STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Laurens County
Honorable Robin B. Stilwell, Circuit Court Judge
Appellate Case No. 2017-000532

THE STATE,

Respondent,

vs.

ROY ELLIS SMITH,

Appellant.

FINAL BRIEF OF RESPONDENT

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II.

The trial judge properly admitted Appellant's methamphetamine into evidence during trial because testimony was presented establishing the identity of each person who was in custody of the methamphetamine along with what was done with it from the point it was seized by a law enforcement officer to the point it was analyzed and identified by a forensic analyst, which meant a complete chain of custody was sufficiently established as far as practicable.

III.

The trial judge did not abuse his discretion by permitting the solicitor to reference the harmfulness of methamphetamine during his opening statement because the solicitor's remarks were accurate, proper, and simply served to aid the jury in understanding the crimes charged and the evidence that was intended to be introduced during the course of trial. However, even if the solicitor's remarks were somehow improper, those remarks were not sufficiently inflammatory or prejudicial to render Appellant's trial fundamentally unfair and, thus, could not warrant the reversal of Appellant's conviction.

STATEMENT OF THE CASE

In May of 2015, Appellant Roy Ellis Smith was arrested after methamphetamine and other incriminating items were discovered inside his residence. In July of 2015, the Laurens County Grand Jury indicted Appellant for one count of manufacturing methamphetamine and one count of disposal of methamphetamine waste. On February 21, 2017, a jury trial was commenced in the Laurens County Court of General Sessions with the Honorable Robin B. Stilwell, circuit court judge, presiding. At the conclusion of the two-day trial, the jury convicted Appellant of manufacturing methamphetamine and acquitted him of disposal of methamphetamine waste. Following the verdict, the trial judge sentenced Appellant to a term of imprisonment of fifteen years. Appellant then filed a timely notice of appeal.

STATEMENT OF FACTS

Around 1:00 p.m. on May 6, 2015, Agent Jim Black, a probation agent with the South Carolina Department of Probation, Parole, and Pardon Services, travelled to the Waterloo, South Carolina, residence of Appellant Roy Ellis Smith, who was one of the probationers under his supervision, in order to conduct a periodic and routine check-up on him.[1] (R. pp. 31-32; p. 46; p. 91; p. 172). Upon arriving, Agent Black encountered several individuals in and around the residence, which was a camper located on Appellant's mother's property near Lake Greenwood. (R. pp. 32-34). Specifically, Agent Black found Tristan Wells outside the camper and both Appellant and Lauren Ginn inside the camper, and he gathered them all together outside and explained why he was there.[2] (R. pp. 32-33; p. 35). After doing so, Agent Black entered the camper and observed a number of suspicious items associated with the production of methamphetamine, including coffee filters, syringes, batteries, cold packs, a bottle of drain opener, multiple hydrogen chloride gas generators, and a "one pot" bottle.[3] (R. pp. 35-41; p. 46;

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[1] At that time, Appellant was on probation for an out-of-state conviction related to manufacturing methamphetamine. (R. p. 164; pp. 272-273).

[2] Wells was the son of Appellant's brother's girlfriend and was described as Appellant's "nephew." (R. p. 50; p. 70; pp. 166-167). Meanwhile, Ginn was Wells's girlfriend at the time of the incident. (R. p. 50; p. 167).

[3] Pursuant to the "one pot" method of methamphetamine production, pills containing pseudoephedrine are ground into a powder and mixed together in a bottle along with some solvent or fuel to separate ephedrine from the other ingredients in the pills, ammonium nitrate from inside a cold pack is ground up and added to the mixture in the bottle along with drain opener and lithium from batteries, the bottle is shaken continuously for approximately an hour with any pressure that develops being released as needed, and a chemical reaction occurs as a result. (R. pp. 85-87; pp. 95-96; p. 193; p. 196). Once the chemical reaction has occurred, the material in the bottle is then poured through coffee filters to separate the liquid, which is methamphetamine oil, from anything else that may be present, such as the lithium from the batteries. (R. p. 88; p. 196). After that, the liquid is exposed to a gas created from a mixture of sulfuric acid and salt, and the resulting chemical reaction produces methamphetamine in a

p. 172). Agent Black then quickly exited the camper and alerted Sergeant Matt Veal, a narcotics investigator with the Laurens County Sheriff's Office, of what he believed to be an active illicit methamphetamine lab. (R. pp. 36-37; p. 41; p. 74; pp. 78-79).

Shortly thereafter, Sergeant Veal, who was an expert in the recognition and identification of clandestine methamphetamine labs, responded to Appellant's residence and began examining the camper. (R. pp. 78-80). During his examination, Sergeant Veal saw three hydrogen chloride gas generators, which he knew were commonly used in the production of methamphetamine, inside a trash can.[4] (R. p. 80). Additionally, he observed used coffee filters containing some unknown matter, a few funnels, a bottle of drain opener, and several syringes containing an unknown liquid substance that appeared to be blood, and he knew all those items were commonly associated with the methamphetamine production process. (R. pp. 80-82; p. 102; p. 112). Furthermore, Sergeant Veal saw the "one pot" bottle hidden underneath one of the camper's interior stairs, and he noted there appeared to be lithium strips from batteries at the bottom of the bottle. (R. p. 112). Based on his observations, Sergeant Veal concluded methamphetamine was being produced in the camper, and he confronted Appellant, Wells, and Ginn about his conclusion. (R. pp. 91-92). However, each of them denied any involvement with the items found in the camper, so Sergeant Veal placed them all under arrest for manufacturing methamphetamine. (R. p. 59; pp. 69-70; pp. 92-93; p. 105; p. 178).

Following the arrests, Sergeant Veal collected the syringes from inside the camper along with a sample of the substance contained in the "one pot" bottle while the other items discovered

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finished solid form. (R. pp. 88-89). Then, if desired, water can apparently be added to the finished methamphetamine in order to make it injectable. (R. p. 194; p. 197).

[4] During his trial testimony, Appellant indicated he put the hydrogen chloride gas generators into the trash can just before Agent Black arrived at the camper. (R. p. 172; pp. 191-193).

in Appellant's residence were carefully disposed of due to their hazardous nature. (R. pp. 76-77; pp. 84-85; pp. 112-113). Thereafter, the items collected from the camper were submitted to the State Law Enforcement Division ("SLED") for analysis. (R. pp. 112-113). Upon analysis, Maribeth McCormack, a forensic scientist at SLED and an expert in drug analysis and identification, determined all the submitted items contained methamphetamine. (R. pp. 127-130; pp. 132-133).

