STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Laurens County

Honorable Robin B. Stilwell, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

ROY ELLIS SMITH,

APPELLANT

APPELLATE CASE NO 2017-000532

FINAL BRIEF OF APPELLANT

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STATEMENT OF THE CASE

On July 24, 2015, the Laurens County Grand Jury returned indictments against Appellant Roy Ellis Smith for manufacturing methamphetamine in violation of S.C. Code Ann. § 44-53-375(B) and disposal of methamphetamine waste in violation of S.C. Code Ann. § 44-53-376. R. 282.

On February 21 and 22, 2017, Smith appeared for trial before the Honorable Robin B. Stilwell and a jury. Smith was represented by Rauch Wise and the State was represented by Dale Scott of the Laurens County Solicitor's Office. R. 1. The jury returned a verdict of not guilty as to the disposal of methamphetamine waste charge but convicted Smith of manufacturing methamphetamine. R. 268. This was Smith's third controlled substance offense as defined in S.C. Code Ann. § 44-53-470. Judge Stilwell imposed a sentence of fifteen years imprisonment. R. 276.

This appeal follows.

ARGUMENT

I.

The trial court erred in denying Appellant's request to charge the jury on the complete definition of "manufacture" from section 44-53-110(25) of the South Carolina Code, which specifies that the term "does not include the preparation or compounding of a controlled substance by an individual for his own use."

Introduction

Appellant Smith had been staying with his brother, Arnold Franklin, who was recovering from surgery for the three to four weeks prior to his arrest in this case. Also residing with Franklin were his girlfriend, his girlfriend's son Tristen Wells, and Wells' girlfriend Lauren Ginn. Smith was previously living in a camper on his mother's property, which he left secured there while he temporarily cared for Franklin. R. 163, ll. 4-9; R. 166, l. 5 – 167, l. 18; R. 178, ll. 16-23; R. 199, ll. 6-24; R. 204, l. 4 – 206, l. 7. Smith was on probation due to a prior conviction in Tennessee for initiation of a process intended to result in the manufacture of methamphetamine. His probation was validly transferred to South Carolina, where he was under the supervision of agent Jim Black. Smith knew that part of the terms of his probation allowed for random searches of his property and drug-testing. R. 32, ll. 9-15; R. 164, l. 14 – 166, l. 4; see Tenn. Code Ann. § 39-17-435.

On the evening of May 5, 2015, Franklin asked Ginn to leave his house because of an argument between she and Wells' mother. Ginn left and was picked up by an unknown third party. R. 167, l. 22 – 168, l. 10; R. 206, l. 8 – 207, l. 5. On the morning of May 6, 2015, Smith and Wells rode over to Smith's camper with the intention of gathering their rods and going fishing at the nearby lake. R. 168, ll. 14-21; R. 207, ll. 6-25. As they were pulling up to the camper, Ginn was dropped off by someone in a red truck. R. 168, l. 22 – 169, l. 5. This was

confirmed by Silver Free, a friend of Smith's mother who was visiting her that morning and saw them all arrive through the window. R. 215, l. 19 – 217, l. 21.

When Smith first approached his camper, he saw that the door was locked but not fully latched. He pulled the door open and looked around but did not see anyone inside. He went into his mother's house to ask if she had seen anyone at his camper. She did not. He stayed inside and visited with her and Free for approximately one hour. R. 169, l. 6 – 170, l. 19; R. 187, l. 25 – 190, l. 7; R. 209, l. 15 – 210, l. 24. When he went back outside, he gathered the fishing rods that he and Wells would need. He then went to use the bathroom in the camper, at which point he saw what he recognized to be three HCL generators, used in the manufacturing of methamphetamine, in the shower. Knowing he could not be around such materials, Smith put them into the waste bin inside of his home. As he was coming out of the bathroom, agent Black arrived to do a routine check and search the camper. R. 170, l. 20 – 172, l. 13; R. 190, l. 19 – 193, l. 1; State's Ex. 2 (photograph of fishing rods against camper, on file with this Court). Black saw Wells outside of the camper and Ginn in the doorway of the camper. He asked Ginn where Smith was, and Smith came into the doorway. R. 32, l. 9 – 33, l. 12; R. 35, ll. 6-19.

