster and was not a participant in the crime, the trial court did not err in declining to require the State to disclose the identity of the confidential informant.

IV.

The trial court did not err in denying the motion for directed verdict as sufficient evidence was presented to the jury that Dill manufactured or attempted to manufacture methamphetamine. The issue is not preserved for review.

STATEMENT OF THE CASE

Appellant Dill was indicted by the Laurens County Grand Jury for manufacturing methamphetamine as prohibited by S.C. Code §44-53-375(B). Dill was tried by jury on April 9, 2012, and found guilty as charged. The Honorable Eugene C. Griffith, Jr., sentenced Dill to ten years imprisonment.

STATEMENT OF FACTS

The Laurens County Sheriff's Office executed a search warrant at the residence where Appellant Dill and co-defendant Molina Armstrong lived. The State's primary witness was Lieutenant Jimmy Sharpton, who is the office's "meth tech." Lieutenant Sharpton described his duty in this regard as follows:

> Basically we go in on calls that there is a meth lab present or one that is suspected, we go in, identify what there is there, we go through the whole process including the disassembly and then bring the lab out for it to be disposed of.

ROA. p. 54, lines 3-7.

Lieutenant Sharpton received specialized training in recognizing methamphetamine labs, including training on the different processes and the different stages of methamphetamine production. Part of the training is actually manufacturing methamphetamine. Lieutenant Sharpton mused, "I would make a pretty good cook if I wasn't a cop, I guess." ROA. pp. 54-55 (direct quote p. 54, lines 7-9). Lieutenant Sharpton's training included a 52 hour course called CLAW (clandestine labs and weapons of mass destruction). Lieutenant Sharpton described how the "class goes pretty deep into . . . the chemicals, the combination of chemicals, how hazardous they are." ROA. p. 56, lines 3-12. In that training, he dismantled methamphetamine labs while wearing HAZMAT suits: "you are trained in how to use all the HAZMAT materials and equipment." ROA. p. 56, lines 12-19. Lieutenant Sharpton is certified in CLAW and is required to recertify every year to maintain this qualification. ROA. p. 57. Lieutenant Sharpton was qualified without objection as an expert in the field of methamphetamine lab identification and cleanup. ROA.

p. 59.

After the deputies secured the location, Lieutenant Sharpton investigated for evidence of a meth lab. Sharpton discovered Coleman fuel, five one-pound bags of salt, hydrogen peroxide, hypodermic needles, and an HCL generator. ROA. pp. 61-63. The HCL generator was found outside the back door; the remaining items were found inside the house. ROA. p. 67, lines 1-5.

Lieutenant Sharpton testified that Coleman fuel is used as a solvent. The ephedrine or pseudoephedrine found in Sudafed or other medications is loosened from the binder ingredients and migrates into the solvent. Lieutenant Sharpton testified as follows about how the salt is used:

> Salt is used to make a shell generator, it is combined with sulfuric acid, drain cleaner, liquid fire. There [are] a lot of different types of sulfuric acid you can just buy on the shelf. Once you mix those two together it produces hydrogen chloride. It is a gas that converts meth from a liquid state to a crystalline state. So it is the last step in the process of manufacturing meth. No matter what method you use before that you are going to gas it off.

ROA. p. 63, lines 16-24. Hydrogen peroxide is used to wash and make the final methamphetamine "look pretty," particularly in the shake and bake manufacturing method. ROA. p. 64, lines 7-12. Hypodermic needles are used to inject methamphetamine. ROA. p. 64, lines 15-19.

Lieutenant Sharpton testified that an HCL generator is a tool used to emit gas from the mixture to convert the methamphetamine from a liquid to a gas state. ROA. p. 65. Lieutenant Sharpton explained how to make an HCL generator as follows:

> You will take a plastic bottle that can be anywhere from, I see a lot of 16.9 ounce just water bottles, drink bottles, the biggest one I have seen was a five gallon garden sprayer that had a lot that was in a big lab that they were, they needed it to last a long time. You start by pouring an amount of salt and then you pour the sulfuric acid over the top of it.

ROA. p. 65, lines 16-23. Lieutenant Sharpton explained further:

> It immediately starts to react. The HCL gas is formed immediately. It starts to smoke and then it continues, it gets worse and worse. The generators generally have a tube, they will cut a hole in the plastic top and they have a tube that comes out. That tube is put down in the liquid that has the liquid methamphetamine and it bubbles like a fish tank and that gas and that liquid, it will start to snow, it looks like it is snowing in the liquid and the meth is turning in to a crystal and collects in the bottom of the container.