Subsequently, Appellant was indicted for manufacturing methamphetamine and disposal of methamphetamine waste, and he proceeded forward to trial. (R. pp. 7-9; pp. 282-285). During the course of trial, Agent Black and Sergeant Veal testified about their discoveries on the date of the incident, McCormack identified the substances recovered from Appellant's camper as methamphetamine, and the methamphetamine was admitted into evidence over objection. (R. pp. 31-46; pp. 74-105; pp. 127-133; p. 139). Following the presentation of that testimony and evidence, Appellant testified in his own defense, readily admitted he had manufactured methamphetamine in the past, and acknowledged he was familiar with the "one pot" method of methamphetamine production. (R. p. 163; pp. 193-195; p. 198). However, he denied having anything to do with any of the methamphetamine-related items found inside his camper on the date of the incident. (R. p. 172; p. 180; p. 198).

Thereafter, at the conclusion of trial, the jury convicted Appellant solely of manufacturing methamphetamine while acquitting him of the remaining charge. (R. pp. 267-268). The trial judge then sentenced Appellant to a fifteen-year term of imprisonment. (R. p. 276).

ARGUMENT

I.

When he was instructing the jury on the elements of manufacturing methamphetamine, the trial judge correctly omitted any reference to the personal use exception contained in the statutory definition of "manufacture" because that particular exception was neither supported by the evidence presented, which established the methamphetamine at issue was created or "cooked" using the "one pot" manufacturing process as opposed to being merely prepared or compounded for personal use while already in existence, nor raised and established by Appellant and, thus, was not applicable in Appellant's case.

Appellant contends the trial judge erred by refusing to instruct the jury on the personal use exception contained in the statutory definition of "manufacture." In raising that particular contention, Appellant readily acknowledges he did not present any evidence to establish he was manufacturing methamphetamine for personal use and, in fact, totally denied any connection to the methamphetamine production occurring in his camper. Nonetheless, Appellant maintains the personal use exception was somehow supported by the evidence presented and was applicable to his case. To the contrary, no testimony was presented during trial that would have supported a conclusion Appellant was merely preparing methamphetamine that was already in his possession for personal use or combining methamphetamine in his possession with other ingredients for personal use. Absent such evidence, the personal use exception in the statutory definition of "manufacture," which was inapplicable to the creation or "cooking" of methamphetamine from precursor ingredients, was neither applicable to Appellant's case nor supported by any evidence, and, under those circumstances, an instruction on that definition could have only served to confuse the jury. Moreover, Appellant never raised the issue of whether his conduct fell within the personal use exception or presented any evidence to support and establish that it did despite the fact the burden was statutorily on him to do so before he could claim the benefits of the proviso. Therefore, a jury instruction on the personal use exception was not appropriate in

Appellant's case, and the trial judge committed no error by instructing the jury on the offense of manufacturing methamphetamine without referring to the irrelevant personal use exception. Appellant's conviction should be affirmed.

RELEVANT FACTS

During the course of trial, evidence and testimony was presented establishing methamphetamine was discovered inside Appellant's residence along with numerous items associated with the "one pot" manufacturing method used to actually create methamphetamine from precursor ingredients. (R. pp. 36-41; pp. 79-99; pp. 127-130; pp. 132-133; p. 193). Likewise, Ginn testified on behalf of the State and indicated Appellant had been "cooking" methamphetamine at his camper for several days at the time of the incident.[5] (R. p. 51; p. 56; p. 62). Ginn also noted she saw Appellant "rework" the "one pot" bottle found in his camper in an effort to extract methamphetamine from it. (R. pp. 55-56; p. 67; p. 72). Furthermore, she asserted neither she nor Wells personally manufactured any methamphetamine and, instead, simply supplied boxes of pills containing pseudoephedrine to Appellant in exchange for the methamphetamine he produced.[6] (R. pp. 52-53; p. 62; p. 68).

In addition to that testimony and evidence, Appellant testified on his own behalf and acknowledged items associated with the "one pot" method used to create methamphetamine were present in his camper at the time of the incident. (R. p. 172; p. 180; pp. 191-195). Moreover, he acknowledged he had "made" methamphetamine in the past. (R. p. 198). However, he completely denied any personal connection to the methamphetamine-related items found in his camper on the date of his arrest. (R. p. 180; p. 198). Consistent with that denial, he also made

[5] Throughout her testimony, Ginn referred to methamphetamine as "dope." (R. pp. 51-52).

[6] During his testimony, Sergeant Veal identified the act of buying pseudoephedrine to assist another person in the manufacture of methamphetamine as "smurfing." (R. pp. 89-90).

no statements of any kind suggesting he had manufactured the methamphetamine located in his residence solely for personal use or had used the methamphetamine-related items in an attempt to make methamphetamine solely for his own use. (R. pp. 162-202).

Subsequently, at the conclusion of the evidentiary phase of trial, defense counsel indicated he intended to request several jury instructions, and an off-the-record discussion on the matter was conducted in the trial judge's chambers. (R. p. 220; p. 266). Thereafter, the trial judge instructed the jury on the applicable law. (R. pp. 256-265).

As part of his jury instructions, the trial judge identified the elements of the offense of manufacturing methamphetamine for the jury. (R. pp. 262-263). Specifically, the trial judge instructed:

> [T]he State must prove beyond a reasonable doubt that [Appellant] manufactured or otherwise, aided, abetted, attempted or conspired to manufacture methamphetamine. 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. pp. 262-263).

Thereafter, at the conclusion of the jury instructions, the trial judge inquired of the parties if there were any objections to the jury charge as presented, and defense counsel objected. (R. p. 265). As support for his objection, defense counsel asserted he was objecting to the trial judge's failure to give a complete statutory definition of "manufacture" as he apparently had noted during the earlier off-the-record discussion that took place in the trial judge's chambers. (R. p. 265). However, the trial judge overruled the objection. (R. p. 266). In doing so, the trial judge appeared to indicate he believed the manufacturing statute would apply to an individual

manufacturing some type of drug for his own personal use.[7] (R. p. 266; pp. 270-271). Furthermore, the trial judge noted Appellant's defense as presented during trial was a complete denial of manufacturing methamphetamine in any manner whatsoever at the time of the incident. (R. p. 266). Accordingly, the trial judge determined the portion of the "manufacture" definition not presented was not supported by the evidence and could have only served to confuse the jury under the circumstances. (R. p. 266).