Smith, Wells, and Ginn were all asked to remain outside while Black and a fellow agent searched the camper. Black recognized what he believed to be three HCL generators in the waste bin, a "one pot"[1] and bottle of drain opener in a storage compartment inside one of the steps of the camper, coffee filters with a white powdery substance, and syringes containing a red substance in the refrigerator. R. 35, l. 20 – 45, l. 25. Black sent a photograph of the suspected "one pot" to Sergeant Matt Veal of the Laurens County Sheriff's Department, who advised Black

[1] A "one pot" is a "meth production procedure." R. 133, ll. 1-2. "[A] person using the one pot method fills a two-liter drink bottle with various ingredients until a chemical reaction takes place." State v. Cain, 419 S.C. 24, 29, 795 S.E.2d 846, 849 (2017).

to go outside and await his arrival. They did a plain view search of the remainder of the property but did not discover anything else of interest. R. 41, l. 23 – 42, l. 3. Once law enforcement photographed the items they determined relevant, they contacted to the State Law Enforcement Division ("SLED") to transport and arrange for disposal of everything. R. 84, l. 16 – 85, l. 8. When asked by the officers, Smith, Wells, and Ginn each said that they did not know to whom the items belonged. R. 177, l. 18 – 178, l. 8; R. 59, ll. 4-11; R. 68, l. 8 – 69, l. 6; R. 92, l. 6 – 93, l. 2.

Veal purportedly extracted a sample from the "one pot" and collected four syringes containing a red substance believed to be blood. R. 111, l. 5 – 114, l. 5. As will be discussed more fully *infra*, defense counsel argued that the chain of custody for those fungible items was not valid such that any analysis conducted upon them should be inadmissible. R. 134, l. 19 – 138, l. 11. Drug analyst Maribeth McCormack, from SLED, testified that the five items all tested positive for methamphetamine. R. 133, ll. 3-18. However, she did not determine the amount of methamphetamine contained in any of the items and conceded that the machine she used can detect even a miniscule amount. R. 144, l. 20 – 146, l. 14. She was further unable to testify as to whether there was any usable methamphetamine in the sample taken from the "one pot." R. 147, ll. 1-12.

The State presented the self-serving testimony from Lauren Ginn, who was able to dispose of both her previously pending drug charge and her charge(s) related to the instant events through the drug court program administered by the Laurens County Solicitor's Office. R. 59, l. 12 – 60, l. 10; R. 69, l. 10 – 70, l. 15; see S.C. Code Ann. § 17-22-1310, et seq. Ginn had been addicted to methamphetamine for eight years and was nearly ten years older than eighteen-year-old Wells. R. 48, l. 14-25; R. 69, ll. 15-21; R. 206, ll. 10-15. She said that the couple lived with

Wells' mother, who was dating Smith's brother. She recalled that Smith had been staying at the house also because his brother had surgery. Ginn claimed that she and Wells both left what she described as Wells' mother's house on the morning of May 6, 2015 due to an argument. She alleged that they arrived at Smith's camper, where they had cooked and smoked methamphetamine in the past, at 5:00 or 6:00 a.m. in order to "get some dope." Per Ginn, neither she nor Wells had ever made methamphetamine, but she saw Smith make it in the past. That morning Smith was purportedly "reworking" the Pepsi bottle in an attempt to extract more "dope." R. 49, l. 21 – 59, l. 3; R. 61, l. 6 – 62, l. 15; R. 63, l. 6 – 68, l. 4. Ginn also said that the white powder on the coffee filters was methamphetamine – a claim that was refuted by Sergeant Veal. R. 57, l. 20 – 58, l. 1; R. 80, l. 25 – 82, l. 3.

While Smith was candid that he had manufactured methamphetamine in the past, he was adamant that the items found in the camper were not his and had never been used by him. R. 172, ll. 21-25; R. 178, l. 9 – 180, l. 19; R. 193, l. 21 – 199, l. 5.

Relevant Facts

The charge conference was held in chambers following the close of the defense's case and the prior to the presentation of closing arguments. R. 220, l. 17 – 221, l. 8. After the trial judge finished charging the jury, defense counsel put his objections to the charge on the record. Specifically relevant to the instant issue, he objected to the trial judge's refusal to charge the complete definition of "manufacture" from S.C. Code Ann. § 44-53-110(25). R. 235, ll. 16-17.

