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JUL 28 2018

SC SUPREME COURT

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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

THE STATE,

Respondent,

vs.

CHARLES CAIN,

Petitioner.

APPELLATE CASE NO. 2015-001983

BRIEF OF RESPONDENT

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STATEMENT OF ISSUE ON APPEAL

Petitioner failed to raise the issue of whether the trial court erred in denying the motion for directed verdict because the State presented theoretical yield analysis instead of potential yield analysis (which is an issue of weight rather than existence of evidence) and no functional equivalent of this argument was presented to the trial court at any point during the trial. Further, petitioner's pre-trial motion challenging the ability to prove weight from a theoretical yield analysis was never presented as a motion for directed verdict.

STATEMENT OF THE CASE

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

Cain's sentence was unsealed at a hearing on April 11, 2013. No explanation was provided for Cain's absence from trial. Judge McIntosh sentenced Cain to ten years' imprisonment.

Cain appealed and raised two issues with subparts. Cain first raised the issue of whether the trial court erred in admitting expert testimony on the theoretical yield of methamphetamine from a given amount of pseudoephedrine. Cain segregated this argument into an argument that the methodology for reaching the expert's conclusions did not meet the threshold for reliability and an argument that the expert's testimony was not supported by facts. **The admissibility of this expert testimony was not raised in Cain's subsequent petition for writ of certiorari.**

The second issue raised was whether the trial court erred in granting a directed verdict on

trafficking. In his statement of the issue, Cain posited whether “[t]he trial court erred in failing to grant a directed verdict as there was insufficient evidence of intent to manufacture in excess of ten grams of methamphetamine.” Final Br. of App. p. 12. The Court of Appeals reached this issue in its opinion. This issue was presented in two parts. Cain framed the first part as whether “[i]n a prosecution under the trafficking statute the State is required to present evidence of ‘potential yield’ and may not rely simply on a hypothetical ‘theoretical yield.’” Final Br. of App. p. 15. The second part of the directed verdict issue was whether “[t]here is insufficient evidence that Appellant had custody and control of all precursor materials sufficient to form an intent to manufacture in excess of ten grams of methamphetamine.” Final Br. of App. p. 19.

The Court of Appeals affirmed the conviction and sentence. Cain petitioned for rehearing, which was denied; however, the Court of Appeals issued a substitute opinion. State v. Cain, 413 S.C. 508, 776 S.E.2d 374 (2015).

In its opinion, the Court of Appeals found the expert testimony was admissible – an issue no longer challenged on certiorari. The Court of Appeals then addressed the motion for directed verdict. The Court of Appeals noted “[a]s a preliminary matter,” Cain’s argument that the State should be required to present “potential yield” calculations and not rely solely on “theoretical yield” calculations was not preserved for review. Cain, 413 S.C. at 530, 776 S.E.2d at 385-86. Therefore, the Court of Appeals declined to make a distinction between “these terms of art for the first time on appeal.” Id. at 386, 776 S.E.2d at 530. However, the Court of Appeals noted Cain raised the issue of “whether evidence of trafficking was too speculative to present that charge to the jury.” Id. The Court of Appeals considered this issue and concluded that evidence of Cain’s possession of meth lab components and the expert’s testimony on theoretical yield was sufficient

for a jury “to decide **whether Cain intended to manufacture in excess of ten grams of methamphetamine.**” Id. at 386, 776 S.E.2d at 531 (emphasis added). The Court of Appeals also found sufficient evidence establishing Cain’s possession of the materials to manufacture the methamphetamine. Id. at 387, 776 S.E.2d at 533.

Cain petitioned only on the directed verdict issue. Cain rephrased his arguments in the petition for writ of certiorari: “Did the Court of Appeals err in finding that petitioner’s argument related to ‘theoretical yield’ was not preserved when even the Court of Appeals’ own opinion states the argument was raised and ruled upon by the trial court?” Pet. for Writ of Cert. p. i. This argument is segmented into three parts. The first claims the issue was raised and ruled upon by the trial court. The second claims Cain was not required to use “any particular ‘magic words’” and supposes that trial counsel was incapable of understanding terms of art from other states. The last part claims the “Court of Appeals erred in finding the evidence of Appellant’s intent was not too speculative.” Pet. for Writ of Cert. p. i. As mentioned before, the Court of Appeals reached the latter issue and this Court denied the petition for certiorari as to this issue. This Court granted certiorari on the two parts of the argument pertaining to whether the issue of theoretical yield versus potential yield was preserved for review and denied certiorari on the substantive directed verdict issue. Cain filed his Brief to this Court. The State’s brief follows.