Subsequently, after the jury ultimately convicted Appellant of manufacturing methamphetamine, defense counsel indicated he wished to put on the record a "new addition" to his earlier objection to the trial judge's failure to give a complete statutory definition of "manufacture." (R. pp. 267-268; p. 271). Specifically, based on his consideration of the matter while the jury was deliberating, defense counsel asserted he believed the jury could have concluded Appellant's manufacturing was for personal use in light of the fact "the only manufacturing was done in . . . one little jar."[8] (R. p. 271). For that reason, defense counsel

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[7] Specifically, the trial judge stated: "I know that we discussed in-chambers the remainder of that statute. As I suggested, the remainder of that statutes 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." (R. p. 266).

[8] Because defense counsel conceded to the trial judge his argument the personal use exclusion was applicable to Appellant's case was a "new addition" to his earlier objection that was only raised *after* the jury returned its verdict, that particular argument was not properly preserved for appellate review. See Bank of New York v. Sumter County, 387 S.C. 147, 159, 691 S.E.2d 473, 479 (2010) ("It is axiomatic that an issue cannot be raised for the first time in a post-trial motion."); State v. Patterson, 324 S.C. 5, 19, 482 S.E.2d 760, 767 (1997) (instructing an appellant is limited on appeal to raising the grounds raised during trial); State v. Penland, 275 S.C. 537, 538, 273 S.E.2d 765, 766 (1981) ("One may not preserve a vice until he learns what the result will be and then, take advantage of the error on appeal."); see also State v. Bryant, 372 S.C. 305, 315-316, 642 S.E.2d 582, 588 (2007) (recognizing an issue conceded during trial cannot subsequently be argued on appeal). As a result, that particular argument cannot appropriately be considered or addressed on appeal. See State v. Head, 330 S.C. 79, 87, 498 S.E.2d 389, 393 (Ct. App. 1997) (instructing an appellate court "cannot address unpreserved errors"); cf. State v. Benton, 338 S.C. 151, 156-157, 526 S.E.2d 228, 231 (2000) (finding

asserted he believed a jury instruction on the personal use exception was justified. (R. p. 270). However, the trial judge disagreed and reaffirmed he did not believe the legislature intended to permit the manufacture of methamphetamine for personal use. (R. pp. 270-271).

STANDARD OF REVIEW

In criminal cases, appellate courts sit to review errors of law only. State v. Wilson, 345 S.C. 1, 5, 545 S.E.2d 827, 829 (2001). On appeal, an appellate court reviewing a trial judge's jury charge must view the charge as a whole and in light of the evidence and issues from trial. State v. Simmons, 384 S.C. 145, 178, 682 S.E.2d 19, 36 (Ct. App. 2009); see Todd v. State, 355 S.C. 396, 402, 585 S.E.2d 305, 308 (2003) ("[J]ury charges should be examined in their entirety and not in isolation in analyzing whether the defendant's due process rights have been violated."). When reviewing a jury charge, the appropriate test involves determining what a reasonable juror would have understood the charge to mean. Sheppard v. State, 357 S.C. 646, 664, 594 S.E.2d 462, 474 (2004). So long as the jury instructions presented are substantially correct and cover the applicable law, reversal is not warranted. See State v. Ezell, 321 S.C. 421, 425, 468 S.E.2d 679, 681 (Ct. App. 1996) ("A jury charge which is substantially correct and covers the law does not require reversal."); see also State v. Rye, 375 S.C. 119, 123, 651 S.E.2d 321, 323 (2007) ("A trial court's decision regarding jury charges will not be reversed where the charges, as a whole, properly charged the law to be applied."). Moreover, an appellate court will only reverse a trial judge's decision regarding jury instructions when that decision constitutes an abuse of discretion resulting in actual prejudice. See Clark v. Cantrell, 339 S.C. 369, 389, 529 S.E.2d 528, 539 (2000) ("An appellate court will not reverse the trial court's decision regarding

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Benton's appellate challenge to the trial judge's refusal to give a requested charge was not preserved for appellate review where Benton "argued one ground in support of a circumstantial evidence charge at trial (State only presented circumstantial evidence of intent) and argues another ground in support of the charge on appeal (palm print is circumstantial evidence)").

jury instructions unless the trial court abused its discretion."); Rauch v. Zayas, 284 S.C. 594, 597, 327 S.E.2d 377, 378 (Ct. App. 1985) ("[A]n alleged error in a portion of the charge must be prejudicial to the appellant to warrant a new trial."); see also State v. King, 367 S.C. 131, 136, 623 S.E.2d 865, 867 (Ct. App. 2005) ("Error without prejudice does not warrant reversal.").

ANALYSIS

In South Carolina, it is unlawful for a person to manufacture or to otherwise aid, abet, attempt, or conspire to manufacture methamphetamine, and a person who commits such an act is guilty of the violent crime of manufacturing methamphetamine. S.C. Code Ann. § 44-53-375(B); see S.C. Code Ann. § 16-1-60 (delineating manufacturing methamphetamine as a violent crime). For purposes of that particular offense, the term "manufacture" is statutorily defined as follows:

> "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).

Based on the broad language of the statutory definition of "manufacture," a person can be guilty of manufacturing by producing, preparing, propagating, compounding, converting, *or*

processing a controlled substance. Id. However, the legislature included an exception excluding two of those six identified acts—preparation and compounding—from the definition of "manufacture" when committed by an individual for the individual's own personal use. Id.; see Stallard v. State, 225 Md. App. 400, 411, 124 A.3d 1165, 1171 (Md. Ct. Spec. App. 2015) ("[B]y its plain and unambiguous language, the personal use exception [in the 'manufacture' definition] applies only when someone prepares (gets ready) or compounds (mixes) a [controlled dangerous substance] for his or her own use, but not when a person produces, propagates, converts, or processes a [controlled dangerous substance]."). Thus, when an individual simply prepares a controlled substance *already in the individual's possession* for use or compounds it by combining it with other ingredients for use, the individual's act would not be considered an act of manufacturing pursuant to the personal use proviso. See People v. Pearson, 157 Mich. App. 68, 72, 403 N.W.2d 498, 500-501 (Mich. Ct. App. 1987) ("The personal use exception [in the 'manufacture' definition] applies only to the preparation and compounding of a controlled substance already in existence."); cf. State v. Childers, 41 N.C. App. 729, 732, 255 S.E.2d 654, 656 (N.C. Ct. App. 1979) ("The plain meaning of the ['manufacture' definition's personal use] exception is to avoid making an individual liable for the felony of manufacturing controlled substance in the situation where, being already in possession of a controlled substance, he makes it ready for use (I.e., rolling marijuana into cigarettes for smoking) or combines it with other ingredients for use (I.e., making the so-called 'Alice B. Toklas' brownies containing marijuana). The four activities not excepted by this proviso contemplate a significantly higher degree of activity involving the controlled substance (I.e., planting, growing, cultivating or harvesting a controlled substance or creating it by any synthetic process or mixture of processes, or taking a controlled substance and, by any process or conversion, changing the form of the controlled