The trial judge's charge instructed only: "Manufacture means the production, preparation, propagation, compounding, conversion or processing of a controlled substance either directly or indirectly by extraction from substances of natural origin or independently by means of chemical

synthesis or by a combination of extraction and chemical synthesis." R. 262, l. 24 – 263, l. 5. The complete definition from the statute is:

> "Manufacture" means the production, preparation, propagation, compounding, conversion, or processing of a controlled substance, either directly or indirectly by extraction from substances of natural origin, or independently by means of chemical synthesis, or by a combination of extraction and chemical synthesis, and includes any packaging or repackaging of the substance or labeling or relabeling of its container, **except that this term does not include the preparation or compounding of a controlled substance by an individual for his own use** or the preparation, compounding, packaging, or labeling of a controlled substance: (a) by a practitioner as an incident to his administering or dispensing of a controlled substance in the course of his professional practice; or (b) by a practitioner, or by his authorized agent under his supervision, for the purpose of, or as an incident to, research, teaching, or chemical analysis and not for sale.

S.C. Code Ann. § 44-53-110(25) (emphasis added). The trial judge responded:

> I know that we discussed in-chambers the remainder of that statute. As I suggested, the remainder of that statute applies if you take it at face value. It would apply to someone who was manufacturing some type of drug for his or her own personal use. In this instance the Defense's position was that he was not manufacturing methamphetamine or any other type of drug in any manner whatsoever. Therefore I think that the evidence did not support charging the remainder of the statute. And I think that would have only served to confuse the jury.

R. 266, ll. 2-12.

Following the jury's verdict, defense counsel again raised his disagreement with the trial court's failure to charge the jury the definition of manufacturing excludes personal use. He argued that the jury could have concluded that "the only manufacturing was done in that one little jar" and was for personal use. R. 270, l. 6 – 271, l. 2. The trial judge responded:

> Okay. And I recognize that you disagree with that and it is a reasonable disagreement. I think ultimately the Supreme Court and/or some other bodies is going to make the determination as to whether the Legislature intended to allow for the manufacturer of methamphetamine for personal use. I tend to think that they didn't. However, I haven't explored the Legislative history, perhaps our appellate courts could. If you are right I think that is going to be a shock to a lot of people in the State.

R. 271, ll. 3-12. Defense counsel responded that there was distinction between the large methamphetamine operations that produce large quantities of methamphetamine and the "shake and bake" method cases that are more prevalent today, which are typically for personal use. R. 271, ll. 13-25. The trial judge responded: "You are protected on the record." R. 272, l. 1.

Discussion

The trial judge provided two reasons for his refusal to charge the jury on the complete definition of "manufacture." Initially, he found that the because the defense's theory of the case was essentially that Smith found the items when he returned to his camper but that none of them were his, there was no evidence to support a charge related to "personal use" and it would have confused the jury. R. 266, ll. 2-12. The trial judge erred in requiring that the personal use evidence have been produced by the defense, when the prosecution's evidence could have supported a finding that Smith was "reworking" a Pepsi bottle on the date of his incident in an effort to extract additional methamphetamine for his own use. See R. 55, ll. 7-16; R. 64, ll. 9-16; R. 67, l. 5 – 68, l. 4; R. 70, l. 23 – 72, l. 2. The trial judge later expressed that he was not inclined to give the charge on the complete definition of "manufacture" because he did not believe that the Legislature intended to allow the manufacture of methamphetamine for personal use. R. 271, ll. 3-12. The trial judge erred in making this assessment, as the result of a finding that Smith was preparing methamphetamine for his own personal use would not absolve him of all criminal liability. Upon request, the trial judge could have charged the jury on the lesser included offense of possession of methamphetamine, pursuant to S.C. Code Ann. § 44-53-375(A), which does not have a personal use exception. It would then have been up to the jury to determine whether Smith was not guilty, guilty of mere possession, or guilty of manufacturing.

Instead, the trial judge substituted his own judgment of what the law should be for the plain language of the statute.

