STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Pickens County
The Honorable Robin B. Stilwell, Circuit Court Judge
Appellate Case No. 2013-002754

THE STATE,

Respondent,

v.

MICHAEL LEVANT MEALOR,

Appellant.

INITIAL BRIEF OF RESPONDENT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Statutes:

Rules:

Other Authorities:

STATEMENT OF ISSUES ON APPEAL

I. The circuit court properly admitted the NPLEX logs of Appellant's and the co-defendants' purchases of pseudophedrine in as business records because the evidence established the logs are required by law, and how the information is submitted, compiled and maintained in the ordinary course of business.

II. The circuit court properly admitted testimony regarding the amount of methamphetamine that could be produced given the amount of pseudophedrine attributed to Appellant and his co-defendants in light of the co-defendants' testimony regarding their receipt of methamphetamine from Appellant, and their observations of methamphetamine related activity and smells in Appellant's home.

III. The circuit court properly denied Appellant's directed verdict motion because there was ample evidence from which a reasonable juror could find him guilty of trafficking over twenty-eight grams of methamphetamine.

STATEMENT OF THE CASE

The Pickens County Grand Jury indicted Appellant Michael Levant Greenfield on one count of trafficking over 100 grams of methamphetamine. The case was called for a jury trial on December 16, 2013, before the Honorable Robin B. Stilwell, Circuit Court Judge.

The jury convicted Appellant of trafficking over twenty-eight grams of methamphetamine, and the circuit court sentenced him to nine years incarceration. This appeal followed.

STATEMENT OF FACTS

On December 10, 2013, the Pickens County Grand Jury indicted Appellant on one count of trafficking over 100 grams of methamphetamine, arising from a year long investigation of pseudoephedrine purchases by Appellant and multiple co-defendants. The case was called for a jury trial on December 16, 2013, before the Honorable Robin B. Stilwell, Circuit Court Judge.

Many named co-defendants testified they made multiple purchases of Sudafed (or the generic brands) during 2011, and gave all or some of it to Appellant and his wife co-defendant Cynthia Greenfield ("Greenfield"). The primary ingredient in Sudafed is pseudoephedrine, which is a key component (a/k/a precursor) in manufacturing methamphetamine. In exchange for the Sudafed, most of the co-defendants received methamphetamine from Appellant and Greenfield, and others received money.[1]

The amount of pseudoephedrine someone can purchase per day and month is restricted (3.6 grams/day, 9 grams/month), and pharmacies are required by law to submit records of all pseudoephedrine sales to a national precursor log exchange (NPLEX) database maintained by Appriss, a software company headquartered in Kentucky. The system notifies a pharmacy if a person attempting to purchase pseudoephedrine has already purchased the maximum amount allowed that day or month, and blocks the sale. (Trial Transcript [TT], pp. 110-125; Record on Appeal [R.], pp. _____).

A Pickens County Sheriff's Department reserve officer testified he started investigating after he reviewed NPLEX records, and noticed multiple pseudoephedrine purchases by people using the same address in Six Mile, SC. The investigation ultimately revealed Appellant and

[1]The specific testimony, with relevant record citation, is set forth in Issue III below.

numerous people associated with him, purchased pseudoephedrine on multiple occasions in 2011. (TT, pp. 172-175; R., pp. _____).

The State presented evidence from employees at various pharmacies frequented by Appellant and the co-defendants, who testified about the record keeping requirements regarding purchases of pseudoephedrine, and how their pharmacies submitted the purchase records to a computer database at the time of purchase. (TT, pp. 80-109; R., pp. _____). The records custodian for Appriss testified about the process of receiving, compiling and maintaining the NPLEX records, and submitted the actual NPLEX records related to Appellant and the co-defendants. (TT, pp. 110-136; R., pp. ____).

The NPLEX records reflected the co-defendants' pseudoephedrine purchases, including dates when they attempted to purchase it but were blocked by the system. Based on the co-defendants' testimony, Appellant and his co-defendant wife ("Greenfield") received at least 179.76 grams of pseudoephedrine from the other co-defendants between January and December, 2011. In addition, NPLEX records showed Appellant personally purchased 69.36 grams of pseudoephedrine during that time period, and was blocked from purchasing it eight times, for a total of 234 grams of pseudoephedrine received or purchased by Appellant in 2011.[2] (TT, pp.175-190, State's Exhibits 1-40; R., pp. _____).

Captain Chad Brooks of the Pickens County Sheriff's Department testified his law enforcement career began in 1989, and he supervised the Department's detectives division, which includes narcotics investigations. He worked full-time as a narcotics investigator until he became the division supervisor in January 2013, and participated in over 10,000 narcotics investigations over the course of his career. In addition, he had over 1000 hours specialized

[2] The NPLEX records also revealed Greenfield personally purchased an additional 68.64 grams of pseudoephedrine in 2011.

training on narcotics investigations, including specific training regarding the manufacturing of methamphetamine, and was certified by the U.S. Drug Enforcement Agency as a methamphetamine site safety officer, which authorized him to enter locations and seize methamphetamine labs. (TT, pp. 423-427; R., pp. _____).