substance or concentrating it) and thus are more appropriately made felonies without regard to the intent of the person charged with the offense as to whether the controlled substance so 'manufactured' was for personal use or for distribution."). However, when the person actually *creates or brings into existence* a controlled substance, such an act would constitute the manufacturing of a controlled substance under the statutory definition of "manufacture."[9] See State v. Hinson, 203 N.C. App. 172, 186, 691 S.E.2d 63, 72 (N.C. Ct. App. 2010) (concluding the act of creating methamphetamine from precursor chemicals did not constitute either preparation or compounding and, thus, did not fall within any exception in the statutory definition of "manufacture"), rev'd on other grounds, 364 N.C. 414, 700 S.E.2d 221 (N.C. 2010); see also State v. Maul, 151 Wis. 2d 349, 352, 444 N.W.2d 430, 432 (Wis. Ct. App. 1989) ("[T]he legislature's exclusion of the other methods of manufacturing from the personal use exception

[9] Critically, the legislature could not have intended to reduce the culpability of an individual who commits the inherently-dangerous act of creating methamphetamine merely because he or she intended to personally use the resulting methamphetamine as such a result would be utterly absurd. See Hatcher v. State, 762 N.E.2d 170, 173 (Ind. Ct. App. 2002) ("[The personal-use exception] could not have been intended to apply to those who decide to manufacture methamphetamine—a drug the manufacturing process of which is inherently dangerous—in their basements. . . . To find otherwise would lead to an absurd result."); see also State v. Sweat, 379 S.C. 367, 377, 665 S.E.2d 645, 650 (Ct. App. 2008) ("Courts will reject a statutory interpretation which would lead to a result so plainly absurd that it could not have been intended by the legislature or would defeat the plain legislative intention."). Therefore, such an absurd interpretation necessarily must be rejected under the rules of statutory construction notwithstanding the fact the plain language of the statute also would not support such an interpretation. See Wade v. State, 348 S.C. 255, 259, 559 S.E.2d 843, 845 (2002) ("[A] court must reject a statute's interpretation leading to absurd results not intended by the Legislature."); State v. Johnson, 396 S.C. 182, 189, 720 S.E.2d 516, 520 (Ct. App. 2011) ("[C]ourts will reject a statutory interpretation that would lead to an absurd result not intended by the legislature or that would defeat plain legislative intention."); see also State v. Morgan, 352 S.C. 359, 365-366, 574 S.E.2d 203, 206 (Ct. App. 2002) ("The cardinal rule of statutory construction is to ascertain and effectuate the legislative intent whenever possible. All rules of statutory construction are subservient to the one that legislative intent must prevail if it can be reasonably discovered in the language used, and that language must be construed in the light of the intended purpose of the statute." (citations omitted)).

indicates its intent that the personal use exception is not extended to these other methods of manufacturing.").

Notably, in Owens v. State, 325 Ark. 110, 124, 926 S.W.2d 650, 657 (Ark. 1996), the Arkansas Supreme Court was confronted with an appellate challenge to a trial judge's failure to present a jury instruction on a personal use exception contained in Arkansas's statutory definition of "manufacture," which is virtually identical to South Carolina's "manufacture" definition. See Ark. Code Ann. § 5-64-101(14)(A) (" 'Manufacture' means the production, preparation, propagation, compounding, conversion, or processing of a controlled substance, either directly or indirectly by extraction from a substance of natural origin, or independently by means of chemical synthesis, or by a combination of extraction and chemical synthesis."); Ark. Code Ann. § 5-64-101(14)(C) ("However, 'manufacture' does not include the preparation or compounding of a controlled substance by an individual for his or her own use[.]"). In that case, Gary Owens and his wife, Christine Owens, were arrested after methamphetamine was discovered inside their residence along with numerous items consistent with methamphetamine manufacturing, such as syringes, ephedrine, lye, vitamins, coffee filters, baking soda, fuel, a funnel, and salt. Owens, 325 Ark. at 115, 926 S.W.2d at 653. During their subsequent trial for manufacturing methamphetamine, the couple requested the trial judge instruct the jury on the statutory language excluding preparation and compounding of a controlled substance for personal use from the definition of "manufacture," but the trial judge declined to do so and they were ultimately convicted as charged. Id. at 123-124, 926 S.W.2d at 657. On appeal, the Supreme Court affirmed. Id. at 114, 926 S.W.2d at 652. In affirming, the Supreme Court concluded "the personal-use exception [wa]s not appl[icable] to the *creation* of a controlled substance, but to the preparation or compounding of a substance already in existence." Id. at

124, 926 S.W.2d at 658. In light of the fact the evidence established the Owens family actually created the methamphetamine instead of merely preparing or compounding it after it was created, the Supreme Court found the personal use exception was not applicable and, thus, was correctly not presented to the jury as part of the trial judge's jury instructions. Id.

In the case sub judice, the evidence presented during trial established Appellant's methamphetamine was made or "cooked" by use of the "one pot" manufacturing method, which involves the creation of methamphetamine by using precursor ingredients and creating chemical reactions. Significantly, the act of "cooking" or creating methamphetamine through that inherently-dangerous process constitutes the production, propagation, conversion, or processing of methamphetamine as opposed to the mere preparation or compounding of existing methamphetamine to ready it for use. See People v. Baham, 321 Mich. App. 228, 242, 909 N.W.2d 836, 844 (Mich. Ct. App. 2017) ("Making or cooking methamphetamine clearly involves the creation of methamphetamine, meaning that it constitutes production, propagation, conversion, or processing of methamphetamine as opposed to the mere 'preparation or compounding' of existing methamphetamine for personal use."); see also Stallard, 225 Md. App. at 412, 124 A.3d at 1172 (concluding it is unlawful "to produce or make methamphetamine, even if it is done by an individual for the individual's own personal use"). Therefore, just like in Owens, the personal use exception contained in the statutory of definition of "manufacture" was not applicable to Appellant's case and was not implicated by any evidence presented. See Owens, 325 Ark. at 124, 926 S.W.2d at 658 ("[T]he personal-use exemption applies only to the *preparation* or *compounding* of a controlled substance. . . . There is abundant evidence in this case that, irrespective of whether the [Owens family] made personal use of their product, they created the product, manufacturing it by means other than mere preparation or compounding.

