ORIGINAL

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Dorchester County
Maite Murphy, Circuit Court Judge

Appellate Case No. 2016-000842

THE STATE,

Respondent,

vs.

FELIX KOTOWSKI,

Appellant.

FINAL BRIEF OF RESPONDENT

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STATEMENT OF ISSUE ON APPEAL

I.

Law enforcement did not randomly knock on the residence where a methamphetamine lab was found. Law enforcement investigated a tip and discovered unusual levels of pseudoephedrine purchases before knocking on the door. Therefore, law enforcement held reasonable suspicion of criminal activity sufficient to approach and knock on the front door. Appellant does not possess an expectation of the privacy as to who might knock on the front door of a house he does not live in or own.

II.

The protective sweep conducted before law enforcement obtained a search warrant was lawful as law enforcement had probable cause to believe exigent circumstances existed due to evidence of active methamphetamine manufacturing occurring inside the residence, and law enforcement was allowed to ensure for their protection that no other individuals were inside the residence. Further, the issue should not be reviewed because appellant only challenges part of the trial court's ruling.

III.

Testimony concerning purchasing history for pseudoephedrine based on database records was not admitted for the truth of the matter asserted. Further, the purchase history was admissible as business records and did not violate the confrontation clause because records of the purchases were not testimonial in nature. Finally, any error was harmless beyond a reasonable doubt.

STATEMENT OF THE CASE

Appellant Kotowski was indicted for manufacturing methamphetamine and possession of methamphetamine. The jury found Kotowski guilty as charged following trial on December 7-9, 2015. The Honorable Maite Murphy sentenced Kotowski to concurrent terms of seven years imprisonment for manufacturing and three years imprisonment for possession.

Kotowski's motion for new trial was denied by Judge Murphy on March 20, 2016.

STATEMENT OF FACTS

The suppression hearing

On June 13, 2014, Sergeant Frank Thompson from the Dorchester County Sheriff's Office received an anonymous tip from a citizen who advised Sergeant Thompson he overheard a conversation about a possible drug house at 111 Marsh Point Drive. Sergeant Thompson testified it was not much to go on, but he started to investigate the location. R. pp. 25-26; p. 28. Later testimony suggests Sergeant Thompson was specifically advised by the tipster that possible meth manufacturing was occurring at the house.[1] Additionally, the search warrant affidavit explains Sergeant Thompson "was watching the residence in reference to a complaint of manufacturing methamphetamine." Court's Exhibit No. 4.

First, Sergeant Thompson checked for pseudoephedrine purchases associated with the address through a national precursor log exchange known as NPLEx, which is administered by a company called Appriss. Under state and federal law, all pharmacies are required to report any pseudoephedrine purchases to the exchange. R. pp. 26-27.[2]

Sergeant Thompson explained how the process worked:

> Under law, South Carolina law, when you purchase pseudoephedrine, you're required to give a picture ID, government issued or some other type of ID. The pharmacist that is filling that order runs the license through a machine or enters the information manually which captures your name, your date of birth, and then height and weight, stuff like that, different demographics and your address, and the log will say, yes, you can make a purchase or no, you can't make a purchase depending on if you have exceeded the amount set by the state which

[1] Sergeant Thompson testified he explained to "Lisa" who was at the residence that "we were there because of a tip of drug activity, specifically manufacturing methamphetamine." Tr. p. 66, lines 1-4.

[2] See S.C. Code Ann. § 23-3-1200; § 44-53-398.

> is nine grams in 30 days. So once the license is swiped and if the okay is there for the purchase to be made, if the person has exceeded their legal amount for the 30 days, then it says no, you can't make a purchase so they block it and so the purchase is denied.

R. p. 28, lines 2-15. Pseudoephedrine is a precursor ingredient absolutely necessary to manufacture methamphetamine. R. p. 32, lines 2-7.

Sergeant Thompson also discussed what higher than normal pseudoephedrine purchases may indicate: "Well, they can be a chemical courier so they go out and they call them smurfs. They are people that go out and hit the pharmacies to buy pseudoephedrine to bring back to . . . the meth cooks . . . ." R. p. 32, lines 10-14.

Sergeant Frank Thompson noted a search for purchases associated with the residence showed substantial purchases by Michelle Vining, the homeowner, and some purchases by an individual identified as Brian Edwards. Older purchases by two other people also appeared for the address. R. pp. 28-29. Sergeant Thompson added a watch for the database so he would be alerted with information on any subsequent purchases from the residence or by Vining. R. p. 30.

Sergeant Thompson also did some "spotty surveillance." He explained surveillance was complicated by its location at the end of a cul-de-sac by a golf course. His presence would likely bring attention since there were so few houses, so Sergeant Thompson relied primarily on continuous drive-by viewings. R. pp. 30-31. He confirmed Vining's vehicle was parked at the house and also noted William Cherry's vehicle parked outside a couple of times. Sergeant Thompson was familiar with Cherry and was aware Cherry's father was a convicted methamphetamine cook. R. p. 30, lines 13-17. Before the jury, Sergeant Thompson described the car as belonging to the son and mother of a convicted meth cook he actually prosecuted. R. p. 127, lines 20-22.

Sergeant Thompson noticed Vining tended to go to different pharmacies to make pseudoephedrine purchases, which was consistent with chemical couriers attempting to conceal their movements from law enforcement. R. p. 32, lines 15-21.

On October 29, 2014, Sergeant Thompson received three separate notifications on NPLEx indicating Vining attempted to purchase pseudoephedrine. First, she was twice declined the purchase of 2.4 grams at Walgreens. Next, she went to CVS and purchased 1.2 grams, which kept the cumulative purchases below the 30-day, 9.0 gram limit under state law. R. pp. 32-33. Sergeant Thompson decided to conduct a knock and talk at the house to further the investigation. R. p. 31.[3]

Sergeant Thompson, Detective Lundberg, and Detective Allen went to the house. They were dressed in clothing with law enforcement paraphernalia. After knocking on the door, Sergeant Thompson saw someone looking through the blinds to the right of the front door. After he knocked on the door again, Detective Lundberg, standing by the side of the house, told Sergeant Thompson that someone removed a fan from the window on the side of the house and closed the window. R. pp. 33-34. Sergeant Thompson knocked on the door again, and this time, a person looked out from a window to the left of the front door. After a few minutes, Appellant Kotowski came out the front door. R. p. 34.

Immediately, when Kotowski opened the door, Sergeant Thompson was overwhelmed by the smell of ammonia emanating from Kotowski's clothes and person. R. p. 35, lines 22-24. Sergeant Thompson testified, "That set a light off for me because I know that methamphetamine cooks using a

[3] On cross-examination, Sergeant Thompson was asked if what he saw was the car owned by the son of someone who was arrested, and Sergeant Thompson replied, "Not only that. I saw that a person was making substantial pseudoephedrine purchases that is well beyond the means of any normal person taking pseudoephedrine. That is what I call a clue." Tr. p. 73, lines 21-24.

one pot method you're creating ammonia gas so I felt that there might have been a lab going on inside the house." R. p. 35, line 24 – p. 36, line 2.