The law to be charged to the jury is to be determined by the evidence presented at trial. State v. Lee, 298 S.C. 362, 364, 380 S.E.2d 834, 835 (1989). The trial court commits reversible error when it fails to give a requested charge on an issue raised by the indictment and the evidence presented. Id.; State v. Burriss, 334 S.C. 256, 513 S.E.2d 104 (1999) ("It is well-settled the law to be charged is determined from the evidence presented at trial, and if any evidence exists to support a charge, it should be given. The trial court commits reversible error if it fails to give a requested charge on an issue raised by the evidence."). It is not the function of the trial judge to weigh the evidence in deciding whether a charge is proper. See, e.g., State v. Light, 378 S.C. 641, 651, 664 S.E.2d 465, 470 (2008) ("[T]he jury is entitled to resolve the question of how the shooting actually occurred."); McDill v. Mark's Auto Sales, Inc., 367 S.C. 486, 492, 626 S.E.2d 52, 56 (Ct. App. 2006) (holding it is "up to the jury, as the finder of fact, to judge the credibility of the witnesses and to resolve any conflicts in their testimony"). Thus, neither the prosecution nor the defense's theory of the case can alone dictate the propriety of the charge. See Holmes v. South Carolina, 547 U.S. 319, 126 S.Ct. 1727 (2006) ("[B]y evaluating the strength of only one party's evidence, no logical conclusion can be reached regarding the strength of contrary evidence offered by the other side to rebut or cast doubt."); State v. Moore, 245 S.C. 416, 421, 140 S.E.2d 779, 781 (1965) ("In determining the issues to be submitted to the jury, however, all of the testimony, both for the State and the defense, must be considered.").

Here, the defense's theory of the case with respect to the manufacturing charge was twofold. First, the state did not prove that any manufacturing of methamphetamine was actually occurring on May 6, 2015. Second, if the jury did believe that methamphetamine was occurring,

it was not Smith who was engaging in it. R. 235 – 243. Regardless, the necessity of a jury charge arises from the evidence presented, not the argument of the defense. The law of South Carolina is clear that the arguments of counsel are not evidence. In re Gonzalez, 409 S.C. 621, 636 n.3, 763 S.E.2d 210, 218 n.3 (2014) ("[A]rguments made by counsel are not evidence."). The jury in Smith's case was accordingly advised that that the attorneys' arguments were not evidence. R. 14, l. 23 – 15, l. 4; R. 221, ll. 23-25. Additionally, the closing arguments were made only after the charge conference in which the trial court ruled that it would not give the complete manufacturing definition. Therefore, there was no reason for the defense to argue the alternative theory of personal use to the jury. It would have been nonsensical of defense counsel to argue a theory upon which he knew the jury would not be instructed and that likely would have drawn an objection from the prosecution. Rather than the theories articulated by defense counsel, the proper measure for whether to charge the jury on the personal use exception to manufacturing was the entirety of the evidence and whether it could have supported a finding that Smith was preparing methamphetamine for his own use. Here, Lauren Ginn's testimony could have supported a finding of personal use. R. 55, ll. 7-16; R. 64, ll. 9-16; R. 67, l. 5 – 68, l. 4; R. 70, l. 23 – 72, l. 2; R. 270, ll. 6-21. The trial court erred in failing to adhere to that standard.

The trial court further erred in determining that a charge on the plain language of the statutory definition of "manufacturing" would be inconsistent with the legislative intent of the narcotics statute, which the judge did not think intended to permit the manufacture of methamphetamine for personal use. R. 271, ll. 3-12. Statutory interpretation is a question of law. See Bryant v. State, 384 S.C. 525, 529, 683 S.E.2d 280, 282 (2009) (citing Catawba Indian Tribe of S.C. v. State, 372 S.C. 519, 524, 642 S.E.2d 751, 753 (2007)). This Court is "free to decide a question of law with no particular deference to the circuit court." Id. at 524, 642 S.E.2d

at 753. "A statute's language must be construed in light of the intended purpose of the statute. Whenever possible, legislative intent should be found in the plain language of the statute itself." State v. Gaines, 380 S.C. 23, 33, 667 S.E.2d 728, 733 (2008).