Thus, the personal-use exception is not applicable, and the trial court was correct to refuse the instruction."); see also Baham, 321 Mich. App. at 242-243, 909 N.W.2d at 844 ("[O]ne may not claim the personal-use exception for making or cooking methamphetamine. . . . [O]ne who knowingly makes or cooks methamphetamine is guilty of manufacturing methamphetamine without regard to whether the methamphetamine will be distributed or used personally." (footnotes omitted)); State v. Bossow, 274 Neb. 836, 846, 744 N.W.2d 43, 51-52 (Neb. 2008) ("The plain meaning of the 'personal use exception' [to the 'manufacture' definition] is to avoid finding an individual liable for the felony of manufacturing a controlled substance when that individual is already in possession of the controlled substance and is simply making it ready for use, such as rolling marijuana into cigarettes for smoking or combining it with other ingredients for use.").

Moreover, beyond the fact no evidence was presented supporting a jury instruction on the personal use exception, Appellant statutorily bore the burden of establishing he fell within that particular proviso in order to be entitled to claim its protections. See S.C. Code Ann. § 44-53-540 ("It shall not be necessary for the State to negate any exemption or exception set forth in this article in any complaint, information, indictment or other pleading or in any trial, hearing, or other proceeding under this article, and the burden of proof of any such exemption or exception shall be upon the person claiming its benefit."); see also McKelvey v. United States, 260 U.S. 353, 357 (1922) ("By repeated decision it has come to be settled rule in this jurisdiction that an indictment or other pleading founded on a general provision defining the elements of an offense, or of a right conferred, need not negative the matter of an exception made by a proviso or other distinct clause, whether in the same section or elsewhere, and that it is incumbent on one who relies on such an exception to set it up and establish it."); cf. State v. Stone, 320 S.C. 395, 398,

465 S.E.2d 576, 577 (Ct. App. 1995) ("Although § 20-7-370 has no application to an 'employee lawfully engaged in the sale or delivery of beer in an unopened container,' the burden of proving the exception to the statute's application belonged to the defendants and not to the State." (brackets omitted)). Instead of meeting that burden, Appellant never attempted to raise the personal use exception as a defense or present any evidence to support its applicability. See State v. Attardo, 263 S.C. 546, 552, 211 S.E.2d 868, 871 (1975) ("It is also well established in case law that when the State has made out a prima facie case under a statute and the defendant claims to fall within an 'exception' or 'proviso' in the statute the burden is on the defendant to establish such a defense."); cf. Baham, 321 Mich. App. at 244-245, 909 N.W.2d at 845 ("[I]f [Baham] believed he was entitled to a personal-use defense, the burden was on defendant to raise the issue as an affirmative defense and to present some competent evidence of preparation or compounding for personal use."). As a result, he simply was not entitled to a jury instruction on an exception he made no attempt to assert or establish. See State v. Weaver, 265 S.C. 130, 137, 217 S.E.2d 31, 34 (1975) ("No instruction should be given by the trial judge, at the request of the appellant, which tenders an issue which is not presented or supported by the evidence.").

Because the personal use exception was not supported by any of the evidence presented during trial and was not raised or established by Appellant, the trial judge correctly omitted the portion of the statutory "manufacture" definition containing the personal use exception from his jury charge, and the jury instructions that were actually presented to the jury correctly conveyed the law that was relevant and applicable to Appellant's case without creating unnecessary and unwarranted confusion. See State v. Blurton, 352 S.C. 203, 208, 573 S.E.2d 802, 804 (2002) ("If a jury instruction is provided to the jury that does not fit the facts of the case, it may confuse the jury. Only law applicable to the case should be charged to the jury. Instructions that do not fit

the facts of the case may serve only to confuse the jury." (citations omitted)); see also State v. Burkhart, 350 S.C. 252, 263, 565 S.E.2d 298, 304 (2002) ("Failure to give requested jury instructions in not prejudicial error where the instructions given afford the proper test for determining the issues."). Under those circumstances, the trial judge committed no error through the manner in which he instructed the jury on manufacturing methamphetamine. See Rye, 375 S.C. at 123, 651 S.E.2d at 323 (explaining a trial judge's decision regarding jury instructions will not be reversed on appeal when the instructions as a whole properly charged the applicable law). Appellant's conviction should be affirmed.

II.

The trial judge properly admitted Appellant's methamphetamine into evidence during trial because testimony was presented establishing the identity of each person who was in custody of the methamphetamine along with what was done with it from the point it was seized by a law enforcement officer to the point it was analyzed and identified by a forensic analyst, which meant a complete chain of custody was sufficiently established as far as practicable.

Appellant contends the trial judge erred by admitting the methamphetamine into evidence during trial. In support of that contention, Appellant maintains a sufficient chain of custody was not established because documentation regarding the chain of custody that possibly could have existed was not produced and the testimony actually presented was allegedly insufficient to establish a complete chain of custody as far as practicable. Contrary to Appellant's contentions, the testimony presented during trial established the identity of each person who was in custody of the methamphetamine along with what was done with it prior to the analysis conducted at SLED. Based on that testimony, a factfinder could have reasonably concluded the methamphetamine was what it was purported to be, and a complete chain of custody was established as far as practicable. Therefore, the trial judge did not abuse his discretion by admitting the methamphetamine into evidence during trial. Appellant's conviction should be affirmed.

RELEVANT FACTS

During Sergeant Veal's testimony on the first day of trial, the investigator stated on cross-examination he did not collect any samples from the "one pot" bottle, did not submit the "one pot" bottle for analysis, and did not submit the syringes for analysis based on an agency policy that was in place at the time of the incident. (R. pp. 99-103). However, on the second day of trial, Sergeant Veal was recalled to the witness stand, and he indicated he realized his earlier

testimony was mistaken after reviewing some information related to the case.[10] (R. pp. 111-112). After refreshing his recollection, Sergeant Veal testified he did, in fact, take a sample from the "one pot" bottle and placed that sample into a "best" evidence kit along with the syringes. (R. p. 112). He further indicated he delivered the evidence kit to Deputy David Craig, who was an evidence custodian with the Laurens County Sheriff's Office at the time of the incident, and the kit was subsequently transported to SLED for analysis. (R. pp. 112-115).