Seargeant Thompson explained to Judge Murphy that ammonia is typically contained in the bottle methamphetamine is cooking in and some ammonia gas will be released in the "burping" process during a cook, although usually not enough to saturate clothing. Seargeant Thompson noticed Kotowski was nervous. Kotowski told them he did not live at the house and Michelle Vining was not home.[4] He claimed the only other person present at the house was "Lisa," his girlfriend. Kotowski went back inside the house and called for "Lisa." She did not come downstairs and so Kotowski went up the stairs to tell "Lisa" to come out. R. pp. 36-37. Kotowski and "Lisa" both came back down the stairs. "Lisa" later admitted after she was detained that she was actually Michelle Vining. R. p. 60, lines 5-16. However, at this time, she kept up the façade as she spoke with officers. She claimed she did not know where "Michelle" was. When asked about methamphetamine, she told them Michelle told her that a couple living at the house before was into that, but they were removed from the house. She claimed she did not have authority to give consent to law enforcement to search the house. Sergeant Thompson asked her to call "Michelle." She declined. Sergeant Thompson then advised her he would seek a search warrant. He asked her if anyone else was inside and she seemed deceptive and "kind of hem hawing." Sergeant Thompson directed Detective Allen and Detective Lundberg to perform a protective sweep of the house while he contacted another officer to seek a search warrant for the residence. R. pp. 37-38. Lisa also smelled like ammonia. R. p. 59, lines 18-22.

[4] Sergeant Thompson testified he did not know if anyone else was actually inside the home. Tr. p. 87, lines 15-16. Before the jury, he testified that Vining's vehicle was parked at the house, "I've

- Sergeant Thompson explained about his decision to pursue a protective sweep as follows:

> I believed that something more was going on there so I told Detective Allen and Detective Lundberg to go inside the house and do a protective sweep and make sure nobody else was inside the house because I saw three different activities at windows and we've got two people so to make sure nobody else was inside, to preserve any evidence inside there, and also to make sure there was no active methamphetamine lab in progress[.]

R. p. 38, lines 5-12.

Sergeant Thompson further explained the reasons for the protective sweep during cross-examination:

> When I talked to Vining who lied to me about her identity as well as Mr. Kotowski, seeing activity at the windows, not knowing how many people were inside there, smelling the ammonia emitting from his clothing because he was saturated in it, I didn't know if anybody was inside the house. We were getting the search warrant so we secured the house to preserve any evidence to make sure there wasn't an active methamphetamine lab inside the house and to make sure nobody else was in there.

R. p. 58, line 18 – p. 59, line 1.

Sergeant Thompson explained the dangers associated with an active methamphetamine cook:

> Depending on what method you're cooking, this one was a one pot or a shake and bake, you're dealing with lithium metal and lithium metal reacts to the water. While you're manufacturing this method you're actually manufacturing water ammonia so you have an explosive hazard. Let alone it's in a bottle under pressure with a lot of fuel, white gas, so you have an explosive hazard.

Tr. p. 38, lines 15-22.

Following the protective sweep, during which the detectives saw evidence of a methamphetamine lab, Kotowski and Vining were arrested. A search warrant was issued for the

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seen it there all the time." Also a truck was parked there. Tr. p. 175, lines 5-9.

residence. R. p. 39.

Detective Brandon Allen testified he went with Sergeant Thompson to knock on the front door at the Marsh Point residence. He also noted people looking through the windows of the house when they knocked. When Kotowski came out, he quickly closed the door behind him so officers could not see inside. Detective Allen found this suspicious, as if Kotowski was trying to distance himself from the house or block their view inside the house. Kotowski carried the overwhelming smell of ammonia. Having been involved with other meth labs, Detective Allen recognized the smell. It is the smell that comes from the one pot method of methamphetamine production. Kotowski was extremely nervous – he was looking around and trembling. When Kotowski went back inside the residence, Detective Allen kept the door open because of the smell and concerns for officer safety. Tr. pp. 93-95.

Detective Allen explained the officers' concerns about whether there were more people inside the house: "We had a lot of movement there at the beginning. People looking through blinds, people closing windows, pulling fans out in different aspects for the house so we were not sure how many people were in there." Tr. p. 96, lines 20-23.

Detective Allen and Detective Lundberg went inside the house to conduct a protective sweep. Detective Allen explained this was done to (1) look for people; (2) preserve evidence while waiting on a search warrant; and (3) determine if there was an active meth lab. After checking downstairs, they proceeded upstairs and faced the overwhelming odor of ammonia. A haze emanated from a closed room at the top of the stairs. Opening the door, the detectives were accosted with the overwhelming odor of ammonia, same as detected on Kotowski. In plain view they saw mason jars with unknown liquids. Detective Allen surmised that Kotowski and Vining disposed of an active

meth lab in the toilet while police were outside knocking on the door. They continued the sweep of the rest of the house. Once law enforcement obtained the search warrant, the two detectives searched the house in hazmat uniforms. When Detective Allen came out of the house, he needed to be decontaminated because his clothes had a high pH level just from being inside the house. Tr. pp. 96-100.

Detective Daniel Lundberg testified he has investigated over 100 meth laboratories. While the other officers knocked on the front door, Detective Lundberg positioned himself by the fence where he could see if anyone fled out of the back of the house. The other two detectives knocked on the door and alerted as to who they were. Detective Lundberg saw someone in the upstairs window on the side of the house take a fan out of the window and shut the window. He alerted Sergeant Thompson. His testimony was consistent with the other two officers. He and Detective Allen performed a protective sweep of the house. Detective Lundberg smelled the odor of ammonia on Kotowski as he passed him on the porch. Tr. pp. 102-06. Coming up the stairs, he saw a door in front of him closed and haze creeping out from the bottom of the door. Approaching the door, he smelled the same ammonia odor he smelled while walking past Kotowski. The officers opened the door to the room, which was a bathroom. He observed mason jars on the counter and chemicals on the floor next to the toilet that would be utilized in a hydrogen chloride gas generator during the final steps of methamphetamine manufacture. It appeared the ingredients were dumped in the toilet. Tr. pp. 106-07; p. 110. Detective Lundberg was concerned about not wearing breathing protection due to the noxious fumes from the bathroom: "Usually we'll wear a mask with filters that help filter out all of the chemicals in the air so we are not breathing it, you know, into our lungs and causing damage." Tr. p. 107, lines 22-24. Detective Lundberg attempted to breathe as little as possible the

remainder of the time they were in the house. Tr. p. 107-08. One of the things observed during the protective sweep was a white powder that later field-tested positive for methamphetamine. Kotowski also saw a camp fuel container in one of the bedrooms. Tr. pp. 108-10.

The jury trial

During trial, Sergeant Thompson explained to the jury he attended numerous classes regarding methamphetamine manufacturing. He attended the two week DEA basic narcotics investigating school. He attended the United States Attorneys Narcotics Commander School. His training includes manufacturing methamphetamine in a laboratory setting. Tr. pp. 168-69.

Sergeant Thompson explained to the jury that he ran a search for Kotowski and determined he purchased pseudoephedrine on September 17 and 29. Vining showed twelve activities where she either purchased, or was blocked from purchasing, pseudoephedrine starting on September 3 until October 29. Tr. pp. 184-85.