During his methamphetamine training, Capt. Brooks learned about various methods used to manufacture it, he personally manufactured it in the SLED lab under controlled conditions, and he learned about pseudoephedrine to methamphetamine yield rates. He stated he was previously qualified in court as an expert in narcotics investigations generally, and clandestine methamphetamine labs specifically. (TT, pp. 427-429; R., pp. _____).

The State offered Capt. Brooks as an expert in the field of clandestine methamphetamine manufacturing. Appellant objected to any testimony regarding pseudoephedrine to methamphetamine yield rates, contending it required an expert in chemistry, and Capt. Brooks was not a chemist. The circuit court overruled the objection, and qualified Capt. Brooks as an expert in the field requested by the State, finding he was qualified by his training and experience, and testifying about yield rates did not require a specific degree. (TT, pp. 429-437; R., pp. _____).

Capt. Brooks testified he had investigated approximately 200 methamphetamine labs, and explained the three basic manufacturing methods: red fee, birch, and shake and bake (also called one pot). People using the shake and bake/one-pot method generally use two liter plastic bottles, and add all the ingredients, including pseudoephedrine, at the same time, which initiates the chemical reaction. The reaction produces a liquid, which is then salted or gassed out to leave the methamphetamine powder. (TT, pp. 439-447; R., pp. _____). He also testified about "smurfing," which is the term used when the methamphetamine cooks have other people

purchase pseudoephedrine for them in order to avoid the amount restrictions. (TT, pp. 447-448; R., pp. _____).[3]

Over objection, Capt. Brooks testified he used three grams of pseudoephedrine in the SLED lab, which produced 2.7 grams of methamphetamine, or a 92% yield. Depending on the method used, he stated his training and experience indicated the lowest yield would be 40% to 50%, and outlined various factors that could affect the yield. (TT, pp. 448-452; R., pp. _____).

At the close of the State's case, Appellant moved for a directed verdict on the ground the State failed to produce sufficient evidence of a conspiracy to manufacture over 100 grams of methamphetamine, and all the evidence regarding amounts was speculative. The circuit court took the motion under advisement, particularly as to the weight manufactured. (TT, pp. 523-538; R., pp. _____).

After the defense rested its case, Appellant and his co-defendants renewed the directed verdict motion on the indicted charge of trafficking over 100 grams of methamphetamine. The circuit court denied the motion, but the State then moved to amend the indictment and reduce the amount to trafficking between 28 and 100 grams, which the circuit court granted without objection. (TT, pp. 664-672; R., pp. _____).

The jury convicted Appellant of manufacturing over 28 grams of methamphetamine, and the circuit court sentenced him to nine years incarceration. (TT, pp. 730, 737; R., pp. _____). This appeal followed.

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[3]This is a commonly known method used to "game" the system. *See* http://www.wistv.com/story/25524990/meth-makers-can-easily-game-pseudoephedrine-system?page=full&N=F.

ARGUMENT

I. The circuit court properly admitted the NPLEX records as business records because the evidence established the records are required by law, as well as how the information is submitted, compiled and maintained in the ordinary course of business.

Appellant asserts the circuit court erred in admitting the NPLEX logs as business records, the State failed to lay a proper foundation for admission, and admitting the records violated Rule 403, SCRE. As a threshold matter, the 403 issue is not preserved for appeal. Appellant's remaining assertions are meritless.

The admission or exclusion of evidence is a matter addressed to the sound discretion of the trial court, and its ruling will not be disturbed in the absence of a manifest abuse of discretion accompanied by probable prejudice. State v. Kromah, 401 S.C. 340, 737 S.E.2d 490, 495 (2013); State v. Price, 368 S.C. 494, 498, 629 S.E.2d 363, 365 (2006) (same); State v. Brown, 411 S.C. 332, 768 S.E.2d 246, 249 (Ct. App. 2015) (same); State v. Weaverling, 337 S.C. 460, 523 S.E.2d 787 (Ct. App. 1999) (same). A prejudicial abuse of discretion occurs when the conclusions of the trial court either lack evidentiary support, or are controlled by an error of law. State v. White, 382 S.C. 265, 676 S.E.2d 684, 686 (2009); State v. Douglas, 369 S.C. 424, 429, 632 S.E.2d 845, 847-848 (2006) (same).