ROA. p. 66, lines 1-10.

Lieutenant Sharpton testified that if he sees an HCL generator that means to him "somebody has been making meth at that location." ROA. p. 66, lines 18-23. The only use for an HCL generator is to gas-off methamphetamine. ROA. p. 66, p. 82, lines 13-22. On cross-examination, defense counsel asked Lieutenant Sharpton, "You said there was a generator but I thought your testimony was it had never been checked to test it to see what was in it?" ROA. p. 82, line 25 – p. 83, line 2. Lieutenant Sharpton replied, "That's true. It had not. But you would not mix salt and any other thing in a bottle with a tube coming out of it if you weren't doing that. If that was not an HCL generator you wouldn't make it look like one." ROA. p. 83, lines 3-5.

Lieutenant Sharpton put the items found in five-gallon buckets as part of the process of packaging the items for transport. Lieutenant Sharpton discussed the dangers found in

meth labs, noting some of the chemicals on their own are hazardous materials. ROA. p. 69. Lieutenant Sharpton explained, "What particularly makes things dangerous in a methamphetamine lab is when you start combining chemicals and they start reacting." ROA. p. 69, lines 22-25. Lieutenant Sharpton warned that if chemicals were combined the wrong way, "you could have fire, explosion, . . . there are vapors that could come off that could be harmful to inhale. The HCL generator, that gas can actually kill you if you inhale enough of it." ROA. p. 70, lines 3-7. Lieutenant Sharpton testified he needed to wear a protective suit to clean up the materials found at the residence. ROA. pp. 70-71. The materials were cleaned up and brought to safe location to be held until a cleanup crew disposed of the materials. ROA. pp. 72-73. Lieutenant Sharpton explained that was necessary because the items seized were hazardous materials. ROA. p. 73.

Lieutenant Sharpton explained why some ingredients or their packaging might not have been found, testifying as follows:

> People have learned, your more experienced cooks know what we are looking for. One of the biggest problems we have in the county now is they will do a cook, they will bag it up and throw it out in a ditch in front of your house. And then, of course, we have unsuspect[ing] citizens locate these bags. That is probably the biggest hazard to the public is finding these smoking garbage bags that have been thrown out. They dispose of it pretty quick.

ROA. p. 84, lines 7-15.

ARGUMENT

I.

The trial court did not err in failing to suppress evidence seized from the execution of the search warrant where the search warrant affidavit, supplemented with law enforcement's oral testimony, established the credibility of the informant and the basis of the informant's knowledge which was sufficient to support probable cause.

Dill argues that the magistrate was not provided enough information to find probable cause. However, law enforcement attested that an informant observed a methamphetamine lab in operation at the residence, that there were items used for methamphetamine production at the residence, and that the informant provided credible information in the past that led to two arrests. Accordingly, the magistrate was provided sufficient information to support issuing the search warrant.

The task of a magistrate when determining whether to issue a search warrant is to make a practical, common sense decision as to whether, under the totality of circumstances set forth in the affidavit, including veracity and basis of knowledge of persons supplying hearsay information, there is a fair probability that evidence of crime will be found in a particular place. State v. Driggers, 322 S.C. 506, 510, 473 S.E.2d 57, 59 (Ct. App. 1996). An appellate court reviewing the decision to issue a search warrant should determine if the magistrate had a substantial basis for concluding that probable cause existed. State v. Arnold, 319 S.C. 256, 260, 460 S.E.2d 403, 405 (Ct. App. 1995). When reviewing a magistrate's decision to issue a search warrant, an appellate court must consider the totality of circumstances. State v. Jones, 342 S.C. 121, 126, 536 S.E.2d 675, 678 (2000). "Although

great deference must be given a magistrate's conclusions, a magistrate may only issue a search warrant upon a finding of probable cause." Id.

"The affidavit must contain sufficient underlying facts and information upon which the magistrate may make a determination of probable cause." State v. Philpot, 317 S.C. 458, 461, 454 S.E.2d 905, 907 (Ct. App. 1995). "A search warrant that is insufficient in itself to establish probable cause may be supplemented by sworn oral testimony." State v. Weston, 329 S.C. 287, 290, 494 S.E.2d 801, 802 (1997).