In addition to that testimony, Deputy Craig confirmed Sergeant Veal submitted the evidence to the evidence room on May 6, 2015, in a sealed evidence kit. (R. pp. 117-118). He further affirmed he never personally handled the contents of the evidence kit in light of the fact the kit was sealed, and he noted the kit remained in his exclusive care and control in a locked evidence vault, which only he was capable of accessing, until he transported it to SLED for analysis, which he asserted he typically did on a weekly basis. (R. pp. 116-118; pp. 125-126). Thereafter, on cross-examination, defense counsel questioned Deputy Craig about a report titled, "Evidence Status." (R. pp. 119-121; p. 277). During that questioning, Deputy Craig confirmed he never returned the evidence kit to Sergeant Veal after it was submitted to him, but he acknowledged the report contained a notation dated May 20, 2015, indicating that it was from the evidence custodian to Sergeant Veal.[11] (R. p. 120). However, despite that notation, Deputy

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[10] As to why he was initially mistaken, Sergeant Veal noted he had been involved in numerous investigations of methamphetamine labs, and he further indicated the applicable agency policy regarding the collection of evidence from methamphetamine labs was altered around the time of the incident. (R. p. 112; p. 114). Supporting Sergeant Veal's testimony regarding the volume of his encounters with methamphetamine labs, Appellant himself was arrested for methamphetamine-related charges on four separate occasions in the months leading up to the incident, and three of those arrests were for manufacturing methamphetamine. (R. pp. 272-273).

[11] Although defense counsel asserted through his questioning the report reflected the drugs were returned to Sergeant Veal on May 20, 2015, that was not accurate based on the information actually contained in the report. (R. pp. 123-124; p. 277). Instead, the report appeared to be a

Craig was adamant he did not return the evidence kit to Sergeant Veal after it was submitted to him, and he indicated he believed there was some documentation that was not currently in his possession that should reflect when Sergeant Veal delivered the drugs to him. (R. pp. 122-123).

Thereafter, McCormack was called to the witness stand and testified about her analysis of the sample from the "one pot" bottle and the syringes. (R. p. 127; pp. 129-130). During her testimony, McCormack noted the evidence was delivered to SLED by Deputy Craig on May 26, 2015, and she indicated she personally received it from Doris Yarborough, an evidence technician, in a sealed tamper-evident evidence kit with an intact seal that was dated May 6, 2015, by Sergeant Veal.[12] (R. pp. 130-131). After that, McCormack testified she opened the evidence kit, analyzed the substances inside, and determined everything analyzed contained methamphetamine. (R. pp. 131-133).

Following the presentation of that testimony, the solicitor moved for the methamphetamine to be admitted into evidence, and defense counsel objected. (R. p. 133). During an ensuing in camera hearing, defense counsel asserted—inaccurately—the report he questioned Deputy Craig about stated the drugs were given to Sergeant Veal on May 20, 2015, and he maintained that particular discrepancy had not been adequately explained. (R. p. 135; p. 277). Furthermore, defense counsel contended he had not been provided with the documentation referenced by Deputy Craig regarding the chain of custody. (R. pp. 136-137). As a result,

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status update reflecting the then-current status of evidence that had been submitted to the evidence custodian on May 6, 2015. (R. p. 277). In fact, the identified subject of the report was, "STATUS OF EVIDENCE BEING DETAINED," and there was no information of any kind in the report indicating or suggesting the evidence kit was returned to Sergeant Veal on May 20, 2015. (R. p. 277). To the contrary, the report expressly stated the sample from the "one pot" bottle and the syringes were "in evidence" at that time. (R. p. 277).

[12] Notably, the delivery date identified by McCormack was consistent with the testimony of Deputy Craig, who indicated he delivered the evidence kit to SLED on May 26, 2015. (R. p. 125).

defense counsel asserted the chain of custody was "flawed," and he "question[ed]" whether the evidence was admissible as a result of those purported flaws. (R. pp. 135-136). In rebuttal, the solicitor asserted the report simply contained a clerical error, noted testimony had been presented establishing a complete chain of custody, and indicated the evidence arrived to the analyst in a sealed evidence kit. (R. pp. 135-136). Based on the establishment of a complete chain of custody, the solicitor contended the evidence should be admitted. (R. pp. 135-137). After considering the arguments of counsel, the trial judge found the chain of custody was sufficiently complete based on the evidence presented, and he noted the report referenced by defense counsel appeared to contain a scrivener's error. (R. p. 137). Based on that, the trial judge allowed the methamphetamine to be admitted into evidence over defense counsel's objection while finding any flaws with the chain of custody were pertinent to the weight of the evidence as opposed to its admissibility. (R. pp. 138-139).

STANDARD OF REVIEW

When reviewing an evidentiary ruling, the appellate court gives great deference to the trial judge because the reception or exclusion of evidence is a matter left largely to the sound discretion of a trial judge. State v. Groome, 274 S.C. 189, 190-191, 262 S.E.2d 31, 32 (1980); 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."). Significantly, an appellate court will not reverse a trial judge's decision to admit or exclude evidence absent a clear prejudicial abuse of the trial judge's broad discretion in evidentiary matters. State v. Gaster, 349 S.C. 545, 557, 564 S.E.2d 87, 93 (2002); see State v. Kelley, 319 S.C. 173, 176, 460 S.E.2d 368, 370 (1995) ("A trial judge has considerable latitude in ruling on the admissibility of evidence and his rulings will not be

disturbed absent a showing of probable prejudice."). "An abuse of discretion occurs when the conclusions of the trial court either lack evidentiary support or are controlled by an error of law." State v. McDonald, 343 S.C. 319, 325, 540 S.E.2d 464, 467 (2000); see also United States v. Summers, 666 F.3d 192, 197 (4th Cir. 2011) (instructing an appellate court will not find a trial judge's evidentiary ruling constituted an abuse of discretion unless it was arbitrary and irrational).