STATEMENT OF FACTS

Petitioner Cain and co-defendant Parkhurst furtively fled away while law enforcement was executing a search warrant at the house where they claimed to reside. Cain and Parkhurst left in their car by the time law enforcement found the meth lab.

Deputy Kevan Kyle, accompanied by Deputy Wilbanks, was attempting to serve a family bench warrant at the house on an individual by the name of Travis Kirby on January 17, 2012. Cain and Parkhurst were present at the residence when Deputy Kyle tried to serve the warrant. Deputy Kyle testified he knocked on the back door because a car was parked by it. Both Cain and Parkhurst came to the door. Both supplied their identification to Deputy Kyle upon his request. They claimed to not know Kirby. They also claimed to rent only one bedroom in the house, it was the only room they went in, and they had nothing to do with the rest of the house. Deputy Kyle testified Cain and Parkhurst did not want him looking inside the remainder of the house. ROA. p. 38.

Deputy Kyle testified he felt Cain and Parkhurst 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 Cain and Parkhurst 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. 38-39 (direct quote, p. 39, lines 16-18); p. 46.

Deputy Kyle found a meth lab in the far corner of the house – 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. 40; 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 from liquids in the meth lab. ROA. p. 41.

Deputies Kyle and Wilbanks decided Kirby was not in the house and went back to the bedroom where they originally found Cain and Parkhurst. The door to the bedroom was now barricaded to prevent the deputies from entering the bedroom. The deputies discovered Cain and Parkhurst were gone, as was the codefendants' car. ROA. pp. 42-43. Outside the exterior door utilized by Cain and Parkhurst were the freshly poured contents of a one pot meth lab; the multicolored pellets poured out on the grass and concrete were still fresh and wet. ROA. p. 42, lines 3-12; p. 45.

Deputy Wilbanks also testified. He accompanied Deputy Kyle to serve the bench warrant. ROA. p. 54. Deputy Wilbanks testified the bedroom in which Cain and Parkhurst claimed to reside did not have a kitchen or a bathroom attached. ROA. p. 57. The deputies accessed the rest of the house through the bedroom door after Cain opened the door for the deputies. ROA. p. 57. The dog, a pit bull, came running towards them. When Deputy Wilbanks said he may need to shoot the dog, Cain implored, "Don't shoot my dog, hold on, let me get him." ROA. p. 62, lines 13-17.

After the deputies found the meth lab and determined no other people were in the house, they attempted to reenter the bedroom, but the door was barricaded. Deputy Wilbanks testified he was able to force the door open but Cain and Parkhurst already were gone. ROA. pp. 58-59. On the way back out of the house, the deputies found the emptied contents of the one pot bottle on the

cement patio outside the bedroom door. ROA. pp. 59-60. 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. 59, lines 19-23.

Chemist Beth Stuart testified last for the State. Stuart testified to her education and training. She 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 and is certified by the American Board of Criminalistics in all areas of forensic science. ROA. pp. 70-71. Stuart has testified as an expert thirty-four times. ROA. p. 71. She was qualified **without objection** as an expert in forensic chemistry and chemical analysis. ROA. p. 72.

Part of her job as a forensic chemist was to respond to meth labs, “a lot of them.” ROA. p. 73, lines 13-15. Stuart described meth labs as follows:

A methamphetamine lab is . . . basically where persons or person are manufacturing methamphetamine, a known drug, by taking normal household products and putting them together in order to make it. And, so, there would be what we call chemicals around, but they’re gonna look like normal household products to the general eye. But, to us, when they’re put in a certain order or done a certain way, those chemicals, those household products are actually the chemicals that will produce this drug.

ROA. p. 73, line 18 – p. 74, line 1. Stuart testified she has responded to 150 methamphetamine labs. ROA. p. 74, lines 2-4.