A. Rule 403, SCRE

Appellant argues admission of the NPLEX logs was error under Rule 403, SCRE, because they were unduly prejudicial. The only objections to admission of the NPLEX logs at trial were the reliability of the records and Appriss system, and lack of foundation. None of the co-defendants, including Appellant, objected to the logs under Rule 403. Therefore, the issue is not preserved for appellate review. *See* State v. Dunbar, 356 S.C. 138, 587 S.E.2d 691, 693

(2003) ("In order for an issue to be preserved for appellate review, it must have been raised to and ruled upon by the trial judge.").

B. Business Records

Prior to the promulgation of the South Carolina Rules of Evidence, South Carolina adopted S.C. Code Ann. § 19-5-510, the Uniform Business Record as Evidence Act, which provides:

> A record of an act, condition or event shall, insofar as relevant, be competent evidence if the custodian or other qualified witness testifies to its identity and the mode of its preparation, and if it was made in the regular course of business, at or near the time of the act, condition or event and if, in the opinion of the court, the sources of information, method and time of preparation were such as to justify its admission.

See State v. Rice, 375 S.C. 302, 652 S.E.2d 409, 423–24 (Ct. App. 2007) (*citing* S.C. Code Ann. §19-5-510 [1985]), *overruled on other grounds by* State v. Byers, 392 S.C. 438, 710 S.E.2d 55 (2011).

Rule 803(6), SCRE, adopted in 1995 and modeled after § 19-5-510 and the Federal Rules of Evidence, allows admission of regularly conducted activity records otherwise inadmissible as hearsay. Pursuant to the Rule, memorandum, reports, records, etc. in any form of acts, events, conditions, or diagnoses, are admissible if they are: (1) prepared near the time of the event recorded; (2) prepared by someone with or from information transmitted by a person with knowledge; (3) prepared in the regular course of business; (4) identified by a qualified witness who can testify regarding the mode of preparation of the record; and (5) found to be trustworthy by the court. Ex parte Dep't of Health & Envtl. Control, 350 S.C. 243, 565 S.E.2d 293, 297 (2002) (*citing* Rule 803(6), SCRE; S.C. Code Ann. § 19-5-510).

Both § 19-5-510 and Rule 803(6), SCRE, require evidence regarding the manner in which records are prepared, or the source of information. Rice, 652 S.E.2d at 424 (internal

citations omitted). Additionally, the business record entries must have been made at or near the time of the act to which they relate in order to aid in establishing the record was honestly and fairly kept. South Carolina Nat'l Bank v. Jones, 302 S.C. 154, 394 S.E.2d 323, 324 (1990). In the instant case, the evidence supported each requirement for admission as a business record.

1. Prepared near the time of the event recorded

Pursuant to S.C. Code §44-53-398(D)(1) (Supp. 2016), all retailers selling nonprescription products containing ephedrine, pseudoephedrine, or phenylpropanolamine must require purchasers to produce appropriate identification, and require purchasers to sign a log showing the date and time of the purchases, the purchasers' names and addresses, the type of identification used, and the amount of the substance purchased. Before completing the sale, the retailer "shall transmit the information entered in the log to a data collection systems provided by the National Association of Drug Diversion Investigators, or a successor or similar entity. S.C. Code §44-53-398(D)(2) (Supp. 2016). The data collection system "must collect this data **in real time** and generate a stop sale alert" if the sale would constitute a violation of applicable state and federal restrictions, and upon receipt of such an alert, "the retailer must not complete the sale." *Id.* (emphasis added).

Contrary to Appellant's assertion Appriss does not have a "business" in connection with the NPLEX logs, Appriss' regular business includes, *inter alia*, establishing the necessary transmission connection with pharmacies for compliance with the applicable statutes, collecting the data and maintaining the NPLEX logs nationwide. (TT, p. 110; R., p. ____). In this case, the pharmacy employees testified their pharmacies comply with the legal requirements and record, in real time, information regarding each sale, or attempted sale, of restricted drugs, which is immediately submitted to the data collection system. The Appriss records custodian testified

how the information is received, stored and maintained on Appriss' dedicated NPLEX secure system. Therefore, the records at issue were prepared simultaneously with the events.[4]

2. Prepared by someone with or from information transmitted by a person with knowledge

The only way Appriss' data collection system gets the information in the NPLEX logs is by transmission from a pharmacy, which occurs at the time of sale. Since the transmission occurs in real time at the point of purchase, it cannot be seriously disputed the pharmacy employee transmitting the information has personal knowledge of the information transmitted.

3. Prepared in the regular course of business

The NPLEX logs are prepared in the ordinary course of business by the pharmacies submitting the information, and Appriss receives and stores the information in the ordinary course of its business. The pharmacies are legally required to obtain the data when the restricted drugs are purchased, and Appriss is the designated entity to receive, store and maintain the data.