In determining the validity of the warrant, a reviewing court may consider only information brought to the magistrate's attention. State v. Gentile, 373 S.C. 506, 513-14, 646 S.E.2d 171, 174 (Ct. App. 2007). Items not specified in a search warrant may be seized if there is a sufficient nexus between the items seized and the criminal activity. State v. McGuinn, 268 S.C. 112, 232 S.E.2d 229 (1977).

"Probable cause is a flexible, common sense standard" that "does not import absolute certainty." State v. Fletcher, 363 S.C. 221, 609 S.E.2d 572, 587 (Ct. App. 2005) *rev'd on other grounds by* State v. Fletcher, 379 S.C. 17, 664 S.E.2d 480 (2008). While supporting affidavits must contain sufficient underlying facts and information upon which the magistrate can make a probable cause determination, they are "not meticulously drawn by lawyers, but are normally drafted by non-lawyers in the haste of a criminal investigation, and should therefore be viewed in a common sense and realistic fashion." Id. "Affidavits must be judged on the facts presented and not on the precise wording used." Id. at 587-88.

Justin Moody was a Deputy with the Laurens County Sheriff's Office on February 15, 2011. Moody testified he received information from an individual of possible manufacturing

of methamphetamine at Dill's residence. Moody testified he received information from this person twice before that proved reliable and led to two arrests. Moody testified the information indicated there were items used to manufacture methamphetamine at the residence. Moody prepared and signed an affidavit and presented the affidavit to Magistrate Copeland. ROA. pp. 24-26. In the affidavit Moody attests to the following:

> Laurens County Sheriff's Office has received information in the last 72 hours that at the above listed location an active methamphetamine lab is in operation. A confidential informant working in an undercover capacity with the Laurens County Sheriff's Office was at this location and did see numerous items that are used in the manufacturing of methamphetamine.

ROA. at 146 (Search warrant affidavit). Magistrate Copeland then issued a search warrant based on the information provided. ROA. p. 26.

"[A] warrant based solely on information provided by a confidential informant must contain information supporting the credibility of the informant and the basis of his knowledge." State v. 192 Coin-Operated Video Game Machines, 338 S.C. 176, 192, 525 S.E.2d 872, 881 (2000). For instance, the search warrant in State v. Hammond, 270 S.C. 347, 242 S.E.2d 411 (1978), was upheld where the affidavit indicated the confidential informant saw use and sale of drugs at the location within the last 48 hours, the affiant knew the informant for three years, and the informant furnished information in the past leading to the arrest and conviction of known drug dealers. Id. at 353, 242 S.E.2d at 414.

In the instant case, the information provided to the magistrate was sufficient for the magistrate to conclude there was a fair probability evidence of a crime would be found. The affidavit indicated that the informant was at the location and saw numerous items used in the

manufacture of methamphetamine and that an active methamphetamine lab was in operation. Moody testified the informant provided information in the past that was reliable and led to two arrests. Therefore, the affidavit provided the basis of the informant's knowledge, and Moody provided information attesting to the informant's proven reliability. Therefore, the trial court did not err in denying the motion to suppress evidence from the search.

II.

The trial court did not err in denying the motion to suppress the search warrant because the inaccurate portion of the search warrant was not the result of an intentional or reckless disregard for the truth and the search warrant still would support probable cause without the misstatement. The issue is not preserved for review.

Dill claims the trial court erred in failing to suppress the search warrant because the search warrant mistakenly claims that the informant was working undercover for law enforcement when he observed the methamphetamine lab in operation. The variance does not rise to an intentional or reckless falsity, and even excluding this fact from the search warrant, the search warrant supports a finding of probable cause. Therefore, the trial court did not err in denying the motion to suppress the evidence seized under the warrant. Further, Dill did not move to suppress the search warrant on this basis.

While Dill complained the warrant was insufficient and noted the inaccuracy in the warrant, Dill never argued the warrant should be suppressed for a Franks violation or argued that the inaccuracy rose to the level of an intentional or reckless disregard for the truth. See ROA. p. 37, lines 5-16. An argument not raised and ruled on by the trial court is not preserved for appeal. State v. Nichols, 325 S.C. 111, 481 S.E.2d 118 (1997) (objection must be entered on a specific ground at trial to preserve an appeal); Humbert v. State, 345 S.C. 332, 548 S.E.2d 862 (2001). "[I]t is the responsibility of trial counsel to preserve issues for appellate review." Jackson v. Speed, 326 S.C. 289, 306 S.E.2d 750, 759 (1997). The ground raised in support of a claim of error on appeal must be the same ground offered in support of the objection at trial. State v. Smith, 337 S.C. 27, 34, 522 S.E.2d 598, 601 (1999). His

failure to raise this issue based on a Franks violation precludes review on appeal on that basis.