The statutes at issue here are S.C. Code Ann. § 44-53-110(25) and S.C. Code Ann. § 44-53-375. Section 44-53-375 prohibits the possession, manufacture, and trafficking of methamphetamine and cocaine base and other controlled substances. Pursuant to subsection (A) of 44-53-375, "[a] person possessing less than one gram of methamphetamine . . . [f]or a third or subsequent offense, the offender is guilty of a felony and, upon conviction, must be imprisoned not more than ten years or fined not more than twelve thousand five hundred dollars, or both." Pursuant to subsection (B) of 44-53-375, "[a] person who manufactures, distributes, dispenses, delivers, purchases, or otherwise aids, abets, attempts, or conspires to manufacture, distribute, dispense, deliver, or purchase, or possesses with intent to distribute, dispense, or deliver methamphetamine . . . is guilty of a felony and, upon conviction . . . for a third or subsequent offense, the offender must be imprisoned for not less than ten years nor more than thirty years, or fined not more than fifty thousand dollars, or both." Subsection (C) of 44-53-375 prohibits the trafficking of methamphetamine, the penalty for which varies based upon the weight trafficked, with "ten grams or more, but less than twenty-eight grams" resulting in the lowest sentence, and whether the offender has a prior drug conviction. While the statute includes language creating a permissible inference that "[p]ossession of one or more grams of methamphetamine or cocaine base is prima facie evidence of [manufacturing]," there was no evidence regarding weight presented in this case and the jury was not charged on this inference in this case. S.C. Code Ann. § 44-53-375(B).

Section 44-53-110 lists the definitions for terms use in Article 3 regarding narcotics and controlled substances. It provides the following definition for "manufacture":

> "Manufacture" means the production, preparation, propagation, compounding, conversion, or processing of a controlled substance, either directly or indirectly by extraction from substances of natural origin, or independently by means of chemical synthesis, or by a combination of extraction and chemical synthesis, and includes any packaging or repackaging of the substance or labeling or relabeling of its container, **except that this term does not include the preparation or compounding of a controlled substance by an individual for his own use** or the preparation, compounding, packaging, or labeling of a controlled substance: (a) by a practitioner as an incident to his administering or dispensing of a controlled substance in the course of his professional practice; or (b) by a practitioner, or by his authorized agent under his supervision, for the purpose of, or as an incident to, research, teaching, or chemical analysis and not for sale.

S.C. Code Ann. § 44-53-110(25) (emphasis added).[2] Thus, the plain language of the statute explicitly excludes the preparation of a controlled dangerous substance for one's own use from the definition of "manufacture." As a result, one who prepares methamphetamine for his own use would not be guilty of the manufacturing methamphetamine under section 44-53-375(B), but rather guilty of only the lesser included offense of possession of methamphetamine under section 44-53-375(A). This does not lead to absurd result envisioned by the trial court that our Legislature "allow[s] for the manufactur[ing] of methamphetamine for personal use." R. 271, ll. 3-12. Rather, the Legislature made a decision not to punish such conduct as harshly. The difference in punishment is significant for a defendant like Smith, who was facing a sentencing range of ten to thirty years for manufacturing, third offense, and ultimately sentenced to fifteen years imprisonment. Had the jury been charged on the personal use exception to manufacturing, he could have either been found not guilty, or if the lesser included charge had been requested,

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[2] The trial judge in this case charged only the portion underlined and not the portion denoted in bold type. See R. 262, l. 24 - 263, l. 5.

found guilty of only possession. The potential sentencing range for possession, third offense, would have been zero to ten years.

The trial court erred in refusing to charge the personal use exception of the manufacturing definition in this case. Smith is accordingly entitled to a new trial.

II.

The trial court erred in denying Appellant's motion to exclude the drug evidence where the prosecution did not produce the evidence log from the Laurens County Sheriff's Department and the documents and testimony that were presented at trial failed to establish a complete chain of custody as far as practicable.

Relevant Facts

On the first day of trial, Sergeant Matt Veal testified that no samples were collected from the suspected "one pot" found inside of the camper and that nothing was sent to SLED for analysis. R. 98, l. 24 – 102, l. 20. However, the State recalled Veal on the second day of trial. He testified that he was mistaken and that he collected a sample from the "one pot" and four syringes containing a red substance suspected to be blood and placed them in a best kit.[3] R. 111, l. 5 – 114, l. 5. According to Veal:

> What we do is I took it in my possession. We entered it into evidence. It was given to our evidence custodian. At the time, would have been Deputy David Craig, at the time. What he does is he'll log it in and keep it until it's taken to SLED, and it's kept in his custody until then, until they call him and tell him that it's ready to be picked up.

R. 112, l. 22 – 113, l. 3.

Next, former evidence custodian David Craig, testified that the Sheriff's Department used a computer system known as "Law Tracks" to track everything that they do "from the time that evidence is seized until the time it's delivered to SLED, [and] brought back." R. 116, ll. 10-14.