Stuart responded to the crime scene on January 17, 2012. She went straight to the bathroom and noted the tubing extending from a bottle on the bathroom counter and out the window. ROA. p. 78. 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. 79, lines 1-14.¹

In the living room, trash bags and coffee filters lay on the floor. Inside one of the trash bags was a bottle containing face masks, blister packs of cold medicine, and battery strips. Unused strips of lithium, taken from lithium batteries, lay in the bottom of a bucket. Stuart found two-liter bottles with pink and white pellets mixed together. ROA. pp. 80-81. 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 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. 83, line 10 - p. 84, line 6. Stuart testified the next step is to add lithium strips and lye. This will start a reaction, but to further the reaction, water is added because the lithium is water reactive. ROA. p. 84-85.

¹ So contrary to Cain’s argument, in which he called the State’s theory of the case “absurd,” this was not a completed crime in the sense that manufacturing was still ongoing when law enforcement arrived at the residence.

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. 83-85. Several bottles of this pink solid were found. ROA. p. 83, p. 85, p. 90, State's Exhibits Nos. 12 and 24.

The liquid is then used in an acid gas generator, which is the bottle with a tube running out. ROA. p. 85; 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. 85-86. Using a funnel and coffee filters, the white powder is filtered out from the liquid to produce useable methamphetamine. ROA. p. 87. State's Exhibit Number 24, found in the living room, is a bottle Stuart determined was acidic and likewise in the last step of the manufacturing stage. ROA. p. 82.

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. 86. 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. 87; 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. 89; State's Exhibit No. 11.

Stuart has produced meth as part of her training: "In the DNA methamphetamine school we actually have to go through the reactions and methamphetamine and determine yields." ROA. p. 99, lines 2-4.

Cain made an analogy to baking and recipes and then made a statement "Cause people have

experimented to get that to give you a recipe.” ROA. p. 99, lines 16-25. After Cain’s counsel finished his testimonial statement, Stuart responded as follows:

Okay. When you’re producing methamphetamine there is an equation. It’s Pseudoephedrine, plus Lithium, plus ammonia gas yields methamphetamine.

Okay. We call it a one-to-one more Stoichiometric ratio between Pseudoephedrine and methamphetamine. What that means is for every mole, which is an extremely scientific term, of Pseudoephedrine that you put into the reaction, you get one mole of methamphetamine out. It’s a one-to-one mole reaction.

To determine the number of moles that you put in, and this is all science and chemistry, if you look at a periodic table, okay, everybody’s seen one of those from some of your time in school, they have elements on there and the elements have what they call a mass, okay, and it’s grams per mole if you remember that.

So, I can take the weight of Pseudoephedrine and do the math of its mass from the periodic table and tell you how many moles of Pseudoephedrine I have. I know it’s a one-to-one molar ratio between Pseudoephedrine and methamphetamine from the equations of how to make meth. Okay. So then all I need to do is take that amount and do it times the mass of methamphetamine in order to get how much methamphetamine is made.

ROA. p. 100, lines 1-23.

Stuart determined the empty blister packs contained a total of 19.2 grams of pseudoephedrine. ROA. pp. 93-94. 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. An eighty percent yield would produce 14.13 grams, a seventy-five percent yield would produce 13.25 grams, a seventy percent yield would produce 12.36 grams, and a sixty-five percent yield would produce 11.48 grams.

ROA. pp. 102-103.

Defense witness Leon Fowler testified he lived in the trailer “behind my house that

everyone's talking about." ROA. p. 123, lines 13-24. Fowler also testified Cain and Parkhurst did not live in the house very long – only two or three weeks. ROA. p. 126. Fowler did not know them, but he knew they were his son's friends. ROA. p. 126. On cross-examination, he testified he "didn't want to know [what was going on in the house]." ROA. p. 129, lines 18-19. Fowler explained he did not know there was a meth lab in the house. ROA. p. 129, lines 24-25.

ARGUMENT

Petitioner failed to raise the issue of whether the trial court erred in denying the motion for directed verdict because the State presented theoretical yield analysis instead of potential yield analysis (which is an issue of weight rather than existence of evidence) and no functional equivalent of this argument was presented to the trial court at any point during the trial. Further, petitioner's pre-trial motion challenging the ability to prove weight from a theoretical yield analysis was never presented as a motion for directed verdict.