Further, the discrepancy does not constitute a Franks violation and the warrant is sufficient. "Where the defendant makes a substantial preliminary showing that a false statement knowingly and intentionally, or with reckless disregard for the truth, was included by the affiant in the warrant affidavit, and if the allegedly false statement is necessary to the finding of probable cause, the Fourth Amendment requires that a hearing be held at the defendant's request." Franks v. Delaware, 438 U.S. 154, 155-56 (1978).

"If a Franks hearing is appropriate and an affiant's material perjury or recklessness is established by a preponderance of the evidence, the warrant must be voided and evidence or testimony gathered pursuant to it must be excluded." United States v. Colkley, 899 F.2d 297, 300 (4th Cir. 1990) (citation and internal quotation marks omitted).

If a defendant alleges there are misstatements in a search warrant affidavit, he is entitled to an evidentiary hearing if (1) the allegations are not conclusory and are supported by more than a mere desire to cross-examine; (2) there are allegations of deliberate falsehood or reckless disregard for the truth which are supported by an offer of proof; and (3) the affiant made the allegedly false or reckless statement. State v. Jones, 342 S.C. 121, 127, 536 S.E.2d 675, 678 (2000). Even if those criteria are met, however, no hearing is required if the alleged false or erroneous information is set aside and the remaining information in the warrant affidavit is sufficient to support a finding of probable cause. State v. Missouri, 337 S.C. 548, 524 S.E.2d 394, 396-97 (1999) (citing Franks).

In Jones, the affiant, a police officer, provided an affidavit that an agent of the

Florence Combined Drug Unit observed cocaine stored on the premises to be searched. However, the person was not an agent, but a confidential informant. The affiant testified he deliberately stated the person was a police officer to protect the confidential informant. So the affiant's statement was deliberately false. The police officer told the magistrate that the person was not an agent, but an informant, and that he used the term agent to protect the identity of the informant. However, the magistrate testified at the hearing challenging the warrant that even after the police officer provided the verbal information, he was still under the impression that the "agent/informant" was a police officer. The magistrate testified he would have asked more questions if he knew the person was merely an informant and not a police officer. Jones, 342 S.C. at 125-26, 536 S.E.2d at 677.

The Supreme Court agreed with the Court of Appeals' assessment that the veracity of the informant was not established due to the false term in the affidavit. The Supreme Court concluded, "that oral information may only be used by an affiant to supplement or to amend incorrect information in an affidavit which was not knowingly, intentionally, or recklessly supplied by the affiant." Jones, 342 S.C. at 128-29, 536 S.E.2d at 679.

In Missouri, the lead detective submitted an affidavit that claimed the informant stated that for the past two months he purchased a total of two kilograms of cocaine from Missouri. The affidavit also indicated that Missouri and an accomplice known as "Hot Sauce" told the informant they were going to Atlanta to get cocaine in order to make crack and would sell crack to the informant when they returned. The affidavit also stated that Hot Sauce later told the informant Missouri and Hot Sauce had the crack cocaine and would call the informant "when it was right." Missouri, 337 S.C. at 395, 524 S.E.2d at 550-552.

At a hearing, the lead detective testified that the affidavit was false because Hot Sauce never told his informant there was crack in Hot Sauce's apartment. In fact, the informant was told Missouri had "the stuff" but it was not at Hot Sauce's house, the location where the search warrant was executed. The informant left Hot Sauce's house and told the lead detective that the crack cocaine was not there and Hot Sauce told the informant he did not want to cook at his house because his wife was trying to go straight. Id. at 396, 524 S.E.2d at 553.

The Supreme Court found the lead detective acted at least recklessly by including the false information and concluded that omitting the false information and including the omissions, there would not have been sufficient evidence to support the magistrate's finding of probable cause. Id. at 555, 524 S.E.2d at 397. The Supreme Court noted that taking out the false information alone was not fatal: "Standing alone, these facts are not conclusive as to the presence of crack cocaine in Hot Sauce's apartment, but they make it a fair probability." Id. at 556, 524 S.E.2d at 398. However, the Court concluded, including the omitted information, "the probable presence of the crack cocaine in the apartment is defeated." Id.