[3] A "best kit" is a tamper evident plastic bag, in which evidence obtained from a crime scene is placed.

According to Craig: "If it comes to court, if anybody views it, it's all there. Everything is documented, so there's a, what we call a chain-of-custody." R. 116, ll. 14-16. No one had access to the county evidence room other than Craig. R. 116, ll. 17-19. Craig reviewed the best kit sent to SLED, which was marked as State's Exhibit 23, and testified:

> This is the evidence in the, the evidence in the case. . . . This was packaged by Matt Veal, and he prepared what's called an iLAB which is a SLED, it's how we transfer evidence to SLED and that's how they would receive it. So he did the iLAB. On 5/6/2015, it was sealed and, of course, I never touched the drugs. It was sealed in a bag by Matt, and I only delivered it to SLED, and then they receive it there.

R. 117, ll. 10-21. Craig said that he would usually take evidence for analysis to SLED within a week, normally on a Tuesday. R. 117, l. 22 – 118, l. 2. Craig was shown an unidentified document that said was the "evidence log for the said drugs" and reflected that they were delivered to the evidence room on May 6, 2015. R. 118, ll. 3-13. Thus, he would usually have taken it to SLED the following Tuesday, which was May 12, 2015.

On cross-examination, Craig claimed that there was documentation to support his testimony but conceded that he did not have of that documentation with him in court. However, he said that SLED should have documentation about the chain of custody from the Sheriff's office. R. 118, l. 23 – 119, l. 7. Craig identified a document dated May 20, 2015 from the evidence custodian, which would have been Craig, to Veal asking him the status of the evidence. Craig was unfamiliar with the document and said that it should have been from Veal to him. R. 119, l. 11 – 123, l. 2; R. 277. Craig maintained that there was a separate form denoting the chain of custody from the Sheriff's Office and that it was delivered to SLED, with a copy also maintained at the Sheriff's Office. R. 123, l. 3 – 124, l. 4. No such document was produced in discovery or ever admitted at trial. On re-direct, Craig reviewed the best kit again and determined that he delivered it to SLED on May 26, 2015. As a result, he claimed that the

evidence was in the vault, under his care and custody, from May 6, 2015 until May 26, 2015. R. 124, l. 17 – 126, l. 2.

When the State attempted to admit the best kit through SLED agent Maribeth McCormick, who conducted the forensic testing, defense counsel object that the chain of custody was flawed. R. 133, l. 19 – 135, l. 18. He further argued that no additional documents regarding the chain of custody of the items while they were supposedly under the control of the Sheriff's Office were produced in discovery. Without that document, defense counsel argued that there is a serious question as to "what happened" to the evidence and whether it should be admissible. R. 136, l. 13 – 137, l. 1. The prosecutor argued that the sworn testimony from Veal and Craig was sufficient to establish the chain of custody. As such, he contended that "as far as practical, the evidence is accounted for, the safekeeping of the evidence is accounted for during the entire time it's with the Sheriff's Department." R. 137, ll. 4-12. The trial judge ruled that while the complete documentation regarding the chain is preferable, the testimony clarified the chain of custody enough that he found no "substantial or significant error in the chain-of-custody which would warrant the inadmissibility of the evidence." R. 137, l. 13 – 138, l. 3. Rather, he determined that the potential flaws went to the weight of the evidence. R. 138, ll. 4-11.

During the remainder of her testimony, SLED agent Maribeth McCormick provided only the SLED chain of custody form, which reflected that the evidence was submitted to them by Craig on May 26, 2015 and was returned to Craig on September 11, 2015. It also accounted for any movement of the item within the SLED facility. R. 140, l. 4 – 141, l. 23; R. 278.

Discussion

While typically chain of custody objections relate to the failure to call a witness, the objection in this case related to the failure of the prosecution to produce the document accounting for the custody and control of the allegedly seized items from May 6, 2015 until May 26, 2015. Interestingly, despite recalling Detective Veal to the stand, the prosecution failed to elicit from him the date on which he submitted the items he purportedly collected from the scene to the evidence custodian. He merely testified regarding what the normal procedure would entail. R. 112, l. 16 – 113, l. 3. David Craig's testimony provided little more reliable detail, as he also testified regarding what he would "normally" or "usually" do rather than being able to specify exactly what was done in the present case. He assumed that because the best kit reflected a packing date of May 6, 2015, that Veal would have submitted it the evidence room that day. He further assumed that he would have taken the evidence to SLED the following Tuesday, which would have been May 12, 2015. However, when confronted with the SLED log, he determined that he did not transport the evidence to SLED until May 26, 2015. That means that despite opportunities to transport the evidence on his routine Tuesday drop-offs on May 12 and May 19, he waited an additional third week before transporting them. R. 117, l. 10 – 126, l. 2.