ANALYSIS

"The 'chain of custody' rule is but a variation of the principle that real evidence must be authenticated prior to its admission into evidence." United States v. Howard-Arias, 679 F.2d 363, 366 (4th Cir. 1982). "The ultimate goal of chain of custody requirements is simple to ensure that the item is what it is purported to be." State v. Hatcher, 392 S.C. 86, 95, 708 S.E.2d 750, 755 (2011); see Howard-Arias, 679 F.2d at 366 ("The purpose of this threshold requirement is to establish that the item to be introduced, i.e., marijuana, is what it purports to be, i.e., marijuana seized from the 'Don Frank.' "). Notably, "[c]ourts have abandoned inflexible rules regarding the chain of custody and the admissibility of evidence in favor of a rule granting discretion to the trial courts." Hatcher, 392 S.C. at 94, 708 S.E.2d at 754.

When a party seeks the admission of fungible evidence like drugs or a blood sample during trial, a complete chain of custody must be established as far as practicable. State v. Governor, 362 S.C. 609, 612, 608 S.E.2d 474, 475 (Ct. App. 2005); see Hatcher, 392 S.C. at 95, 708 S.E.2d at 755 ("The State need not establish the identity of every person handling fungible items in all circumstances; rather, the standard is whether, in the discretion of the trial judge, the State has established the chain of custody as far as practicable."). However, the proof of the chain of custody need *not* exclude every possibility of tampering. State v. Smith, 326 S.C. 39,

41, 482 S.E.2d 777, 778 (1997); see State v. Rogers, 361 S.C. 178, 187, 603 S.E.2d 910, 915 (Ct. App. 2004) ("South Carolina law does not require testimony as to the exclusion of any possibility of tampering."). Instead, in order to satisfy the requirements for establishing the chain of custody, the evidence and testimony presented during trial must simply not leave to conjecture who was in possession of the fungible item and what was done with it between its seizure and analysis. State v. Johnson, 318 S.C. 194, 196, 456 S.E.2d 442, 443 (Ct. App. 1995).

Significantly, "if the identity of each person handling the evidence is established, and the manner of handling is reasonably demonstrated, no abuse of discretion by the trial court is shown in admitting the evidence absent proof of tampering, bad faith, or ill-motive." State v. Sweet, 374 S.C. 1, 6, 647 S.E.2d 202, 205-206 (2007); State v. Carter, 344 S.C. 419, 424, 544 S.E.2d 835, 837 (2001) ("[W]e have found evidence inadmissible *only* where there is a missing link in the chain of possession because the identity of those who handled the blood was not established at least as far as practicable." (emphasis added)). Moreover, "where there is a weak link in the chain of custody, as opposed to a missing link, the question is only one of credibility and not admissibility." Carter, 344 S.C. at 424, 544 S.E.2d at 837.

In Appellant's case, testimony was presented during trial establishing the identity of each person who was in custody of the methamphetamine and what was done with it from the point it was seized to the point it was analyzed, which meant a complete chain of custody was established in regard to that evidence. Specifically, Sergeant Veal testified he collected a sample from the "one pot" bottle and placed it in a "best" evidence kit along with the syringes he found inside Appellant's camper. After that, Sergeant Veal indicated he delivered the evidence kit to Deputy Craig, and Deputy Craig confirmed he received the sealed kit from Sergeant Veal. After receiving it, Deputy Craig testified the evidence kit remained in his exclusive care and control

and was not opened prior to being delivered to SLED. Beyond that, McCormack confirmed the evidence kit was delivered to SLED by Deputy Craig, and she indicated it was still sealed with no signs of tampering when she personally received it from an evidence technician.

In light of that testimony, every individual who handled the methamphetamine from the point it was seized to the point it was analyzed was sufficiently identified such that a full chain of custody was established. See Governor, 362 S.C. at 613, 608 S.E.2d at 476 (finding fungible evidence should have been admitted in light of the fact a complete chain of custody was presented and noting discrepancies in the manner in which the evidence was handled were not a proper basis for suppression). Likewise, the testimony from Sergeant Veal, Deputy Craig, and McCormack established as far as practicable the methamphetamine had not been altered by anyone who handled it as it was sealed in a tamper-evident evidence kit by Sergeant Veal and remained sealed until it was received by McCormack. See Benton v. Pellum, 232 S.C. 26, 33-34, 100 S.E.2d 534, 537 (1957) (" 'Where the substance analyzed has passed through several hands the evidence must not leave it to conjecture as to who had it and what was done with it between the taking and the analysis.' " (citation omitted)); cf. State v. Trapp, 420 S.C. 217, 233, 801 S.E.2d 742, 750 (Ct. App. 2017) ("We find this is evidence from which a juror could reasonably conclude the item was what the State purported it to be."). Under those circumstances, the evidence presented established Appellant's methamphetamine was exactly what it was purported to be, and there were no missing links in the chain of possession. See Hatcher, 392 S.C. at 95, 708 S.E.2d at 755 ("The ultimate goal of chain of custody requirements is simple to ensure that the item is what it is purported to be."); see also Carter, 344 S.C. at 424, 544 S.E.2d at 837 (recognizing evidence has only been found to inadmissible based on a chain of custody issue when an actual missing link in the chain of possession existed). Accordingly, the

trial judge did not abuse his broad discretion by admitting the methamphetamine into evidence during trial, and any issues resulting from the possible missing documentation referenced by Deputy Craig or the alleged inconsistencies in the report referenced by defense counsel merely impacted the weight of the testimony and evidence presented. See Johnson, 318 S.C. at 196, 456 S.E.2d at 444 ("The State established a continuous chain of custody through the testimony of all people who had control and possession of the evidence. Although a discrepancy existed as to the dates Dailey received the evidence, no evidence was presented to indicate the drugs were not within the control of identifiable people during the entire time. *A reconciliation of this discrepancy was not necessary to establish the chain of custody*, but merely reflected upon the credibility of the evidence rather than its admissibility." (emphasis added)); cf. State v. Williams, 297 S.C. 290, 293, 376 S.E.2d 773, 774 (1989) (finding no abuse of discretion in the admission of a fungible blood sample where the nurse who actually drew the blood sample did not testify but the chain of custody for the sample was sufficiently established through a form and the testimony of another nurse). Appellant's conviction should be affirmed.

III.

The trial judge did not abuse his discretion by permitting the solicitor to reference the harmfulness of methamphetamine during his opening statement because the solicitor's remarks were accurate, proper, and simply served to aid the jury in understanding the crimes charged and the evidence that was intended to be introduced during the course of trial. However, even if the solicitor's remarks were somehow improper, those remarks were not sufficiently inflammatory or prejudicial to render Appellant's trial fundamentally unfair and, thus, could not warrant the reversal of Appellant's conviction.