During trial, Detective Allen testified that, after the magistrate issued a search warrant for the premises, the detectives went back inside the house in chemical suits. Tr. p. 210. They found a variety of items, they found eight boxes each containing 50 matchbooks, a plastic bag containing white powder, muriatic acid, liquid fire, mason jars, empty soda bottles, a container of lighter fluid, two containers of salt, drain cleaner, lye, a Ziploc bag containing tubing, an HCl generator,[5] coffee filters, pill grinders, empty blister packs, and used coffee filters containing remnants. Tr. pp. 211-14; pp. 218-25. Notably, they found aluminum foil containing a glass pipe, which is commonly used to

[5] At trial, Detective Hurschel Tanner, an expert in methamphetamine investigation, explained that an HCL generator is made from a vessel, typically a soda or Gator-Aid bottle, with plastic tubing like that used in fish tanks. He described how various precursor ingredients were used inside the HCL generator to create the "shake and bake reaction." Tr. pp. 282-83.

smoke meth. Tr. p. 214, lines 20-24.

Detective Allen described how the officers were outfitted for the search when executing the search warrant:

> We are all clandestine lab certified so we have to wear chemical suits. We refer to them as a Tyvek suits. It's basically a full body jump suit that protects you from chemicals. We wear a mask similar to what firefighters would wear when they go into a house that's on fire with respirators and a tank which is called an APR an SCBA to basically push clean oxygen and clean air through our lungs so that we can actually operate in that kind of environment.

Tr. p. 210, lines 3-10.

Detective Allen explained to the jury that OSHA requires the officers be medically cleared when they come out of a meth lab site. The pH level on Detective Allen and his equipment was so high he needed to be decontaminated by the fire department. Tr. p. 225, lines 11-25. Then the paramedics checked his medical vitals. Tr. p. 226, lines 1-3.

Detective Lundberg testified detectives found Kotowski's driver's license in the house. Tr. p. 247. He told the jury how when the officers opened the bathroom door, they came upon a haze with a strong chemical odor. It was almost like smoke, as if someone was smoking in the bathroom. He thought the chemicals might have been dumped in the toilet causing the haze. Tr. pp. 236-37. He tried to hold his breath the rest of the time so he would not breathe the chemicals in. Tr. p. 237, lines 9-22. Another room appeared to maybe be a child's room, it had toys in it. Tr. p. 237.

During Detective Lundberg's testimony, the jury saw a video made by Detective Lundberg, showing the inside of the house. In the upstairs bathroom, there was a mason jar, lighter fluid, an empty bottle of muriatic acid, lye, breathing masks, an empty bottle with unknown liquid in the

bottom, a container of salt, lye, oven mitts,[6] and coffee filters. State's Exhibit No. 65 (at 7:00 – 10:30). There also was a soda bottle with two tubes protruding from each side of the bottle where holes were made. State's Exhibit No. 65 (at 9:15-9:20); State's Exhibit No. 27.

State's Exhibit No. 6 shows a glass pipe, burned at the end, in a bed of aluminum foil. Also admitted into evidence was a hand-written list of the following items:

10 bxs matches
2 bts peroxide
10 bts iodine
1 lye
1 muriatic acid
3 boxes 12/20
coffee filters

State's Exhibit No. 46. Detective Hershel Tanner, qualified as an expert in methamphetamine investigation, testified this appeared to be the recipe or shopping list for manufacturing methamphetamine under the red phosphorus method. Tr. p. 289, lines 8-11.

The video made by Detective Lundberg shows a can of Coleman fuel next to a bed in one of the bedrooms. There are also toys in the bedroom. Detective Lundberg opened a Styrofoam container with empty soda bottles inside, with holes in the sides of them much like the soda bottle found in the bathroom that was used as an HCL generator. State's Exhibit No. 65 (at 11:30-15:30). A tube still remained stuck in the side of a two-liter bottle. State's Exhibit No. 43. A sample of liquid was taken from one of the green bottles. Tr. p. 246, State's Exhibit No. 61.

SLED chemist Douglass Robinson tested six items for methamphetamine and four of them tested positive. Two plastic corner bags contained methamphetamine – one was only a residual

[6] Detective Tanner explained that during the reaction, the bottles will get hot, so the oven mitts allow the cooks to handle the vessels. Tr. p. 286, lines 12-17.

amount, the second contained .66 grams of methamphetamine. Robinson testified the corner bags are commonly used for controlled substances packaged for street sale. A piece of foil tested positive for methamphetamine residue. A liquid submitted to SLED for testing in a glass vial also tested positive for methamphetamine. Tr. pp. 272-76.

Detective Tanner testified as an expert in methamphetamine investigation. He described the shake and bake method of manufacture and the red phosphorus method, which utilizes striker pads from matchbooks. Tr. pp. 282-89.

Detective Tanner also testified about the dangers of methamphetamine production as follows:

> The air quality levels are very dangerous to the human body when you're in there. Different cooks have different dangers One pots, they are very volatile when it comes to, you have got the flammables with inside of a vessel that's pressurized with ammonia nitrate it's very dangerous when it comes to explosion and fire . . . .

Tr. p. 289, line 24 – p. 290, line 4. Cooks not using breathing apparatus will start developing lung problems and have trouble breathing after a short time of manufacturing. Tr. p. 291, lines 16-21. Detective Tanner testified a person would need to be in close proximity with a one pot in order for the ammonia to get on the person's clothing. Tr. p. 291.

During sentencing, the trial court noted the following:

> Methamphetamine as the Solicitor stated is a huge problem in our community and not just because of the health effects that it has on those who use it but those all around it. The explosion potential that could potentially kill and injure others in the neighborhood is very great and it's something that this Court takes very serious so I don't think it's appropriate for a probationary sentence.

Tr. p. 352, line 19 – p. 353, line 1.

ARGUMENT

I.

Law enforcement did not randomly knock on the residence where a methamphetamine lab was found. Law enforcement investigated a tip and discovered unusual levels of pseudoephedrine purchases before knocking on the door. Therefore, law enforcement held reasonable suspicion of criminal activity sufficient to approach and knock on the front door. Appellant does not possess an expectation of the privacy as to who might knock on the front door of a house he does not live in or own.

Kotowski complains that pursuant to State v. Counts, 413 S.C. 153, 776 S.E.2d 59 (2015), law enforcement lacked reasonable suspicion to knock on Vining's front door. However, Kotowski's argument ignores that, as in Counts, law enforcement did not randomly knock on Vining's front door or broadly target Vining's neighborhood: law enforcement only knocked upon the door when law enforcement's carefully conducted investigation, in response to a tip, revealed Vining made numerous pseudoephedrine purchases in a short time frame and was even declined during an attempt to purchase what would have exceeded the nine gram, thirty-day limit for pseudoephedrine purchases. They approached and knocked on the residence the day after the declined purchase attempt. Law enforcement held sufficient reasonable suspicion under Counts to knock on the front door of the residence.

While Counts recognized privacy interests under the State's constitution exceed federal constitutional protections in some respects, the parameters of Counts' ruling remain largely undefined. Federal authority recognizes the implied license allowing members of the public to approach a person's front door and knock. That is why Sergeant Thompson did not implicate a Fourth Amendment concern by merely knocking on Kotowski's door. Kentucky v. King, 131 S. Ct.

1849, 1862 (2011) ("When law enforcement officers who are not armed with a warrant knock on a door, they do no more than any private citizen might do."); State v. Wright, 391 S.C. 436, 444, 706 S.E.2d 324, 328 (2011) (finding a law enforcement officer may lawfully go to a person's home and door to interview that person); see also Florida v. Jardines, 133 S.Ct. 1409, 1417, n. 4 (2013) ("[I]t is not a Fourth Amendment search to approach the home in order to speak with the occupant, *because all are invited to do that.*" (emphasis in original)).