In the Court of Appeals, Cain argued the trial court should have a granted directed verdict because evidence failed to show the intent to manufacture in excess of ten grams of methamphetamine. The uncontroverted evidence was that the amount of pseudoephedrine based on the empty blister packs could yield as much as 17.67 grams of methamphetamine. The Court of Appeals reached this issue, finding as follows:

To the extent Cain argues the evidence of his intent to manufacture ten or more grams of methamphetamine was too speculative, we disagree and find the circuit court properly submitted the trafficking charge to the jury. When viewed in a light most favorable to the State, the evidence of Cain's possession of the meth lab components – coupled with Stuart's **properly admitted theoretical yield testimony**² – was sufficient for the circuit court to allow the jury to decide whether Cain intended to manufacture in excess of ten grams of methamphetamine. . . .

Cain, 413 S.C. at 531, 776 S.E.2d at 386 (citation omitted). This Court denied certiorari on this issue.

In analyzing the directed verdict issues, the Court of Appeals found a sub-argument was not preserved for review, holding as follows:

² Cain no longer challenges the admissibility of the expert testimony.

As a preliminary matter, Cain argues the State was required to present evidence of “potential yield” calculations based on his particular capabilities and the manufacturing site – and could not simply rely on a “hypothetical theoretical yield” – to prove his intent. We find this issue is not preserved for our review. A review of the record reveals that, aside from the constructive possession issue, the only other issue raised in Cain’s directed verdict motion was whether the State’s evidence of trafficking was too speculative to present that charge to the jury. The theoretical yield versus potential yield argument was not raised as a ground that in Cain’s directed verdict motion, not at any other point during the trial.

Cain, 443 S.C. at 530, 776 S.E.2d at 385-86.

In a footnote to this paragraph, the Court of Appeals noted the following:

The record is devoid of any reference to a potential yield calculation. Although Cain raised several objections during trial to the State relying on a theoretical weight to establish his intent to traffic methamphetamine, his objections were based on the fact that the State could not show evidence of an actual weight of methamphetamine because the pseudoephedrine blister packs were empty.

Id. at 530, 776 S.E.2d at 386 n.5.

How the issue of potential versus theoretical yield was not presented.

This Court granted certiorari solely on the issue of whether the sub-argument concerning potential yield was preserved for review. 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).

Cain's objections to theoretical yield were not raised in a directed verdict motion, but rather in a pre-trial motion to dismiss. During the pre-trial motion, Cain remonstrated no methamphetamine was found and the prosecution for trafficking was based on a theoretical yield of items seized at the scene. Cain argued, "But 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. 12, lines 9-19. The prosecutor explained that the case was being prosecuted under the trafficking case as an attempt to manufacture. ROA p. 35, lines 9-19. Following further discussion, Cain argued the following:

. . . I just, I think that, that in that plain meaning of attempt that is you have the components. Not that you have done it. They're based on not – given the Sudafed they have, given the other components, they could have manufactured this much. That would be attempt.

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.

ROA p. 16, line 22 – p. 17, line 6.

In a difficult-to-follow argument, Cain maintained the trafficking statute does not contemplate possession of ingredients and equipment alone being sufficient to constitute trafficking, and argued the case should proceed under the manufacturing statute and not the trafficking statute.³ The trial court took the argument under advisement. ROA pp. 18-21. Both sides made further points. Cain remonstrated, "[W]e don't have any – we have the theoretical weight here. Not a natural weight here." ROA p. 23, lines 15-17.

³ "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). Trafficking proscribes attempts to manufacture in excess of ten grams of methamphetamine. S.C. Code § 44-53-375(C).

After reviewing the case law provided by the State during a break, the trial court brought the issue up, noting “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 28-grams, then I guess they can find him guilty of trafficking.” ROA p. 27, lines 12-16. After the trial court’s comments and a quick search in the courthouse for the missing defendants, the trial began. ROA. pp. 27-29.