Contrary to Appellant's continued assertion the sole purpose of the NPLEX logs is to support law enforcement's litigation efforts, the data collection is intended to **stop** the illegal production of illicit and dangerous drugs, which would be sold in the community. For instance, the stop sale alerts are intended to **prevent** purchases of excessive amounts of known drug precursers, which protects the public at the point of sale just as much as the records may assist law enforcement at some later date. The mere fact law enforcement has access to the NPLEX logs does not remove the logs from the business records exception. *See* United States v. Lynn, 851 F.3d 786, 793 (7th Cir. 2017) (NPLEX records are not created for litigation, but are

[4]Appellant confuses the time the act occurred with the time the logs are printed off from Appriss' system. The relevant information is transmitted, and the record created, at the time the sale actually occurs. The NPLEX logs are originally received, stored and maintained in electronic form, and the logs presented at trial were print outs of the original records.

"regularly maintained and updated each time an individual purchases an over-the-counter cold medicine that includes pseudoephedrine," and state regulatory bodies may have a legitimate interest in maintaining the records beyond their evidentiary value, such as deterring pseudoephedrine misuse); *see also* Montgomery v. State, 22 N.E.3d 768, 775 (Ind. Ct. App. 2014) ("NPLEX records may occasionally be used to establish or prove some fact at trial, but "the main purpose is to track and regulate the sale of non-prescription pseudoephedrine and ephedrine sales").

4. Identified by a qualified witness who can testify regarding the mode of preparation of the record

Paul Forst testified he was the records custodian for the NPLEX records, and explained how Appriss receives, stores and maintains the information in the NPLEX logs. (TT, pp. 110-114, 118; R., pp. _____). Clearly, he was a qualified witness who was able to testify regarding the mode of preparation of the record.

5. Found to be trustworthy by the court

The circuit court made a specific finding the NPLEX logs were reliable based on the testimony of the pharmacy employees and Paul Forst. The records were then admitted in evidence as business records. (TT, pp. 116-119; R., pp. _____).

There is ample evidence in the record to support the circuit court's finding of reliability and admitting the NPLEX records as business records. Therefore, the circuit court's ruling on this issue should be affirmed.

C. Foundation

Appellant further contends the State failed to lay a proper foundation for admission of the NPLEX records, which he asserts required the name of each individual employee who recorded the purchases, what training that employee received, and what procedures that employee used to record the information. Appellant's argument essentially guts the purpose of the business records hearsay exception.

The Rule 803(6) business records hearsay exception "does not require the testifying witness to have personally participated in the creation of the document or to know who actually recorded the information." Midfirst Bank, SSB v. C.W. Haynes & Co., Inc., 893 F.Supp. 1304, 1311 (D.S.C.1994) (*citing* United States v. Keplinger, 776 F.2d 678, 693 (7th Cir.1985)). "[S]uch a requirement would eviscerate the business records exception, since no document could

be admitted unless the preparer (and possibly others involved in the information-gathering process) personally testified as to its creation." Keplinger, 776 F.2d at 694. Rather, the exception requires the witness offering the document as a business record to be familiar with the recordkeeping system. *Id.*; *see also* United States v. Hathaway, 798 F.2d 902, 906 (6th Cir.1986).

As Appellant acknowledges, the pharmacy employees testified about their pharmacy's policies and procedures regarding the sale of pseudophedrine, which complied with the statutory requirements, as well as the training all pharmacy employees must undergo on the computer based system. The information required by law is the same regardless of which employee enters the information into the system, and pharmacies have ample incentives to ensure employee compliance to avoid criminal charges and fines.

Further, as discussed above, there was sufficient evidence regarding the reliability of the Appriss system and the resulting logs. Appriss has an incentive to ensure the information in its system complies with the legal requirements regarding the type of information obtained, how it is gathered and how it is entered into the system. There is absolutely no evidence suggesting the sources of the information recorded in the NPLEX logs were not credible, or the methods and circumstances of preparation were unreliable. Rice, 652 S.E.2d at 424.

The record supports the circuit court's finding the NPLEX logs were admissible as business records. Therefore, the court's ruling should be affirmed.

II. The circuit court properly admitted testimony regarding the amount of methamphetamine that could be produced given the amount of pseudophedrine attributed to Appellant and his co-defendants in light of the co-defendants' testimony regarding their receipt of methamphetamine from Appellant, and their observations of methamphetamine related activity and smells in Appellant's home.

Appellant contends the circuit court erred in allowing Captain Brooks to testify regarding the theoretical yield of methamphetamine from the amount of pseudoephedrine attributed to Appellant and his co-defendants. He argues this testimony exceeded the scope of Captain Brooks' expertise since he was not an expert in chemistry.