However, in Counts, the South Carolina Supreme Court declared a police officer does not share this license with private citizens when conducting a criminal investigation absent a reasonable suspicion to believe criminal activity may be occurring inside the residence. Kotowski relies on State v. Counts, 413 S.C. 153, 776 S.E.2d 59 (2015) to argue law enforcement violated his rights under the South Carolina Constitution. The Supreme Court noted that S.C. Const. art I, § 10 provides an express right to privacy. The Supreme Court noted that its prior opinions acknowledge the constitutional provision but spoke mainly in passing about its import. Id. at 167-70, 776 S.E.2d at 67-69.

Referencing other jurisdictions addressing their own constitutional provisions concerning the right to privacy, the Supreme Court observed these other "courts have analyzed whether law enforcement needs to (1) have probable cause or reasonable suspicion to approach the private residence; or (2) inform the citizen of his or her right to refuse consent to search." Id. at 171, 776 S.E.2d at 69.

The Supreme Court reached the following conclusion:

> Because the privacy interests in one's home are the most sacrosanct, we believe there must be some threshold evidentiary basis for law enforcement to approach a private residence. Otherwise, we foresee

> the potential for abuse **if law enforcement targets a neighborhood and indiscriminately knocks on doors** with the hope of discovering contraband without a search warrant. Although the State maintains these encounters are entirely consensual, we cannot ignore the nature of the "knock and talk" procedure. In contrast to a routine sales call, the "knock and talk" technique is inherently coercive as it is conducted by law enforcement and not a private citizen.

Id. at 172, 776 S.E.2d at 69-70 (emphasis added).

Accordingly, the Supreme Court held that "law enforcement must have a reasonable suspicion of illegal activity at a targeted residence prior to approaching the residence and knocking at the door." Id. at 172, 776 S.E.2d at 70.

Turning to the facts of that case, the Supreme Court found reasonable suspicion noting:

> [L]aw enforcement received two separate anonymous tips from citizens who alleged that Counts was selling drugs. These tips also identified vehicles driven by Counts, his phone number, and his use of multiple identities. Through their investigation, the officers confirmed that Counts had two false identification cards on record and had prior drug convictions.

Id. at 173, 776 S.E.2d at 70.

Importantly, the Supreme Court found, "In light of this evidence, **the officers were not randomly knocking** on Count's door but had reasonable suspicion to support their decision to approach Counts' residence and conduct the 'knock and talk.'" Id. (emphasis added).

In the instant case, Sergeant Thompson did not randomly knock on Vining's door, instead Sergeant Thompson investigated a tip, and only visited Vining's residence when he believed, based on the tip and the NPLEx records, he had reasonable suspicion to pursue the investigation further. Tr. p. 78, lines 21-22 ("That gave me reasonable suspicion to go and look at this house more, yes."). Judge Murphy observed, "I think the timing is important and the timing is important in this case

because Sergeant Thompson took the time to obtain corroborative evidence of the tip that led to the reasonable suspicion of illegal activity at the targeted location." Tr. p. 133, lines 17-21.

Under Fourth Amendment law, reasonableness of a warrantless seizure depends on the balance between public interest and the individual's right to be free from arbitrary interference from law enforcement. State v. Woodruff, 344 S.C. 537, 551, 544 S.E.2d 290, 297 (Ct. App. 2001). In the instant case, the balance is between the State's interest in investigating potential methamphetamine labs, which create grave danger for the communities where they are located, and the right for an overnight guest to be free from the minimal intrusion from their hosts' door being knocked on by law enforcement and someone inside the house answering the door. See State v. Weaver, 374 S.C. 313, 322, 649 S.E.2d 479, 483 (2007) ("The focus in the state constitution is on whether the invasion of privacy is reasonable, regardless of the person's expectation of privacy in the vehicle to be searched."), see generally United States v. Christmas, 222 F.3d 141, 145 (4th Cir. 2000) (noting a "community might quickly succumb to a sense of helplessness if police were prevented from responding to the face to face pleas of neighborhood residents for assistance.").

Further, this case differs from the nightmare hypothetical articulated by the Supreme Court in Counts because investigating the tip was a valid response to a complaint from the community. Investigating a tip concerning a single residence is not broadly targeted or random, and does not seem to be within the realm of the Supreme Court's fears expressed in Counts. See Wright, 391 S.C. at 443, 706 S.E.2d at 327 (2011); 1 Wayne R. LaFave, Search and Seizure: A Treatise on the Fourth Amendment § 2.3(b), at 475 (3d ed.1996) ("It is not improper for a police officer to call at a particular house and seek admission for the purpose of investigating a complaint or conducting other official business.").

An officer's experience and intuition are proper to take into consideration in determining if reasonable suspicion exists. State v. Taylor, 388 S.C. 101, 116, 694 S.E.2d 60, 68 (Ct. App. 2010) *rev'd on other grounds*, 401 S.C. 104, 736 S.E.2d 663 (2013). Sergeant Thompson testified he was assigned to the metro narcotics unit and received extensive training in methamphetamine drug labs. He has been clandestine meth lab certified since 2004 and investigated over 100 meth labs in Dorchester County. Tr. pp. 53-54. He also was proficient in utilizing the NPLEx database. The record reflects he was aware of the purchasing habits of pseudoephedrine couriers and the difference between irregular and regular purchasing activity for pseudoephedrine.

Under federal law, "[i]n applying the concept of reasonable suspicion to the various facts of the case, it is the entire mosaic that counts, not single tiles." State v. Wallace, 392 S.C. 47, 707 S.E.2d 451 (Ct. App. 2011) (citation and internal quotation marks omitted); see also United States v. Branch, 537 F.3d 328 (4th Cir. 2008) (judicial review of evidence offered to demonstrate reasonable suspicion must be commonsensical, focus on the evidence as a whole, and be cognizant of both context and the particular experience of police officers). Accordingly, innocent conduct, like the presence of a car parked in the driveway belonging to the family of a convicted meth cook, also becomes relevant in a reasonable suspicion analysis.

Reasonable suspicion, under federal law, consists of "'a particularized and objective basis' that would lead one to suspect another of criminal activity." State v. Lesley, 326 S.C. 641, 644, 486 S.E.2d 276, 277 (Ct. App. 1997) (quoting United States v. Cortez, 449 U.S. 411, 417 (1981)). The reasonable suspicion standard "is a less demanding standard than probable cause and requires a showing considerably less than preponderance of the evidence. . . ." Illinois v. Wardlow, 528 U.S. 119, 123 (2000). "Reasonable suspicion is more than a general hunch but less than what is required

for probable cause." State v. Willard, 374 S.C. 129, 134, 647 S.E.2d 252, 255 (Ct. App. 2007); see State v. Rogers, 368 S.C. 529, 534, 629 S.E.2d 679, 682 (Ct. App. 2006) ("Reasonable suspicion is something more than an inchoate and unparticularized suspicion or hunch."). "Reasonable suspicion depends on the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act." Navarette v. California, 134 S.Ct. 1683 (2014) (citations and internal quotation marks omitted).