In the instant case, unlike Jones and Missouri, the variance does not rise to the level of deliberate or reckless falsity. "Allegations of negligence or innocent mistake are insufficient." Franks, 438 U.S. at 171. The mistake of fact – that the informant was working with law enforcement in this particular case – fails to rise to anything more than an unintended misstatement. See Colkley, 899 F.2d at 301 (noting "the defendant must show that the omission is the product of a deliberate falsehood or of reckless disregard for the truth" (internal quotation marks and citation omitted)).

Further, taking out the information that the informant was working with law enforcement does not alter the information relied on for probable cause. The informant is still someone who provided information twice in the past that led to arrests and still viewed the methamphetamine lab. The statement does not alter the veracity of the informant or the information he provided. Whether working for law enforcement or merely acting as a tipster, probable cause is determined from the informant's observations which were still outside the purview of law enforcement. Accordingly, the misstatement does not result in the search warrant being invalid.

III.

Where the confidential informant was a mere tipster and was not a participant in the crime, the trial court did not err in declining to require the State to disclose the identity of the confidential informant.

Dill claims the trial court erred in failing to grant his motion to compel the State to reveal the identity of the confidential informant.[1] However, the confidential informant was merely a tipster and did not participate in the investigation. Accordingly, disclosure is not warranted. This Court has observed the following:

> The disclosure of the identity of one who is merely an informer and not a participant nor a material witness is not generally required. Where, however, the informer is also a participant and/or a material witness on the issue of guilt or innocence, disclosure may or may not be required depending on various factors and circumstances.

State v. Wright, 322 S.C. 484, 488, 472 S.E.2d 642, 645 (Ct. App. 1996). This Court noted that "the trial court must balance the public's interest in perpetrating the flow of vital information to law enforcement officials against the right of the individual to prepare his defense." Id.

---

[1] In a footnote in his discussion of this issue, Dill makes a completely unrelated complaint about law enforcement destroying the materials seized. App. Br. p. 23 n. 8. Dill's apparently earnest claim is that his due process rights are violated when law enforcement failed to risk their safety and test dangerous methamphetamine lab materials. This argument is troubling. Further, the point is frivolous because the record fails to show the seized materials had exculpatory value. State v. Cheeseboro, 346 S.C. 526, 552 S.E.2d 300 (2001). Finally, the complaint should not be reviewed because it is not included in the statement of issues. State v. Culbreath, 377 S.C. 326, 332, 659 S.E.2d 268, 271 (Ct. App. 2008) ("In order for an issue to be properly presented for appeal, the appellant's brief must set forth the issue in the statement of issues on appeal.").

The Supreme Court has observed "an informant's identity need not be disclosed where he possesses only a peripheral knowledge of the crime or is a mere 'tipster' who supplies a lead to law enforcement." State v. Humphries, 354 S.C. 87, 90, 579 S.E.2d 613, 615 (2003). "The burden is upon the defendant to show the facts and circumstances entitling him to the disclosure." Id. Dill recognizes case law indicating that an informant who is merely a tipster and not a participant in the crime does not need to be disclosed; Dill nonetheless ignores the fact that the informant in this case was merely a tipster and no evidence indicates the informant was a participant in the crime.

In the instant case, Dill's main contention is that law enforcement relied exclusively on the informant in order to have a search warrant issued. This contention fails to distinguish this case from other cases where a member of the public provides information to law enforcement. The same interest in protecting the flow of information exists in the present case. Dill speculates that merely because a year had passed at the time of trial, it was possible the informant was no longer providing information to law enforcement. Considering that informants face the possibility of retribution by the accused, and the informant in this case may have continued to provide helpful information to law enforcement past the time of trial, Dill's self-serving musings carry no weight.

Further, Dill's contention of any benefit to him at trial from having the informant available is highly speculative and unlikely. It is highly likely the informant could have provided helpful testimony for the prosecution, but presumably other considerations, such as the continued utility of the informant, mitigated against the State presenting the informant as a witness.

IV.

The trial court did not err in denying the motion for directed verdict as sufficient evidence was presented to the jury that Dill manufactured or attempted to manufacture methamphetamine. The issue is not preserved for review.