If scientific, technical, or **other specialized knowledge** will assist the trier of fact in understanding the evidence, or determining a fact in issue, a witness qualified as an expert by **knowledge**, **skill**, **experience**, **training**, or education, may testify about the evidence or fact in the form of an opinion or otherwise. Rule 702, SCRE. To be competent to testify as an expert, "a witness must have acquired by reason of **study** or **experience** or both such **knowledge** and **skill** in a **profession** or science that he is better qualified than the jury to form an opinion on the particular subject of his testimony." Gooding v. St. Francis Xavier Hospital, 326 S.C. 248, 487 S.E.2d 596, 598 (1996) (citation omitted) (emphasis added).

Qualification of an expert witness and the admissibility of the expert's testimony are matters within the trial court's discretion, and absent a showing of abuse, the appellate court will not disturb the trial court's determination regarding a witness' qualifications as an expert. State v. Baker, 411 S.C. 583, 769 S.E.2d 860, 869 (2015) (Toal, CJ, dissenting opinion) (*citing* State v. Schumpert, 312 S.C. 502, 435 S.E.2d 859 [1993]). Defects in an expert witness's education and experience go to the weight of the expert's testimony, rather than its admissibility. *Id.* (*citing* Gooding, 487 S.E.2d at 598).

Capt. Brooks had over twenty years experience in law enforcement, much of which involved narcotics investigations. He also had extensive training and experience involving methamphetamine manufacturing. He testified he "had over a thousand hours just specialized in narcotics investigations," and was DEA certified as a site safety officer at methamphetamine labs. He had participated in "thousands" of general methamphetamine investigations, and approximately 200 investigations dealing with methamphetamine labs. (TT, pp. 423-430, 439; R., pp. _____).

During his methamphetamine specific training, Capt. Brooks actually manufactured methamphetamine from pseudoephedrine in the SLED lab, and was trained on the methamphetamine yield rates from precursors, which is primarily a mathematical equation. Using the birch method in the SLED lab, he used three grams of pseudoephedrine to produce 2.7 grams of methamphetamine (92% yield). Based on his training and experience, Capt. Brooks testified the yield rates depend on the method used and other factors, and the lowest yield rate was 40% to 50% pseudoephedrine to methamphetamine. (TT, pp. 448-449; R., pp.____).

Capt. Brooks' testimony clearly reveals his extensive knowledge, training and experience regarding methamphetamine manufacturing. As part of his training and experience, he learned there is a mathematical formula for calculating the amount of methamphetamine that can be manufactured from a given amount of pseudoephedrine, how to use the formula and factors affecting the yield rate. Notably, he did not render an opinion of the specific yield in this case, but merely testified the general yield rates ranged from 40% (worst case scenario) to 92% percent (best case scenario).

Appellant does not contest the fact methamphetamine can be manufactured from pseudoephedrine, but argues an expert chemist was required to testify about the yield rates.

Published DEA data, however, indicates the typical yield rate is 50% to 75%, and the United States Sentencing Guidelines Commission used that data to establish a conversion rate of 50% pseudoephedrine to methamphetamine for sentencing purposes in federal courts. *See* U.S.S.G. §2D1.1, n. 8(D) (Drug Conversion Tables); *see also* United States v. Stacy, 769 F.3d 969, 977 (7th Cir. 2014) (sentencing guidelines use yield ratio of 50% pseudoephedrine to methamphetamine based on yield rates in typical clandestine methamphetamine labs); United States v. Martin, 438 F.3d 621, 625, 633-636 (6th Cir. 2006) (discussing basis for 50% conversion rate); U.S. Government Accountability Office Report to Congressional Requesters, GAO-13-204, 6-7 (January 31, 2013) (discussing conversion process and noting certain methods result in 90% to 95% conversion rates).

In short, the yield rates of pseudoephedrine to methamphetamin are generally accepted and well-documented. Thus, Capt. Brooks was not required to be a chemist, personally develop the yield rates, or even know all the technical science behind the process, in order to testify as an expert about the generally accepted yield rates. *See* People v. Reatherford, 345 Ill.App.3d 327, 802 N.E.2d 340, 347 (2003) (police officer properly qualified as an expert in manufacturing methamphetamine and allowed to testify regarding yield rates of pseudoephedrine to methamphetamine based on his training and experience). Any purported "defects" in Capt. Brooks' education and experience go to the weight of his testimony, not its admissibility. Baker, 860 S.E.2d at 869.

There is ample evidence in the record to support the circuit court's qualification of Capt. Brooks as an expert in clandestine methamphetamine labs, and admission of his testimony regarding the range of yield rates from such labs. The circuit court did not abuse its discretion, and its rulings should be affirmed.

III. The circuit court properly denied Appellant's directed verdict motion because there was ample evidence from which a reasonable juror could find him guilty of trafficking over twenty-eight grams of methamphetamine.

Appellant asserts the circuit court erred in denying his directed verdict motion because there was no evidence any amount of methamphetamine was actually possessed, produced, or trafficked within the timeframe of the investigation, and because experts disagree on yield rates, the State's evidence regarding the amount of methamphetamine produced was speculative. On the contrary, there was direct evidence Appellant possessed, produced and trafficked methamphetamine in 2011, and substantial circumstantial evidence of the amount of methamphetamine Appellant and Greenfield manufactured during that time.