In the instant case, law enforcement held a reasonable suspicion of criminal activity at Vining's residence, and therefore did not run afoul of either federal or state constitutional law in knocking on her door. Accordingly, the trial court did not err.

II.

The protective sweep conducted before law enforcement obtained a search warrant was lawful as law enforcement had probable cause to believe exigent circumstances existed due to evidence of active methamphetamine manufacturing occurring inside the residence, and law enforcement was allowed to ensure for their protection that no other individuals were inside the residence. Further, the issue should not be reviewed because appellant only challenges part of the trial court's ruling.

Kotowski argues the trial court erred in finding the protective sweep of the residence lawful because, Kotowski contends, no exigent circumstances existed – Kotowksi argues law enforcement was required to assume no other individuals were inside the residence. Kotowski fails to address the elephant in the room, exigent circumstances existed because of evidence an active methamphetamine lab was inside the residence. Methamphetamine labs are extremely dangerous because they are volatile and explosive. They start fires and create dangerous noxious gas. Further, law enforcement was validly concerned whether anyone remained inside and potentially posed a threat to officer safety. A further exigency was the possibility that evidence would be destroyed before a warrant could be secured.

First, Kotowski only argues the trial court erred in finding the sweep was not proper to look for more people; he does not argue error in the trial court's findings that the meth lab created exigent circumstances. Therefore, because only part of the trial court's ruling is challenged, this Court should not consider review of his claim that the protective sweep was improper because there were not anymore people inside the house.

The Court found the following regarding the protective sweep:

> In regards to the protective sweep of the property, the Court finds that there were exigent circumstances that warranted it. The

> overwhelming smell of ammonia certainly is a potentially dangerous type of situation that would risk not only officer safety but safety of the neighbors if there was to be an explosion and further there was activity which was described at different windows and the officers did not know for officer safety if there were other individuals located in the residence.

Tr. p. 133, line 22 – p. 134, line 5.

"Under the two issue rule, where a decision is based on more than one ground, the appellate court will affirm unless the appellant appeals all grounds because the unappealed ground will become law of the case." Jones v. Lott, 387 S.C. 339, 346, 692 S.E.2d 900, 903 (2010). Because Kotowksi fails to challenge Judge Murphy's ruling finding the possibility of an active methamphetamine lab created exigent circumstances warranting the protective sweep, it is unnecessary for this Court to review the issue of whether the protective sweep was justified by concerns that other individuals may be hiding in the residence.

Regarding the substantive issue, as discussed in the beginning of the first issue, no Fourth Amendment issue is implicated when law enforcement knocks on the door for purposes of speaking with a person. "A voluntary response to a knock at the front door of a dwelling does not generally implicate the Fourth Amendment, and thus an officer generally does not need probable cause or reasonable suspicion to justify knocking on the door and then making verbal inquiry." United States v. Cephas, 254 F.3d 488, 493 (4th Cir. 2001).

Upon detecting the strong odor of ammonia from Kotowski and his clothes, law enforcement possessed probable cause to believe methamphetamine was being manufactured inside the residence. In Cephas, a police officer received an anonymous tip that Cephas was smoking marijuana with a fourteen year old in his apartment. The officer investigated and found Cephas' apartment and

knocked on the apartment door. When Cephas opened the door, the officer smelled marijuana from the apartment. Cephas tried to close the door on the officer, but the officer forced his way inside and found a gathering of people and a marijuana roach in an ashtray. Id. at 490-91.

Reversing the district court's suppression of evidence, the Fourth Circuit found that "[w]hen Cephas opened his apartment door without knowing who was on the other side, he voluntarily exposed to the public any odors and such a view as one standing at the door could perceive." Id. at 494. The Fourth Circuit concluded that, based on the odor alone, the officer had probable cause to enter the apartment. Id. at 495. Likewise, the odor on Kotowski, in conjunction with the NPLEx history, provided officers probable cause to believe methamphetamine was being manufactured in the residence.

Further, law enforcement was allowed due to exigent circumstances to enter Vining's residence. "Warrantless entries into a residence are presumptively unreasonable." Cephas at 494. Recognized exceptions to this rule include plain view and exigent circumstances. See State v. Dupree, 319 S.C. 454, 462 S.E.2d 279 (1995), *cert. denied*, 516 U.S. 1131(1996) (plain view); State v. Brown, 289 S.C. 581, 347 S.E.2d 882, 886 (1986) (exigent circumstances). "Warrants are generally required to search a person's home or his person unless the exigencies of the situation make the needs of law enforcement so compelling that the warrantless search is objectively reasonable under the Fourth Amendment." Brigham City, Utah v. Stuart, 126 S.Ct. 1943 (2006) (citations and internal quotation marks omitted).

In the instant case, limited immediate action without a warrant was necessary both because the danger evidence would be destroyed, and because the safety of anyone remaining inside the residence was at risk due to the volatility of methamphetamine manufacturing. United States v.

Santana, 427 U.S. 38, 42 (1976) (noting that once the suspect saw police and fled inside the house, there was a realistic expectation that any delay could result in the destruction of evidence); State v. Abdullah, 357 S.C. 344, 351, 592 S.E.2d 344, 348 (Ct. App. 2004) (noting law enforcement may enter a dwelling "to prevent a suspect from fleeing or where there is a risk of danger to police or others inside or outside [the] dwelling").

Further, officer safety and the safety of those in the neighborhood were at risk. In the instant case, Sergeant Thompson explained to Judge Murphy the dangers of leaving a methamphetamine cook unattended:

> [T]his one was a one pot or a shake and bake, you're dealing with lithium metal and lithium metal reacts to the water. While you're manufacturing this method you're actually manufacturing water ammonia so you have an explosive hazard. Let alone it's in a bottle under pressure with a lot of fuel, white gas, so you have an explosive hazard.

Tr. p. 67, lines 15-22.

At trial, on cross-examination, he explained that before executing the search warrant the officers needed to get their equipment and line up support from EMS and the fire department. Kotowski actually needed to be decontaminated because he was saturated in ammonia. Tr. p. 192, lines 5-12.

"Jurisdictions that have tackled the issue have held that the dangers posed by an operating methamphetamine lab are sufficient to constitute an exigent circumstance for purposes of conducting a warrantless search of a residence." Williams v. State, 995 So.2d 915, 920 (Ala. Crim. App. 2008).

Methamphetamine manufacturing and the ingredients used in the manufacture of methamphetamine creates the risk of explosion, fire, noxious gas emissions, and injurious chemical

reactions that constitutes an exigency. In United States v. Layne, 324 F.3d 464, 468–69 (6th Cir. 2003), the Court of Appeals noted methamphetamine production "'poses serious dangers to both human life and to the environment ... [and] these chemicals and substances are utilized in a manufacturing process that is unstable, volatile, and highly combustible. Even small amounts of these chemicals, when mixed improperly, can cause explosions and fires.'" Id. (quoting H.R. Rep. 106–878, pt. 1 at 22 (September 21, 2000)).