Dill argues the trial court erred in denying his motion for directed verdict because evidence fails to support an overt act sufficient to constitute an attempt. However, evidence indicates the crime was completed. Further, the State proved steps beyond mere preparation as not only were several ingredients for methamphetamine found in Dill's residence, but an assembled HCl generator was found, a necessary tool for making methamphetamine.

First, the issue is not preserved for review. Dill argued lack of constructive possession and lack of intent, but never argued the absence of an overt act. 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). A party cannot argue one ground for directed verdict at trial and in turn argue an alternative ground on appeal. State v. Bailey, 298 S.C. 1, 377 S.E.2d 581 (1989). Accordingly, this Court should refrain from reviewing this issue.

However, sufficient evidence supports submitting this charge to the jury. Under S.C. Code § 44-53-375(B): "A person who manufactures, distributes, dispenses delivers, purchases, or otherwise aids, abets, attempts, or conspires to manufacture, distribute, dispense, deliver, or purchase, or possesses with intent to distribute, dispense, or deliver methamphetamine . . . in violation of the provisions of Section 44-53-370, is guilty of a felony . . ."

"'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.

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).

The Supreme Court 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) (emphasis added) (quoting State v. Cherry, 361 S.C. 588, 593, 606 S.E.2d 475, 478 (2004) (citations and internal quotations omitted)); see also State v. Richburg, 250 S.C. 451, 459, 158 S.E.2d 769, 772 (1968) ("When the evidence is susceptible of more than one reasonable inference, questions of fact must be submitted to the jury.").

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.

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." In the instant case, evidence indicates Dill was in constructive possession of the found items. 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. at 200, 284 S.E.2d at 775. "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." Id. at 203, 284 S.E.2d at 775. In the instant case, Dill does not challenge on appeal constructive possession of the paraphernalia.

Instead, Dill argues lack of evidence of an attempt to manufacture methamphetamine although the evidence suggests the methamphetamine had already been manufactured.[2] Evidence is sufficient to support the attempt or the completed crime of manufacturing methamphetamine.[3] 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.

---

[2] Note the residue in the water bottle (the HCL generator) in State's Exhibit #3. Further, the jury could reasonably conclude that the brown jug containing unknown liquid, also seen in State's Exhibit #3, is the byproduct of methamphetamine production – the liquid remaining after the crystals of meth fall out of the liquid during the gassing out phase of production. See ROA. p. 66, lines 1-10; p. 68, lines 9-14 (referring to unknown liquid).

[3] Attempt is a lesser included offense of the completed offense. State v. Hiott, 276 S.C. 72,

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).

In the present case, numerous items used to manufacture methamphetamine were found in the residence. Highly probative are the five one-pound bags of salt found, some open and some not. Salt is a critical ingredient in the gassing out process for manufacturing methamphetamine. The jury may have called upon their own life experiences and decided that five pounds of salt is an abnormally high quantity of salt for a household to have on hand. An HCL generator was found outside the back door, its only purpose is for manufacturing methamphetamine. Other ingredients were located inside – hydrogen peroxide and Coleman lighter fluid. Also telling is the presence of numerous used and unused syringes, suggestive of drug activity and therefore, highly corroborative of the other evidence.

Dill notes the lack of published cases on manufacturing methamphetamine in South Carolina, but cases from other jurisdictions are helpful. In Cluck v. State, 226 S.W.3d 780 (Ark. 2006), Cluck argued evidence was insufficient to support a conviction for possession of drug paraphernalia with intent to manufacture methamphetamine because the items found were merely household items and several ingredients necessary to produce methamphetamine were not present; no methamphetamine was found at his residence. Id. at 783. However, evidence of his intent included his purchase of iodine and his prior criminal record related to methamphetamine. The Arkansas Supreme Court found criminal intent could be inferred

---

80, 276 S.E.2d 163, 166 (1981).

from the circumstantial evidence. Id. at 785. As to his argument that evidence was insufficient because not all the ingredients necessary for methamphetamine production were present, the court found:

> Cluck's argument that the evidence was insufficient because the police officers did not find all the ingredients necessary to manufacture methamphetamine has no merit. Neither this statute nor this court's prior case law require that *all* the ingredients necessary to manufacture methamphetamine be found in a defendant's possession in order for that defendant to be charged and convicted for committing this crime.

Id. (emphasis in the original).