At the close of the State’s case, Cain moved for directed verdict primarily on the issue of constructive possession of the materials found at the house. In making the motion, Cain observed, “The testimony has been presented that there is some type of something going on in this house, some ingredient in this house that has been identified as a meth lab with some yield. In optimal conditions, maybe, to be a little over 17 grams.” ROA p. 116, line 23 – p. 117, line 3. Cain complained about the lack of nexus between him and the materials found in the rest of the house.⁴ ROA p. 117, lines 4-10. Then Cain suggested the evidence was too speculative for trafficking and if there was enough to present to the jury, it should “be for manufacturing as opposed to trafficking.” ROA p. 117, lines 11-17. This seems to be the basis for the Court of Appeals generously reaching the issue of whether there was sufficient evidence of intent to support trafficking. The fact that the Court of Appeals did reach this issue certainly contradicts Cain’s complaint that the Court of Appeals was requiring “magic words” since Cain never used the term of art “intent” in his arguments to the trial court.

⁴ Cain and Parkhurst told law enforcement they only stayed in the bedroom and did not go in the rest of the house. Evidence contradicted this (such as letting their dog roam the rest of the house), and Cain is no longer arguing the lack of constructive possession of the evidence seized at the house.

The Court of Appeals correctly determined the theoretical yield versus potential yield argument was never raised. “Potential yield” was never used, which Cain concedes, but nonetheless Cain argues the substance was presented without the use of the term of art. Cain further complains that trial counsel could not be expected to use a term of art from another state, as if counsel did not have access to Westlaw or similar research tools, and could not have done the legal research that the appellate attorneys, the Court of Appeals, and the prosecutor have done in this case.

Cain previously claimed he incorporated his motion to dismiss into his directed verdict motion. Cain never moved to incorporate the argument into a directed verdict motion. Final Br. of App. p. 5, see ROA. pp. 116-119. While the trial court brought up the **pre-trial motion** following his ruling on the directed verdict argument concerning constructive possession, the trial court did not state that the issue was incorporated in the directed verdict motion. See State v. Fletcher, 363 S.C. 221, 258, 609 S.E.2d 572, 591 (Ct. App. 2005) (finding “the trial court’s mentioning the issue does not preserve it for appeal.”) *rev’d on other grounds by State v. Fletcher*, 379 S.C. 17, 664 S.E.2d 480 (2008). The trial court took the **pre-trial motion** under advisement, which the trial court mentioned later at the close of evidence; but as observed by the Court of Appeals, counsel never raised this argument in support of a directed verdict motion. Now, in Cain’s brief to this Court, Cain acknowledges the issue was framed as a motion to dismiss, but nonetheless asks this Court to revisit the issue of whether the “directed verdict” issue was preserved, arguing that it the substance that should be controlling.

But as discussed above, the substance actually raised was whether prosecution for trafficking based on precursor materials and no finished product could be done at all as a matter of

statutory interpretation. It was not presented as a question of whether prosecution should be based on Cain's "potential" as a methamphetamine cook. Cain never argued that one form of analysis (potential) should be preferred to another form of analysis that is less beneficial to him (theoretical). The Court of Appeals correctly determined no argument was presented that theoretical yield evidence should not be considered because some other analysis would be more appropriate. Of course, the very argument of what the preferred method should be obviously implicates a weight-of-evidence rather than existence-of-evidence analysis, but further,⁵ Cain did not make that argument.

Cain also argues his counsel's questions posed to an expert witness should preserve the issue for appeal. However, Cain cites State v. Williams, 386 S.C. 503, 690 S.E.2d 62 n.8 (2010) for the four part test in determining if an issue is preserved for appeal. The first requirement under Williams is for the issue be raised **to the trial court**. Id. The test is not whether an argument was raised **to a witness**.

The Court of Appeals correctly found there was evidence of intent to manufacture more than ten grams of methamphetamine.