A party offering into evidence fungible items such as drugs or blood samples must establish a complete chain of custody as far as practicable. State v. Hatcher, 392 S.C. 86, 91, 708 S.E.2d 750, 753 (2011); Benton v. Pellum, 232 S.C. 26, 33, 100 S.E.2d 534, 537 (1957). When an analyzed substance has passed through several hands, the identity of individuals who acquired the evidence and what was done with the evidence between the taking and the analysis must not be left to conjecture. Benton, 232 S.C. at 33-34, 100 S.E.2d at 537. "Proof of chain of custody need not negate all possibility of tampering so long as the chain of possession is complete." State

v. Carter, 344 S.C. 419, 424, 544 S.E.2d 835, 837 (2001). "In applying this rule, we have found evidence inadmissible only where there is a missing link in the chain of possession *because the identity of those who handled the [substance] was not established at least as far as practicable.*" Id. (emphasis added).

In State v. Joseph, 328 S.C. 352, 363, 491 S.E.2d 275, 280 (Ct. App. 1997), this Court found that the trial court erred by admitting the drug evidence because of defects in the chain of custody. The failed to call Susan Kilmer, the chemist who first analyzed the evidence, because she had moved to Michigan. 328 S.C. at 356, 491 S.E.2d at 277. The Joseph Court found that Kilmer was the critical link in the State's chain of custody—it was Kilmer who retrieved the evidence from the drop box and first analyzed the evidence, and it was Kilmer who retained possession of evidence for six months. Id. at 364-65, 491 S.E.2d at 281. The Court determined that "[t]he fact that Kilmer had moved to Michigan does not render Kilmer unavailable or make it impracticable for the State to produce her for trial once Joseph objected to the use of her affidavit." Id. Here, it was a document rather than an individual that was missing from the prosecution's proof of the chain of custody. According to David Craig, the documentation missing should have been easily obtained from the Sheriff's Office, such that it was not impracticable for it have been produced. Even so, the prosecution failed to produce the written documentation, which would tend be much more reliable than the faulty memories of events that occurred nearly two years prior. The trial court's determination that the "paper trail" was preferable but not necessary to establish chain of custody was an error under the facts of this case. Smith is accordingly entitled to a new trial.

III.

The trial court erred in overruling Appellant's objection to the prosecution's opening statement, in which he referred to methamphetamine as a "curse" and "poison [that] destroys lives," where such characterizations were irrelevant and detracted from the jury's task of focusing on the allegations against Appellant.

Relevant Facts

In the prosecutor's opening statement, he began his argument with:

> As you heard, this case is about manufacturing methamphetamine. That's what the indictment says; that's what the case is about and that happens to be a curse in your community, the manufacture of methamphetamine. I don't know why, but Laurens County more so than a lot of other counties across the State, across the nation, seems to struggle with this problem, and it really is a problem.

R. 21, ll. 19-25. He then described the evolution of methamphetamine from large scale operations to less sophisticated production from items that can purchased at a Wal-Mart. R. 12, ll. 1-25. Defense counsel objected when the solicitor said: "It really is bad, I call it a curse. It is, it is a poison, it destroys lives." R. 22, l. 25 – 23, l. 2. Defense counsel stated that he hated to interrupt an argument "but whether or not methamphetamine is a curse, not a curse, a problem, not a problem, is really not relevant to this case and it improperly distracts the jury from focusing on this case with these facts with this Defendant." R. 23, ll. 3-8. The trial judge overruled the objection, reasoning: "I appreciate that. Understand, that I am going to grant both of you some latitude with regard to arguments. I'm instructing the jury that this isn't evidence, that it's an introduction, it is not to be considered evidence." R. 23, ll. 9-14.

With the objection overruled, the prosecutor immediately continued:

> And some people don't like to hear that, it is a curse. People don't like to hear that it destroys lives, like I was saying, it tears families apart. It degrades communities like Laurens. When they dump it out when they are done manufacturing it, the byproduct, the waste product poisons your groundwater. It's terrible stuff.