In Chavies v. Commonwealth, 354 S.W.3d 103 (Ky. 2011), Chavies was convicted of manufacturing methamphetamine based on possession of ingredients or equipment for the manufacture of methamphetamine. Law enforcement found four plastic bottles at the scene; three were inactive methamphetamine labs and one was an HCL generator. Three of them tested positive for ammonia. The various bottles contained different combinations of lithium, ether, and pill soak. Id. at 112. The evidence was supported by a detective's testimony who was experienced in cleaning up methamphetamine labs. Id. The Kentucky Supreme Court noted: "[C]hemical testing of an alleged controlled substance is not required to sustain a conviction." Id. (quoting Jones v. Commonwealth, 331 S.W.3d 249, 252 (Ky. 2011)). The court found given the detective's testimony, it was not unreasonable for the jury to find Chavies guilty. Id.

In Sevier v. Commonwealth, 434 S.W.3d 443 (Ky. 2014), the Kentucky Supreme Court found evidence sufficient to support conviction for manufacturing methamphetamine. Evidence included a pickle jar containing what was described as flakes in "meth oil." The

opinion notes that the meth oil is the result of the final chemical reaction necessary to produce methamphetamine. The meth oil is poured through a filter to capture the methamphetamine flakes and produce the end product. Id. at 449. Other items included Coleman fuel in a milk jug, rock salt, liquid drain cleaner, a funnel, and coffee filters. Id. Located nearby in a car were batteries stripped of lithium and three HCL generators that tested positive for hydrochloric acid. Id. The court noted, "The volatility of the HCL generators and the mixture in the pickle jar necessitated the deployment to the scene of an independent hazardous-waste disposal company to stabilize and remove the tainted items." Id.

In finding evidence sufficient, the Kentucky Supreme Court noted the following: "The storage of the chemical mixture in the pickle jar in close proximity to the other chemicals and items of equipment further provides a basis to infer that Sevier was participating in an on-going enterprise to produce methamphetamine as opposed to an isolated instance as he alleges." Id. at 454. See also, Saul v. State, 225 S.W.3d 373, 378 (Ark. 2006) ("We do not view the fact that Saul was not apprehended in the process of 'cooking meth' as being determinative.").

Instead of examining the law of other jurisdictions, Dill opts to review moonshining cases within our own jurisdiction. The first case Dill relies on is State v. Evans, 216 S.C. 328, 57 S.E.2d 756 (1950). In that case, Evans and two others surrounded a campfire in close proximity to an active still and ran when law enforcement came upon the still. However, Evans lived fifteen miles away from the location in the woods, and law enforcement did not observe any of the three members taking part in manufacturing – they

were just sitting around the campfire. Id. at 331-332, 57 S.E.2d at 757.

The Supreme Court noted there was no evidence of an overt act by Evans or the other two men. Id. at 332-33, 57 S.E.2d at 757-58. However, despite its terminology, Evans has little in common with the present case. In essence, the Evans court found evidence insufficient because there was no evidence Evans was not just merely present and the evidence failed to indicate he had dominion and control over the still. Id. If the still was found in Evans' backyard then certainly the outcome of the case would have been different.

Dill also relies on State v. Quick, 199 S.C. 256, 19 S.E.2d 101 (1942). In Quick, law enforcement found two stills on Quick's non-residential property close by the dead end of a road. However, Quick lived in the opposite part of the county. Neither of the two stills were currently in operation. However, one still contained mash and the other appeared to have been recently operated. Law enforcement waited by the stills for a time, and as they departed in their car, they came upon Quick's car, occupied by Quick, two other men, and two children. The car contained 500 pounds of sugar, a sack of mill feed, and three cases of yeast cakes. Id. at 256, 19 S.E.2d at 102. The Supreme Court found that evidence indicated Quick had the intent to manufacture liquor, but that there was no evidence of an overt act.

In the present case, unlike Quick, evidence indicated the manufacture of methamphetamine already occurred. In the instant case, the HCl generator was found discarded outside the door and law enforcement found a jar of liquid that appeared to be the by-product of the manufacturing process. Further, unlike Quick, beyond the ingredients found, evidence indicated an overt act because an HCl generator was created, the tool necessary for the last step of the manufacturing process, the gassing out phase of production.