The Iowa Supreme Court found "[t]he volatile nature of the dangers created by methamphetamine labs can be exigent circumstances justifying an immediate limited search of premises harboring such a lab." State v. Simmons, 714 N.W.2d 264, 273 (Iowa 2006). Likewise, the Eighth Circuit found the volatile nature of methamphetamine labs present exigent circumstances justifying an immediate limited search after officers smelled an odor associated with methamphetamine production. Kleinholz v. United States, 339 F.3d 674, 676-77 (8th Cir. 2003). The Tenth Circuit found the strong odor of methamphetamine production emanating from a residence and the agent's awareness of the inherent dangers of an active methamphetamine lab contributed to the reasonable grounds for law enforcement to immediately enter the home to protect the public. United States v. Rhiger, 315 F.3d 1283, 1289-90 (10th Cir. 2003). The Ninth Circuit opined "faced with a potential disaster in the form of an ether explosion and fire . . . exigent circumstances existed because . . . a reasonable person could have believed that immediate entry was necessary to safeguard public safety . . ." United States v. Wilson, 865 F.2d 215, 217 (9th Cir. 1989). "The potential hazards of methamphetamine manufacture are well documented, and numerous cases have upheld limited warrantless searches by police officers who had probable cause to believe they had uncovered an ongoing methamphetamine manufacturing operation." United

States v. Walsh, 299 F.3d 729, 734 (8th Cir. 2002). The Ninth Circuit found the odor that law enforcement associated with methamphetamine production emanating from an apartment constituted an exigent circumstance allowing entry under the emergency exception to the warrant requirement, which is invoked when law enforcement's assistance is immediately needed to protect life or property. United States v. Cervantes, 219 F.3d 882 (9th Cir. 2000) *abrogated on other grounds by* Stuart, at 404-05 ("An action is reasonable under the Fourth Amendment, regardless of the individual officer's state of mind, as long as the circumstance, viewed *objectively*, justifies the action.").

Further, law enforcement could validly conduct a protective sweep to ensure no dangerous individuals remained inside the residence. "This Court has recognized that because of the 'indisputable nexus between drugs and guns' where an officer has reasonable suspicion that drugs are present in a vehicle lawfully stopped, there is an appropriate level of suspicion of criminal activity and apprehension of danger to justify a frisk of both the driver and the passenger in the absence of other factors alleviating the officer's safety concerns." State v. Banda, 371 S.C. 245, 253, 639 S.E.2d 36, 40 (2006) (quoting State v. Butler, 353 S.C. 383, 391, 577 S.E.2d 498, 502 (Ct. App. 2003)).

"A warrantless search is justified under the exigent circumstances doctrine to prevent a suspect from fleeing or where there is a risk of danger to police or others inside or outside a dwelling." State v. Wright, 416 S.C. 353, 368, 785 S.E.2d 479, 487 (Ct. App. 2016) (citations and internal quotation marks omitted). "In such circumstances, a protective sweep of the premises may be permitted." Id. (citation and internal quotation marks omitted). A protective sweep is warranted if "the searching officer possesses a reasonable belief based on specific and articulable facts that the

area to be swept harbors an individual posing a danger to those on the arrest scene." Maryland v. Buie, 494 U.S. 325, 337 (1990).

In the instant case, someone peeked through the window to the right of the door, someone peeked through the window to the left of the door, someone took the fan out of an upstairs window and shut the window. Law enforcement could not be certain how many people were inside. Further, Vining claimed her name was "Lisa" and Vining's vehicle was in the driveway, law enforcement could justifiably believe that Vining, unaccounted for due to her deceit, was still inside the residence. The officers testified they felt "Lisa" was being deceitful, adding to their suspicion. Considering officers had probable cause to believe narcotics were manufactured inside the residence and aware of the connection between the narcotics trade and weapons, law enforcement was justified on conducting the protective sweep in search of anyone lying in wait, or ready to point a weapon out a window. Accordingly, the trial court did not err in finding the protective sweep was permissible. State v. Weaver, 374 S.C. 313, 649 S.E.2d 479 (2007) ("When reviewing a Fourth Amendment search and seizure case, an appellate court must affirm the trial judge's ruling if there is any evidence to support the ruling.").

Further, any error by the officers in conducting the protective sweep would not warrant suppression of evidence since it would be inevitably discovered once law enforcement obtained a search warrant. No items were seized during the protective sweep. Some items observed were discussed in the search warrant, most importantly, the small baggie of methamphetamine and the haze. State's Exhibit No. 4. However, as testified to by Sergeant Thompson, law enforcement was going to seek a search warrant on the information it had prior to the protective sweep, which included the tip, the purchasing history, Kotowski and Vining's suspicious behavior, and especially

the strong ammonia smell on Kotowski and Vining. This evidence alone supports probable cause regardless of evidence observed during the protective sweep. Accordingly, the evidence observed should not be suppressed since it would be inevitably discovered. See Nix v. Williams, 467 U.S. 431 (1984).

III.

Testimony concerning purchasing history for pseudoephedrine based on database records was not admitted for the truth of the matter asserted. Further, the purchase history was admissible as business records and did not violate the confrontation clause because records of the purchases were not testimonial in nature. Finally, any error was harmless beyond a reasonable doubt.

Kotowski claims Sergeant Thompson's testimony regarding Vining and Kotowski's purchasing history was inadmissible hearsay and could not be admitted as a business record without a representative from Appriss present to testify. However, Sergeant Thompson was a qualified witness, familiar enough with the NPLEx database to teach a webinar on its use. Kotowski also claims admitting the evidence violated the confrontation clause, although it was not testimonial, as federal courts have found. Further, he claims testimony about Kotowski's two pseudoephedrine purchases was more prejudicial than probative, but it was not **unfairly** prejudicial. Any error was harmless beyond a reasonable doubt as Kotowski was soaked with the odor of ammonia and the house was seemingly bursting with methamphetamine ingredients and paraphernalia.

"Hearsay" is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted. Rule 801, SCRE. Hearsay is inadmissible except as provided by statute, the Rules of Evidence, or other court rules. Rule 802, SCRE; State v. LaCoste, 347 S.C. 153, 553 S.E.2d 464 (Ct. App. 2001), *cert. dismissed* 353 S.C. 538, 579 S.E.2d 318. "Evidence is not hearsay unless it is an out of court statement offered to prove the truth of the matter asserted." State v. Thompson, 352 S.C. 552, 558, 575 S.E.2d 77, 81 (Ct. App. 2003).

An out of court statement is not hearsay if offered for the limited purpose of explaining why a

government investigation was undertaken. Thompson, 352 S.C. at 558, 575 S.E.2d at 81. Thompson found no error because the statement was not for the truth of the matter asserted but "to explain and outline" law enforcement's investigation and why law enforcement went to Thompson's home. Id. at 559, 686 S.E.2d at 81. In the instant case, the NPLEx records were not for the truth of the matter asserted: Sergeant Thompson testified about Vining's transactions because it explained why law enforcement was investigating Vining's residence. Similarly, evidence Kotowski made two unremarkable purchases of pseudoephedrine was not critical for the truth of the matter asserted, but was relevant to demonstrate the steps taken in the investigation, including seeking an arrest warrant. The jury, knowing that Vining's pseudoephedrine purchases were investigated, might have wondered why Kotowski's purchase history was not investigated, and hold that against the State.