The Court of Appeals did not err in finding evidence supported the verdict. Further, this Court denied certiorari on whether Cain had the specific intent to manufacture methamphetamine. Cain abandoned his argument to the Court of Appeals concerning the admissibility of expert evidence. The law of the case now is that the expert testimony on theoretical yield was admissible. State v. Sampson, 317 S.C. 423, 454 S.E.2d 721 (Ct. App. 1995) (unchallenged

⁵ State v. Walker, 349 S.C. 49, 53, 562 S.E.2d 313, 315 (2002) (finding when considering a motion for directed verdict, the trial court is concerned with the existence of evidence, not its weight).

rulings are the law of the case). Accordingly, evidence proves Cain possessed and utilized sufficient pseudoephedrine to produce up to seventeen grams of methamphetamine **because the expert said he could**. State v. Buckman, 347 S.C. 316, 324 n.6, 55 S.E.2d 402, 406 n.6 (2001) (credibility of a witness goes to the weight of the evidence and not consideration by the trial court in determining whether to grant a directed verdict). Cain's present argument goes to the weight, not existence of evidence. "After the trial court properly has determined a witness is competent, the resolution of the credibility of the witness is within the province of the jury." State v. Needs, 333 S.C. 134, 144, 508 S.E.2d 857, 862 (1998).

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).

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).⁶ 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). “The question of criminal intent with which an act is done is one of fact and is ordinarily for jury determination except in extreme cases where there is no evidence thereon.” Tuckness, 257 S.C. at 299, 185 S.E.2d at 608.

Because testimony was elicited that the amount of pseudoephedrine based on empty blister packs was sufficient to make more than ten grams of methamphetamine, the evidence supported the verdict for trafficking.

The amount of methamphetamine that may be produced from a given amount of pseudoephedrine is not hypothetical, but based on simple chemistry and math. The expert’s testimony established Cain could convert all of the pseudoephedrine to methamphetamine if he used sufficient amounts of other precursor ingredients and washed the equipment sufficiently, so Cain had the “potential” for a 100% yield.

⁶ The Court of Appeals cited Nesbitt for this proposition, which contradicts Cain’s claim that the Court of Appeals failed to analyze whether Cain had the specific intent to manufacture in excess of ten grams of methamphetamine. Cain, 413 at 527, 776 S.E.2d at 384.

The State presented evidence that pseudoephedrine is used to produce methamphetamine, and yields may reasonably be calculated by those with basic working knowledge of chemistry equations. As Stuart testified, it's a mole to mole conversion ratio between pseudoephedrine and methamphetamine. Stuart only had to divide the amount of pseudoephedrine by the molecular mass of pseudoephedrine and then multiply by the molecular mass of methamphetamine. ROA. p. 100.⁷ This is not hypothetical or speculative, it's math. "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 [91.9% yield] was a scientifically sound conclusion). Labelling does not avoid this reality, notwithstanding Cain's play on words throughout his brief.

Cain relies on United States v. Eide, 297 F.3d 701 (8th Cir. 2002) to argue Stuart should have calculated the "potential yield" rather than the "theoretical yield." This argument is an issue of weight rather than existence of evidence. Additionally, the manufacturing process in Eide was the lithium ammonia reduction method, which may be a separate manufacturing process than in

⁷ Undersigned counsel offers the following calculation based on Stuart's instructions: Take 19.2 grams of pseudoephedrine and divide by the approximate Mol. mass of pseudoephedrine ($C_{10}H_{15}NO$), which is $19.2/165.23 = .116$ (rounded). Multiply by the Mol. mass of methamphetamine ($C_{10}H_{15}N$), which is approximately 149.23 ($.116 \times 149.23$). The result is 17.34 grams (rounded). Stuart calculated 17.67 grams. See <http://en.wikipedia.org/wiki/Methamphetamine>; <http://en.wikipedia.org/wiki/Pseudoephedrine> (both visited 4/16/2014). However, both the pseudoephedrine and methamphetamine would be in their salt form, so when adding HCl (36.45 Mol. mass.) to the equations, the relative masses are 201.68 Mol. mass and 185.68 Mol. mass. See periodic table, Los Alamos National Laboratory, at <http://periodic.lanl.gov/index.shtml> (visited 4/16/2014). Therefore, 19.2 grams divided by 201.68 = .095 (rounded). Multiply by 185.68 Mol. mass yields 17.677 grams (rounded). Accordingly, although referred to as pseudoephedrine and methamphetamine, the ingredient and product is pseudoephedrine hydrochloride and methamphetamine hydrochloride.

the instant case. Finally, in that case, based on testing of residue, the government's expert estimated the conversion rate would have only been forty to fifty percent, apparently a good rate back in 2000. That rate would have produced ten to twelve grams of "pure" methamphetamine,⁸ easily in excess of the five gram threshold under the federal statute, and therefore, the theoretical versus potential yield was not an issue.