Additionally, the offense in Quick was not an attempt crime, as noted in this Court's opinion in State v. Reid, 383 S.C. 285, 293, 679 S.E.2d 194, 198 (Ct. App. 2009). Instead, the issue was sufficiency of evidence for the liquor manufacturing statue that found a completed crime from merely commencing the manufacturing process. In the instant case, preparation to commence manufacturing (attempt to start manufacturing) may constitute the overt act. See generally Reid, 383 S.C. at 297, 679 S.E.2d at 200 n.4 (citing Justice Holmes' observation in Commonwealth v. Peaslee, 59 N.E. 55, 56 (Mass. 1901) that "preparation is not an attempt. But some preparations may amount to an attempt. It is a question of degree.").

In State v. Nesbitt, 346 S.C. 226, 550 S.E.2d 864 (Ct. App. 2001), this Court found evidence sufficient to support attempted armed robbery when the two defendants approached a convenience store, one wearing a mask and holding a gun. However, one of them opened the door to the store and then they fled without ever entering the store. This Court found the evidence sufficient, noting the following:

> According to Brockman, a black male masking his appearance approached the entrance of the store brandishing a weapon. Sarratt testified that one of two perpetrators opened the door and said something before fleeing the scene. We find that these actions move directly toward the commission of an armed robbery. While the conduct may not have been the last proximate step toward the commission of the offense, the acts committed went beyond mere preparation. In our view, these acts are sufficient to meet the overt act requirement espoused in Quick. **It should not be necessary to subject victims to a face-to-face confrontation with a lethal weapon in order to find the essential element of an overt act.** From the sum of all evidence presented, the jury could infer that an armed robbery was immediately forthcoming, or that the attempt had begun.

Id. at 234, 550 S.E.2d at 868 (emphasis added).

Likewise, assembling multiple ingredients and building an HCL generator constitutes a substantial step towards manufacturing methamphetamine sufficient to constitute an attempt to manufacture. See also State v. Reid, 393 S.C. 325, 713 S.E.2d 274 (2011) (finding travelling to a pre-determined destination for a rendezvous with what Reid would have expected to be a fourteen year-old girl was an overt act to sustain a conviction for attempted criminal sexual conduct with a minor in the second degree).

Accordingly, the trial court did not err in denying the motion for directed verdict.

CONCLUSION

For all of the foregoing reasons, the judgment and conviction of the lower court should be affirmed.

Respectfully submitted,

ALAN WILSON
Attorney General

DAVID SPENCER
Senior Assistant Attorney General

DAVID M. STUMBO
Solicitor, Eighth Judicial Circuit

BY: _____
DAVID SPENCER

Office of the Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 734-3727

ATTORNEYS FOR RESPONDENT

July 10, 2015

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

RECEIVED
JUL 10 2015
SC Court of Appeals

Appeal From Laurens County
Eugene C. Griffith, Jr., Circuit Court Judge

THE STATE, Respondent,

v.

JAMES CLYDE DILL, JR., Appellant.

CERTIFICATE OF COUNSEL

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

ALAN WILSON
Attorney General

DAVID SPENCER
Senior Assistant Attorney General

By: _____
DAVID SPENCER
Office of Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 734-3727

ATTORNEYS FOR RESPONDENT

July 10, 2015

RECEIVED
JUL 10 2015
SC Court of Appeals

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal From Laurens County
Eugene C. Griffith, Jr., Circuit Court Judge

THE STATE, Respondent,

v.

JAMES CLYDE DILL, JR., Appellant.

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: John H. Strom, Esquire, SC Commission on Indigent Defense, Division of Appellate Defense, P.O. Box 11589, Columbia, SC 29211.

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

This 10TH day of July, 2015.

NORMA BIGBEE
Legal Assistant

Office of Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 734-3727

ALAN WILSON
ATTORNEY GENERAL

July 10, 2015

VIA HAND DELIVERY
The Honorable Jenny A. Kitchings
Clerk, South Carolina Court of Appeals
Post Office Box 11629
Columbia, S. C. 29211

Re: **State v. James Clyde Dill, Jr.**
Appellate Case No: 2013-000724

Dear Ms. Kitchings:

Enclosed please find the original and nine (9) copies of the **Final Brief of Respondent** along with **proof of service**, in the above-referenced matter for filing in your office. By copy of this letter, we are serving opposing counsel with this brief today.

Sincerely,

David Spencer
Senior Assistant Attorney General
Bar No: 68571

DS/nb
Enclosures

cc: John H. Strom, Esquire (2 copies)
Victim Services (with enclosure)