Accordingly, not only were the purchases not for the truth of the matter asserted, but contrary to Kotowski's arguments, the probative value was not outweighed by the danger of unfair prejudice. The jury could decide for itself the probative value of these two purchases. A trial court's decision regarding the comparative probative value and prejudicial effect of relevant evidence will be reversed only in exceptional circumstances. State v. Adams, 354 S.C. 361, 580 S.E.2d 785 (Ct. App. 2003). "If judicial self-restraint is ever desirable, it is when a Rule 403 analysis of a trial court is reviewed by an appellate tribunal." State v. Hamilton, 344 S.C. 344, 358, 543 S.E.2d 586, 598 (Ct. App. 2001) *overruled on other grounds by* State v. Gentry, 363 S.C. 93, 610 S.E.2d 494 (2005). "'Unfair prejudice means an undue tendency to suggest a decision on an improper basis.'" State v. Stephens, 398 S.C. 314, 728 S.E.2d 68, 71-72 (Ct. App. 2012) (*quoting* State v. Lyles, 379 S.C. 328, 665 S.E.2d 201, 206 (Ct.App.2008)). "**All** evidence is meant to be prejudicial; it is only **unfair** prejudice which must be [scrutinized under Rule 403]." State v. Gilchrist, 329 S.C. 621, 496 S.E.2d

424, 429 (Ct.App.1998) (citations and quotation marks omitted) (emphasis added). If the jury considered the purchases as some evidence of guilt, that is not an improper consideration, accordingly, admission of the evidence did not create any danger of **unfair** prejudice.

Additionally, the evidence was admissible under the business records exception. Sergeant Thompson advised the jury about the history and workings of the NPLEx database. Sergeant Thompson explained that in 2005, congress passed legislation requiring any purchase of pseudoephedrine be recorded on a log. Originally the logs were simply maintained at any pharmacy or gas station selling the medication. In 2010, legislation was passed requiring the purchases be captured electronically. Presently, a government issued ID is required, which is either scanned or entered by the pharmacist at the point of sale, and the name, date of birth, and address of the purchaser are entered into the database system, along with the product purchased and purchase amount. Access to this database is limited to law enforcement and pharmacies. Law enforcement is allowed to go into the database, pull records, and make investigative searches. Tr. pp. 170-71.

Sergeant Thompson explained the training he has received in using NPLEx as follows:

> The company is called Appriss and they put on this thing called a webinar. Basically it's a training class and not too long ago I was actually asked by one of the people from Appriss to put on one of these webinars where I logged into a computer and gave training on how to use Appriss to all participating states that use it. . . . [P]articipants of the program were able to watch this webinar with me giving training on how to use it.

Tr. p. 171, line 22 – p. 172, line 6.

During cross-examination, Sergeant Thompson explained, "The log speaks for itself. You have to give your ID to purchase the pseudoephedrine. They scan that and make sure the information there is correct and then if you are able to buy it, they make the sale. If you exceed it, they block the

sale so the information is pretty reliable." Tr. p. 187, lines 8-12.

Sergeant Thompson explained his understanding of how the information is recorded,

> You go to the store, you provide the pharmacist, because only the pharmacist can sell it, you provide the pharmacist your ID and then that information – the ID is scanned, the information embedded in your license is recorded and the pharmacist would input the name of this product that you're wanting to buy and the grams associated with that product.

Tr. p. 189, lines 11-17.

Testimony regarding the purchase history retrieved from the NPLEx database is admissible pursuant to Rule 803(6), SCRE, or S.C. Code Ann. § 19-5-510. 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.

State v. Rice, 375 S.C. 302, 330–32, 652 S.E.2d 409, 423–24 (Ct. App. 2007) *overruled on other grounds by* State v. Byers, 392 S.C. 438, 710 S.E.2d 55 (2011) (citing S.C. Code Ann. § 19-5-510 (1985)).

Rule 803(6), SCRE, adopted in 1995 and modeled after § 19-5-510 and the Federal Rules of Evidence, allows for the admission of records of regularly conducted activity that would otherwise be excluded by the rule against hearsay. Rule 803(6), SCRE, provides that memorandum, reports, records, etc. in any form of acts, events, conditions, or diagnoses, are admissible as longs as 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, 249-50, 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 about the manner in which records are prepared or the source of information. Rice, 375 S.C. at 331, 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, 155, 394 S.E.2d 323, 324 (1990).

In the instant case, the requirements for admission as a business record are met. Sergeant Thompson's testimony establishes that pseudoephedrine purchases, by law: (1) are recorded at the time of sale, (2) by a pharmacy employee, (3) in the regular course of business.

Further, Sergeant Thompson was a qualified witness pursuant to § 19–5–510 and Rule 803(6), SCRE, even though Sergeant Thompson was not employed by Appriss or one of the pharmacies where the pseudoephedrine was purchased. See Twelfth RMA Partners, L.P. v. Nat'l Safe Corp., 335 S.C. 635, 642, 518 S.E.2d 44, 48 (Ct. App. 1999) (holding if a witness's testimony conveys information from a person "with knowledge" at the time the records were created, the witness may be deemed qualified to testify despite not being the custodian "at or near the time" the records were made); see also Midfirst Bank, SSB v. C.W. Haynes & Co., 893 F. Supp. 1304, 1310 (D.S.C. 1994) ("Business records of an entity are admissible even though another entity made the records, and the rule does not require an employee of the entity that prepared the record to lay the

foundation."), *aff'd,* 87 F.3d 1308 (4th Cir. 1996).

Sergeant Thompson's testimony shows his familiarity with the system, including how data was collected. He testified officers routinely use the database and it is accurate. He explained he taught a webinar at the request of Appriss for other law enforcement officers on how to use the NPLEx database. Accordingly, ample evidence indicates Sergeant Thompson was a qualified witness for purposes of establishing the trustworthiness of the records.

Finally, Judge Murphy found the records trustworthy. Specifically, Judge Murphy found the following:

> In accordance to Statute 44-53-398 which deals with the sale of products containing ephedrine or pseudoephedrine basically the statute does delineate the requirements of a retailer which they must go through in order to give a purchaser or to sell to a purchaser such products and basically they say shall require purchaser to produce a government issued photo ID showing the date of birth of the person and require the purchaser to sign an electronic log showing the date and time of the transaction, the person's name and address, the type of issuing government entity, identification number, the amount of compound, mixture or preparation. The retailer shall also determine [if] the name entered in the log corresponds to the name on the identification, that the date of birth and the address are correct and shall enter the log and the name of the product and quantity sold. The retailer shall ensure that the product is delivered directly into the custody of the purchaser and the log must include notice to purchasers that entering false statements or misrepresentations on the log may subject the purchaser to criminal penalties.
>
> The statute further delineates potential criminal penalties for retailers for not complying with the statute's requirements. An employee's duty to accurately report, basically it means that they could be held criminally responsible and criminally reliable [sic] for not accurately reporting into the database.
>
> This Court finds that this requirement pursuant to the statute gives the indicia of trustworthiness based upon the proper foundation being laid by the State [for] the transactions. That would be further corroborated by statute 23-3-1200 which is the SLED electronic monitoring system of the collection and storage of use of this

> information. This statute delineates the access to this data which is only to local, state or federal law enforcement official[s] which may be given access to this information. . . .

Tr. p. 164, line 6 – p. 165, line 22.