When ruling on a directed verdict motion, the trial court is concerned with the existence or nonexistence of evidence, not its weight, and must deny the motion when the State presents any direct evidence, or substantial circumstantial evidence, to prove guilt. State v. Gaines, 380 S.C. 23, 667 S.E.2d 728, 733 (2008); State v. Phillips, 411 S.C. 124, 767 S.E.2d 444, 448 (Ct. App. 2014). In reviewing the denial of a directed verdict, the appellate court must view the evidence and all reasonable inferences in the light most favorable to the State, and find the case was properly submitted to the jury if there is sufficient direct and/or circumstantial evidence reasonably tending to prove guilt. State v. Lane, 410 S.C. 505, 765 S.E.2d 557, 558 (2014); State v. Lynch, 412 S.C. 156, 771 S.E.2d 346, 354 (Ct.App. 2015) (same); Phillips, 767 S.E.2d at 448 (same) "Unless there is a total failure of competent evidence as to the charges alleged, refusal by the trial judge to direct a verdict of acquittal is not error." State v. Arnold, 361 S.C. 386, 605 S.E.2d 529, 531 (2004); State v. Bennett, 408 S.C. 302, 758 S.E.2d 743, 745 (Ct. App. 2014) (same).

Direct evidence is based on personal knowledge or observation, and immediately establishes the fact to be proved, while circumstantial evidence is proof of a chain of facts and circumstances from which the jury may infer the existence of a separate fact. Phillips, 767 S.E.2d at 448 (citations omitted). If the State relies exclusively on circumstantial evidence to prove guilt, that evidence must be "substantial" to justify denying a directed verdict motion. *Id.*

In this case, the State presented the following evidence:

1. NPLEX records documented numerous purchases of pseudoephedrine by Appellant and his co-defendants at multiple pharmacies between January and December 2011. (State's Exhibits 1-40; R., pp. _____);

2. Co-defendant Rebecca Crisp testified she gave all the Sudafed she purchased during that time (10.8 grams) to another co-defendant who lived in the home with Appellant and Greenfield, she saw methamphetamine used in that home, as well as plastic bottles and batteries with the labels peeled off, and she detected a "toxic" smell there a few times. (TT, pp. 138-147; R., pp. _____);

3. Co-defendant Steven Hurley testified he purchased Sudafed for Greenfield, who told him the legal limits he could purchase, and gave one-half (15.12 grams) of what he purchased in 2011 to Greenfield in exchange for methamphetamine. (TT, pp. 213-216; R., pp. _____);

4. Co-defendant Kelley McCall testified she gave her 2011 Sudafed purchases (17.28 grams) to Appellant and Greenfield, and a few days later they gave her a bag of methamphetamine; Greenfield told her they could make methamphetamine cheaper and cleaner than what they could buy on the street; she saw many plastic bottles where Appellant lived, and Appellant said they could feel the plastic bottles expand better than glass bottles; and when she noticed a strong odor in the home, Greenfield told her the less she knew, the better. (TT, pp. 241-252; R., pp. _____);

5. Co-defendant Angela Armstrong testified she purchased 12.81 grams of Sudafed in 2011, gave all but 1.77 grams (11.04 grams) to Appellant and Greenfield, and several days later, she received methamphetamine in return; Appellant and Greenfield told her they were making methamphetamine, and said they could make it cheaper and better. (TT, pp. 275-280, 294-296; R., pp. _____);

6. Co-defendant Melissa Wardlaw testified she gave one-half (22.32 grams) of the Sudafed she purchased in 2011 to Appellant, who gave her the money to buy it and she kept the change; she knew other people were also buying it for him, and she saw Greenfield with Sudafed at times; she knew Appellant was making meth-

amphetamine; she saw him purchase ether and batteries; and she heard Appellant and Greenfield talking about cooking methamphetamine and saying they could do it.[5] (TT, pp. 312-331, 346; R., pp. _____).

7. Co-defendant Thomas Rooney testified he gave at least two boxes (5.76 grams) of his 2011 Sudafed purchases to Appellant and Greenfield, in exchange for methamphetamine and money; he saw Appellant and Greenfield use the shake and bake method to make methamphetamine in their bedroom "quite a few" times; he saw plastic bottles, big bottles of Coleman fuel, and cut open batteries at the home; and he smelled a strong ammonia type smell in the home when they were making the methamphetamine. (TT, pp. 361-371; R., pp. _____);

8. Co-defendant Billy Miller testified he gave all his 2011 Sudafed purchases (17.28 grams) to Appellant and Greenfield in exchange for methamphetamine, and they told him they were making methamphetamine. (TT, pp. 384-397; R., pp. _____);