R. 23, ll. 16-22. He later stated: "When that stuff leaks out and when it's left and not disposed of properly, it does, it seeps down in the groundwater and it is poison. That's what it is. I'm going to call it what it is." R. 27, ll. 1-5. Though no additional objection was raised, the prosecutor continued his theme regarding the "poison" and "curse on your community" that methamphetamine constitutes in his closing argument. R. 222, l. 13 – 223 l. 7; R. 227, ll. 4-6; R. 228, ll. 12-19; R. 233, ll. 22-25.

Discussion

The trial judge erred in overruling the defense's objection to the prosecution's reference to methamphetamine as a poison and curse where such comments were irrelevant and detracted for the jury's task of determining whether the State had proven the elements of the offenses with which Smith was charged. "Improper comments do not automatically require reversal if they are not prejudicial to the defendant, and the appellant has the burden of proving he did not receive a fair trial because of the alleged improper argument." Brown v. State, 383 S.C. 506, 516, 680 S.E.2d 909, 915 (2009) (quoting Humphries v. State, 351 S.C. 362, 373, 570 S.E.2d 160, 166 (2002)). "The relevant question is whether the solicitor's comments so infected the trial with unfairness as to make the resulting conviction a denial of due process." Id. (quoting Humphries, 351 S.C. at 373, 570 S.E.2d at 166).

Though it dealt with an improper closing argument rather opening statement, this Court's opinion in State v. Liberte, 336 S.C. 648, 521 S.E.2d 744 (Ct. App. 1999), is instructive. In Liberte, the prosecutor argued: "Ladies and gentlemen, I want to ask you right now to listen to the judge's instructions about reasonable doubt, and ask yourselves is it being used as a sword to attack law and order, to attack law enforcement, to attack people who are trying to keep drugs off our streets?" 336 S.C. at 652, 653, 521 S.E.2d at 746. This Court found that those remarks were

improper and "calculated to appeal to the jury's passions and prejudices by playing on the jury's fear of the impact of drugs on our society." Id. at 653, 521 S.E.2d at 747. "The argument invited the jury to convict the Defendants, even if the evidence did not prove their guilt beyond a reasonable doubt, in order to keep the streets safe from the scourge of drugs." Id. This Court explained:

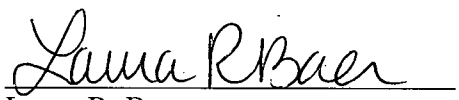
> A prosecutor may not urge jurors to convict a criminal defendant in order to protect community values, preserve civil order, or deter future lawbreaking. The evil lurking in such prosecutorial appeals is that the defendant will be convicted for reasons wholly irrelevant to his own guilt or innocence. Jurors may be persuaded by such appeals to believe that, by convicting a defendant, they will assist in the solution of some pressing social problem. The amelioration of society's woes is far too heavy a burden for the individual criminal defendant to bear.

Id. at 654, 521 S.E.2d at 747 (quoting United States v. Monaghan, 741 F.2d 1434, 1441 (D.C. Cir. 1984), *cert. denied,* 470 U.S. 1085 (1985)).

Similarly here, the prosecution's argument to the jury, both in opening and closing, focused upon the dangerousness of the manufacturing and disposal of methamphetamine both for the individual and the community. Regardless of the prosecutor's subjective intent in making constructing his argument in the manner in which he did, his appeal to the passions of the jury and detraction from the jury's task prejudiced Smith. See Berger v. United States, 295 U.S. 78, 88-89 (1935) (A prosecutor "may prosecute with earnestness and vigor-indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one."); California v. Bolton, 589 P.2d 396, 398 (Cal. 1979) ("Injury to appellant is nonetheless an injury because it was committed inadvertently rather than intentionally.").

CONCLUSION

Based on the foregoing, Appellant Roy Ellis Smith respectfully requests that this Court reverse his conviction and sentence and remand his case for a new trial.



Laura R. Baer
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ATTORNEY FOR APPELLANT

This 20th day of August, 2018.

CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of my ability this Final Brief of Appellant complies with Rule 211(b), SCACR, and the April 15, 20014, order from the South Carolina Supreme Court entitled "Interim Guidance Regarding Personal Data Identifiers and Other Sensitive Information in Appellate Court Filings."

August 20, 2018

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