Judge Murphy's holding is consistent with the holdings of other jurisdictions addressing the issue. In State v. Hicks, 777 S.E.2d 341 (N.C. Ct. App. 2015), an officer was allowed to testify about NPLEx results showing six pseudoephedrine purchases by the appellant. The North Carolina Court of Appeals noted the officer testified about his knowledge and familiarity with the database. The officer testified, "[Pharmacy employees] are required to long [sic] into the system, CVS for example they scan your ID [and] it goes straight into the system the information does. And then the electronic signature is also put straight into the system." Id. at 349. The officer testified law enforcement officers, including himself, regularly consult the database to view pseudoephedrine purchases for investigating possible methamphetamine manufacturing. The officer attended training sessions on using the database. The court found the officer "thoroughly demonstrated his understanding of the NPLEx database" and found his testimony provided sufficient foundation for the admission of the computer report from the database to be admitted as a business record. Id.

In Embrey v. State, 989 N.E.2d 1260 (Ind. Ct. App. 2013), the Indiana Court of Appeals rejected appellant's argument that a person with first-hand knowledge of the pseudoephedrine transactions was required to testify rather than a custodian from Appriss. In reaching that conclusion, the court explained the following:

> Business records are an exception to the hearsay rule because they are imbued with independent indicia of trustworthiness. . . . These indicia are that the business establishes a routine of record-making, that the record is made by one with a duty to report accurately, and that the business relies upon that record in carrying out its activities. . . . The

> fact that the business record is prepared by a party independent of the business does not negate these factors.

Id. at 1264 (quotation marks and citations omitted). The court found that the NPLEx report admitted into evidence contained the independent indicia of trustworthiness. Id. at 1267.

Kotowski further claims his rights under the confrontation clause were violated. The Confrontation Clause of the Sixth Amendment states the following: "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." U.S. Const. Amend. VI. This procedural safeguard is also applicable to state prosecutions. Crawford v. Washington, 541 U.S. 36, 42 (2004).

In Crawford, the United States Supreme Court held the Confrontation Clause bars "admission of testimonial statements of a witness who did not appear at trial unless he was unavailable to testify, and the defendant had had a prior opportunity for cross-examination." Crawford, at 53-54. Critically, only testimonial statements require compliance with the Confrontation Clause. Id. at 68. Thus, a nontestimonial statement would be admissible, subject to traditional limitations upon hearsay evidence, even though the defendant never had the opportunity to cross-examine the declarant. Id.

The Missouri Court of Appeals rejected an argument that NPLEx records violated the confrontation clause, finding that the NPLEx records are not testimonial in nature. State v. Cady, 425 S.W.3d 234, 245 (Mo. Ct. App. 2014). The Indiana Court of Appeals rejected a confrontation clause claim, finding while "NPLEx records may occasionally be used to establish or prove some fact at trial, that is not the main purpose of the NPLEx records." Montgomery v. State, 22 N.E.3d 768, 775 (Ind. Ct. App. 2014). Instead, the main purpose is to track and regulate the sale of non-prescription pseudoephedrine and ephedrine sales. Id.

In United States v. Lynn, 851 F.3d 786 (7th Cir. 2017), the Seventh Circuit Court of Appeals rejected a claim that NPLEx records violated the confrontation clause, noting the Fifth, Sixth, and Eighth circuits likewise came to the same conclusion. Id. at 792. The court concluded that NPLEx records are not created for litigation, but are "regularly maintained and updated each time an individual purchase an over-the-counter cold medicine that includes pseudoephedrine." Id. at 793. Further, the Seventh Circuit noted state regulatory bodies may have a legitimate interest in maintaining the records beyond their evidentiary value. For instance, requiring identification for pseudoephedrine purchases may deter pseudoephedrine misuse. The Seventh Circuit concluded the records were non-testimonial. Id.

One of the decisions relied upon by the Seventh Circuit, United States v. Towns, 718 F.3d 404, 411 (5th Cir. 2013) noted the purchase logs entered into the database were created to comply with state law and not in response to an active prosecution.

In the instant case, Judge Murphy found the NPLEx records were not testimonial. The court noted that the NPLEx records being testified to are merely compilations of non-criminal data and are more akin to telephone records. Tr. p. 168. In the instant case, the information gathered in the database is not testimonial, but instead represents information compiled by individual businesses seeking to comply with state and federal law for the purposes of tracking legal pseudoephedrine sales.

Trial judges have considerable discretion in ruling on the admission or exclusion of evidence, and an appellate court will not reverse a trial judge's ruling on evidentiary matters absent a clear abuse of that discretion resulting in prejudice to the defendant. State v. Gaster, 349 S.C. 545, 557, 564 S.E.2d 87, 93 (2002); see State v. Torres, 390 S.C. 618, 625, 703 S.E.2d 226, 230 (2010) ("The

appellate court reviews a trial judge's ruling on admissibility of evidence pursuant to an abuse of discretion standard and gives great deference to the trial court." (emphasis added)).

In the instant case, Sergeant Thompson's testimony supports admitting the evidence as a business record. Accordingly, Judge Murphy did not err. Further, any error would be harmless beyond a reasonable doubt. Errors are considered to be harmless when they could not reasonably have affected the result of the trial. State v. Adams, 354 S.C. 361, 380, 580 S.E.2d 785, 795 (Ct. App. 2003). "It is a rule of practically universal application in appellate procedure that an accused cannot avail himself of error as a ground for reversal where the error has not been prejudicial to him." State v. Hariott, 210 S.C. 290, 298, 42 S.E.2d 385, 388 (1947). When a review of the entire record establishes an error is harmless beyond a reasonable doubt, an appellate court should not reverse a conviction. State v. Thompson, 352 S.C. 552, 562, 575 S.E.2d 77, 83 (Ct. App. 2003). State v. Mitchell, 286 S.C. 572, 573, 336 S.E.2d 150, 151 (1985) (holding whether an error is harmless depends on the circumstances of the case, but it is harmless where it could not reasonably have changed the outcome of the trial).

In the instant case, evidence of guilt was overwhelming. Kotowski smelled of ammonia, his driver's license was found in the house, and he maintained Vining was "Lisa" in an attempt to deceive law enforcement. The evidence of methamphetamine manufacturing was extensive. Consumable methamphetamine was found packaged, a liquid testing positive for methamphetamine was found in a bottle, and trace amounts of methamphetamine were found on two more items. A pipe for smoking methamphetamine, complete with burn marks was found. Further, ingredients for the manufacture of methamphetamine were found all over the house. The items in the bathroom, items not typically stored in a bathroom, were particularly incriminating, including oven mitts, lye,

lighter fluid, and an HCl generator – the soda bottle with two holes on the side and tubing protruding from those holes. More bottles with similar holes in the side found stored in the bedroom indicate extensive manufacturing in the household. Also an excessive amount of matches were found, indicative of the red phosphorus mode of manufacturing, along with a recipe listing the ingredients utilized in the red phosphorus mode of manufacturing. A chemical haze emanating from the toilet and an empty bottle are consistent with Vining and Kotowski attempting to destroy evidence by dumping the contents of a one-pot into the toilet. The evidence is overwhelming and it is fortunate law enforcement investigated this complaint before someone was injured by this dangerous enterprise. The convictions and sentences should be affirmed.

CONCLUSION

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

Respectfully submitted,

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July 26, 2017

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Dorchester County
Maite Murphy, Circuit Court Judge

THE STATE,

Respondent,

vs.

FELIX KOTOWSKI,

Appellant.

CERTIFICATE OF COUNSEL

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

Respectfully submitted,

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Respondent,

vs.

FELIX KOTOWSKI,

Appellant.

CERTIFICATE OF COUNSEL

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

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