9. Co-defendant Lauren Summerall testified she and her husband purchased Sudafed (7.2 grams) for Appellant and Greenfield in 2011 in exchange for money and methamphetamine, and they knew Appellant and Greenfield were making methamphetamine with the Sudafed they provided. (TT, pp. 393-397; R., pp. _____);

10. Co-defendant Michael Hayes testified he gave all of his 2011 Sudafed purchases (60.74 grams) to Appellant in exchange for methamphetamine, which he picked up a few days after he provided the Sudafed. (TT, pp. 407-414; R., pp. _____);

11. Co-defendant Amanda Hurley testified Appellant and Greenfield gave her and her husband money to purchase Sudafed in 2011, and they gave about one-half (23.02 grams) of their 2011 Sudafed purchases to Appellant and Greenfield. (TT, pp. 516-521; R., pp. _____).

12. In addition to the pseudoephedrine they received from the co-defendants, Appellant and Greenfield each purchased over sixty-five grams of pseudoephedrine in 2011. (State's Exhibits 1 [Appellant] and 2 [Greenfield]; R., pp. _____); and

13. Capt. Brooks testified pseudoephedrine, ether, Coleman fuel and lithium (from cut open batteries) are used in the shake and bake method of making meth-

[5]Wardlaw originally told law enforcement she saw Appellant cooking methamphetamine using the shake and bake method several times after people gave him pseudoephedrine, and he purchased other ingredients he needed from the hardware store. At trial, she claimed she lied to law enforcement because she was mad at Appellant and Greenfield. When confronted with specific discrepancies, however, Wardlaw's memory conveniently got hazy regarding which parts of her earlier statement were lies. (TT, pp. 316-328; R., pp. _____).

> amphetamine; plastic bottles are used rather than glass bottles because the plastic expands more the person can feel when the pressure builds, and they are less likely to explode so they are generally safer; methamphetamine manufacturers use other people to purchase pseudoephedrine for them in order to avoid the legal limitations (smurfing); based on his training and experience, the yield rates of pseudoephedrine to methamphetamine are from 40% to 92%; bottles used in the shake and bake method are easy to clean or discard so they are very portable for use as a methamphetamine lab; and the manufacturing process creates a very strong ammonia smell (TT, pp. 439-462; R., pp. _____).

Thus, there was both direct and substantial circumstantial evidence Appellant and Greenfield manufactured methamphetamine from pseudoephedrine they personally purchased and/or received from the co-defendants in 2011.

Capt. Brooks testified the generally accepted yield rates range from 40% to 92% pseudoephedrine to methamphetamine. As discussed above in Issue II, the federal courts use a 50% yield rate to calculate the appropriate base offense level for sentencing purposes in manufacturing methamphetamine cases, which was based on data compiled by the DEA, and is well within the range given by Capt. Brooks. Even expert disagreements about yield rates do not make Capt. Brooks' testimony mere speculation. *See* Martin, 438 F.3d at 636 (differences of opinion in the scientific community about yield rates did not render the 50% yield rate adopted by the Sentencing Commission arbitrary and capricious).

The evidence, including NPLEX records and testimony, revealed Appellant personally received and/or purchased 234 grams of pseudoephedrine in 2011.[6] The following chart indicates the theoretical yield of methamphetamine from that amount of pseudoephedrine, using yield rates ranging from 40% to 90%:

[6]Appellant contends the totals were speculative because some co-defendants used the pseudoephedrine for medicinal purposes; however, the State only attributed to Appellant the amounts each co-defendant testified they gave to him.

Pseud.	40%	50%	60%	70%	80%	90%
234	93.6	117	140.4	163.8	187.8	210.6

Assuming for argument purposes the pseudoephedrine Appellant personally purchased (69.36 grams) was used for medicinal purposes, the following chart shows the theoretical yield of methamphetamine just from the pseudoephedrine Appellant himself received from the co-defendants:

Pseud.	40%	50%	60%	70%	80%	90%
164.64	65.856	82.32	98.784	115.248	131.712	148.176

Under either scenario, the **minimum** methamphetamine yield using a 40% to 50% yield far exceeded 28 grams.[7]

Appellant's contention a directed verdict was warranted because law enforcement did not find or seize a methamphetamine lab, or a large stash of pseudoephedrine, from Appellant is unavailing. As set forth above, there was direct testimony Appellant and Greenfield manufactured methamphetamine in their home. Some co-defendants actually saw them manufacturing methamphetamine, and/or saw items commonly associated with manufacturing methamphetamine (plastic bottles, cut open lithium batteries and Coleman fuel) inside their home, and some co-defendants detected a strong ammonia-like odor in the home.