In the instant case, Cain's "potential" to manufacture in excess of ten grams of methamphetamine was established. The evidence established Cain utilized the necessary ingredients to manufacture methamphetamine. Cain asked Stuart if it was possible some of the pseudoephedrine would not react with the other ingredients. Stuart replied: "That would be possible if you don't put enough of the other stuff in there or you don't wash it enough times to get it all out." ROA. p. 109, lines 8-10. No evidence in the record suggests that Cain did not have enough of the other ingredients or was incapable of washing out the equipment. No evidence suggests that Cain was not capable of making all the pseudoephedrine react. So the evidence established not only was the theoretical yield roughly seventeen grams, but the "potential" yield was also seventeen grams. Yield was a jury issue.

Further, Cain's argument ignores the practical reality that one attempts a crime to succeed, and a reasonable juror, based on the juror's life experiences and knowledge of human nature, could conclude Cain was attempting to produce as much methamphetamine as possible, regardless of his actual abilities, and seventeen grams of methamphetamine was possible, as calculated by Stuart. In Wilke, the Illinois court noted "[t]he statute focuses on what defendant *intended* to produce, not

⁸ The term is reflective of the "market oriented" approach under federal law for determining weight. See State v. Johnson, 410 S.C. 10, 26, 763 S.E.2d 36, 45 (Ct. App. 2014).

on what he actually produced, or what he could have produced.” Wilke, 854 N.E.2d at 281. Wilke found the testimony that the theoretical yield of 124.7 grams of pseudoephedrine would be 114.7 grams of methamphetamine was “scientifically sound.” The Wilke court then scoffed, “Defendant has not shown that he intended to fail so miserably at his conversion as to prevent him from yielding a mere 30 grams of methamphetamine (the minimum amount for the charged offense from 124.7 grams of precursor pseudoephedrine).” Id. at 854 N.E.2d at 281-282.

Attempt crimes ensure both success and failure are punished. Cain and Parkhurst might have failed to make enough methamphetamine if they were incompetent cooks. No evidence indicates they were incompetent cooks. Further, incompetency does not absolve the intended act when attempting to commit a crime. See State v. McCluney, 361 S.C. 607, 606 S.E.2d 485 (2004) (finding evidence supported attempt and conspiracy to purchase real cocaine under the trafficking statute, even though substance provided by undercover officer was imitation cocaine); see also State v. Mickle, 164 S.W.3d 33, 50 (Mo. Ct. App. 2005) (finding while the government is required to prove a defendant intended to manufacture methamphetamine, it is not required to prove a defendant knew how to manufacture methamphetamine).

Cain attempts to make a distinction between theoretical yield and potential yield that was rejected in Wilke. Ultimately, Cain asks this Court to weigh Stuart’s testimony based on arguments never presented to the trial court. However, such weighing of evidence is improper. The jury could reasonably conclude Cain and Parkhurst intended to be successful in their endeavor and not fail miserably. Accordingly, evidence supports the jury’s verdict. 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”).

CONCLUSION

For all of the foregoing reasons, it is respectfully submitted that the judgment and conviction of the Court of Appeals should be affirmed.

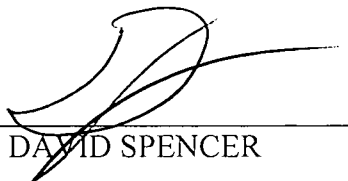
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July 29, 2016

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SC SUPREME COURT

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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

THE STATE,

Respondent,

vs.

CHARLES CAIN,

Petitioner.

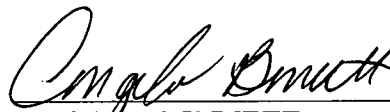
APPELLATE CASE NO. 2015-001983

PROOF OF SERVICE

I, Angela Bennett, certify that I have served the Brief of Respondent on petitioner by depositing two copies of the same in the United States mail, postage prepaid, addressed to his attorneys of record, Thomas J. Rode, Esquire, 15 Mid-Atlantic Wharf, Charleston, SC 29401 and Robert M. Dudek, Esquire, South Carolina 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 29th day of July, 2016.



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