Further, the evidence established Appellant and Greenfield found out in November 2011 they were being investigated, but they were not arrested until June 2012. As Captain Brooks testified, methamphetamine labs, particularly the shake and bake/one pot version, are very portal and easily discarded. (TT, pp. 450-451, 464-483; R., pp. _____). Therefore, it is reasonably inferable Appellant and Greenfield were much more careful after November 2011, and either

[7]Even if Appellant was a terrible methamphetamine cook and only achieved a 20% yield, the amounts would still exceed 28 grams (46.8 grams & 32.92 grams).

promptly discarded any evidence of methamphetamine manufacturing in their home, or found another location altogether.

Appellant's reliance on the recent case of State v. Cain, 419 S.C. 24, 796 S.E.2d 846 (2017), is misplaced because the instant case is readily distinguishable. In Cain, police officers serving a bench warrant found equipment used to manufacture methamphetamine, and a forensic chemist found empty packages of Sudafed, which she determined had contained 19.2 grams of pseudoephedrine. The chemist testified at trial that amount of pseudoephedrine "could theoretically produce 17.67 grams of methamphetamine, if Cain manufactured the methamphetamine with maximum efficiency." The chemist's testimony was the only evidence regarding the quantity of methamphetamine the defendant produced for purposes of the trafficking charge. *Id.* at 847-849.

The Supreme Court reversed the trafficking conviction, finding the chemist's testimony regarding the quantity of drugs assumed the process used was 100% efficient, and there was **no** evidence the defendant "even knew how to manufacture methamphetamine." *Id.* at 850. The Court compared the evidence presented in Cain to the evidence of quantity the Eighth Circuit Court of Appeals found sufficient in United States v. Eide, 297 F.3d 701 (8th Cir. 2002), and concluded the State's evidence "provided the jury no basis on which to determine how much methamphetamine Cain could actually have produced." *Id.* at 851.

The evidence in this case is comparable to the evidence presented in Eide, and favorably cited in Cain. The expert in Eide testified about the particular manufacturing process the defendant used, and stated his method was capable of producing a 40% to 50% yield. The Eight Circuit found the nature of the expert's testimony, combined with evidence suggesting the

defendant was experienced in manufacturing methamphetamine, was sufficient for the jury to find the defendant was a good cook capable of producing a 40% to 50% yield. 297 F.3d at 705.

As set forth above, the co-defendants' testimony provided ample evidence from which the jury could find beyond a reasonable doubt Appellant and Greenfield were experienced in manufacturing methamphetamine using the shake and bake/one pot method. They routinely used methamphetamine they produced to pay co-defendants who purchased pseudoephedrine for them, and co-defendants actually saw them manufacturing methamphetamine, and/or saw the ingredients used in the manufacturing process in their home.

Further, Appellant's and Greenfield's own statements indicated they were "good" cooks. Greenfield told Kelley McCall she and Appellant could make methamphetamine "cheaper" and "cleaner" than what was available on the street. Appellant and Greenfield also told Angela Armstrong they could make methamphetamine "better" and "cheaper," and Melissa Wardlaw heard them talking about manufacturing methamphetamine and how to do it.

Captain Brooks testified in detail about the shake and bake/one pot manufacturing process, including the chemical process involved, and the equipment and ingredients required. Like the expert in Eide, he stated the lowest yield from that manufacturing process was 40% to 50%. His detailed testimony, combined with the co-defendants' testimony, provided sufficient evidence Appellant and Greenfield were experienced at manufacturing methamphetamine, and capable of producing at least a 40% yield of methamphetamine from the pseudoephedrine they purchased and/or received between January and December 2011.

There was ample direct and circumstantial evidence from which the jury could find beyond a reasonable doubt Appellant conspired with others and manufactured in excess of

twenty-eight grams methamphetamine in 2011. Therefore, the circuit court properly submitted the case to the jury, and its ruling should be affirmed.

CONCLUSION

Based on the foregoing, Respondent submits Appellant's conviction and sentence should be affirmed.

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June 6, 2017

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal From Pickens County
The Honorable Robin B. Stilwell, Circuit Court Judge
Appellate Case No. 2013-002754

THE STATE,

Respondent,

v.

MICHAEL LEVANT MEALOR,

Appellant.

PROOF OF SERVICE

I, Sally B. Ellison, certify I served the Initial Brief of Respondent and Designation of Matter on Appellant by depositing two copies in the United States mail, postage prepaid, addressed to:

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

This 6th day of June, 2017.

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Re: The State v. Michael Levant Mealor
Appellate Case No. 2013-002752

Counsel:

Enclosed are two copies (1 copy each) of the Initial Brief of Respondent and Designation of Matter, with proof of service, in the above-referenced case.

Sincerely,

Deborah R.J. Shupe

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Senior Assistant Deputy Attorney General

DRJS/sbe

Enclosures

cc: The Honorable Jenny A. Kitchings (original and 2 copies enclosed)
Victim Services (with enclosure)