Appellant contends the trial judge erred by overruling an objection raised by defense counsel to a portion of the solicitor's opening statement in which the solicitor made several remarks regarding the harmfulness of methamphetamine. In support of that contention, Appellant maintains the solicitor's remarks regarding methamphetamine's harmful nature were improper, were irrelevant, and detracted from the jury's task of focusing on the specific allegations against him. To the contrary, the solicitor's remarks were not improper and, instead, constituted accurate, proper, and reasonable commentary that merely served to aid the jury in understanding the indicted offenses and the evidence the solicitor intended to introduce during the course of trial. However, even assuming the solicitor's comments were somehow improper, those remarks were nonetheless not sufficiently inflammatory, outrageous, or prejudicial to render Appellant's trial fundamentally unfair. Because Appellant's trial was not rendered fundamentally unfair by the solicitor's remarks, the trial judge did not abuse his discretion in regard to the solicitor's opening statement, and there is no proper basis upon which to reverse Appellant's conviction on appeal. Appellant's conviction should be affirmed.

RELEVANT FACTS

At the outset of trial, the trial judge presented some preliminary instructions to the jury. (R. pp. 10-18). Through those instructions, the trial judge advised the jurors: (1) they were the sole and exclusive judges of the facts and would have to decide the facts based on the evidence

presented; (2) the opening statements of counsel did not constitute evidence and, instead, were simply an introduction of the attorneys and their respective cases; (3) the State bore the burden of proving each and every element of the indicted offenses beyond a reasonable doubt while Appellant did not have to prove anything; and (4) the closing arguments of counsel also did not constitute evidence. (R. pp. 10-14).

Following the trial judge's preliminary instructions, the solicitor began his opening statement and asserted Appellant's case was about the manufacture of methamphetamine, which the solicitor described as a curse, a problem, a poison, and a destroyer of lives. (R. pp. 21-23). At that point, defense counsel objected, asserted the issue of whether methamphetamine was a curse or problem was irrelevant, and maintained the solicitor's remarks could distract the jurors from focusing on the facts and specific case before them. (R. p. 23). In response, the trial judge overruled the objection while indicating he intended to give counsel for both sides some latitude with regard to arguments. (R. p. 23). However, the trial judge reaffirmed to the jury the opening statements from counsel were not evidence and were not to be considered as evidence. (R. p. 23). The solicitor then resumed his remarks and again briefly asserted methamphetamine was a curse, was terrible, and was responsible for destroying lives, tearing families apart, and degrading communities. (R. p. 23). After that, the solicitor discussed the evidence the State intended to present to prove Appellant was guilty of the indicted offenses while noting methamphetamine and items associated with the manufacture of methamphetamine were all discovered in Appellant's camper. (R. pp. 24-28). Defense counsel then presented his opening statement to the jury, asserted the trial's purpose was to determine whether the State proved its case and not to pass judgment on whether methamphetamine was a problem, and contended the evidence would not be sufficient to prove Appellant's guilt. (R. pp. 28-30).

Thereafter, as the trial proceeded forward, evidence and testimony was presented establishing methamphetamine was discovered inside Appellant's residence along with numerous items associated with methamphetamine manufacturing. (R. pp. 50-55; pp. 93-113; pp. 145-148; pp. 150-151; p. 211). Additionally, Sergeant Veal presented testimony establishing methamphetamine waste must be disposed of in a proper fashion and, to explain why that was so, indicated—without objection—methamphetamine and the products associated with its manufacture were hazardous, extremely flammable, volatile, harmful, and toxic. (R. pp. 90-91; pp. 107-108). Furthermore, Ginn presented testimony—without objection—revealing her past methamphetamine use did harm to her body and caused her to lose custody of her children, her home, and her job, and, similar to her statements, Appellant informed the jury during his testimony he suffered scarring as the result of an explosion related to methamphetamine and had struggled with addiction because of it. (R. pp. 62-63; pp. 74-75; p. 200; p. 212).

Subsequently, at the conclusion of the evidentiary phase of trial, the trial judge again reminded the jurors the arguments of the solicitor and defense counsel did not constitute evidence for them to consider, and the parties presented their closing arguments to the jury. (R. pp. 221-256). During the solicitor's lengthy initial closing argument remarks, the solicitor—without objection—briefly referenced the fact methamphetamine was a poison, a curse on the community, and toxic and hazardous to the environment at several different points.[13] (R. pp. 222-224; pp. 227-228; p. 230; p. 233). Aside from those brief references to the harmful nature of

[13] To the extent Appellant's argument on appeal could be construed as a challenge the solicitor's closing argument remarks, that particular argument is not properly preserved for appellate review because defense counsel did not raise any objections to the solicitor's closing argument during trial. See State v. Grovenstein, 340 S.C. 210, 222, 530 S.E.2d 406, 412-413 (Ct. App. 2000) ("Grovenstein contends a portion of the State's closing argument contained prejudicial statements of fact not supported by the record. We do not address this issue because Grovenstein did not raise it to the trial court. Thus, it is not preserved for our review.").

methamphetamine, the solicitor focused the remainder of his remarks on the specific evidence presented establishing Appellant's guilt, which included the evidence and testimony establishing Appellant was located inside his own camper with methamphetamine and numerous items associated with methamphetamine manufacturing on the date of the incident. (R. pp. 222-233). Furthermore, the solicitor specifically noted Appellant had to be found not guilty unless the evidence presented met the State's burden of proving his guilt beyond a reasonable doubt and left the jurors firmly convinced of his guilt. (R. pp. 231-233). After that, defense counsel presented his closing argument and argued the State failed to prove Appellant's guilt, no methamphetamine manufacturing was occurring at the camper, and Appellant was not involved with it if any manufacturing was actually occurring there. (R. pp. 234-250). The solicitor then offered his rebuttal to defense counsel's remarks without making any further references to the harmful nature of methamphetamine. (R. pp. 250-256).

Thereafter, the trial judge instructed the jury on the applicable law. (R. pp. 238-247). In doing so, the trial judge stated the jurors had to determine the facts solely from the evidence presented, emphasized Appellant was presumed to be innocent, indicated the State had the burden of proving Appellant's guilt beyond a reasonable doubt, explained reasonable doubt to the jurors, informed the jurors they were responsible for applying the evidence to the law as presented in determining whether the State met its burden of proof, and identified the elements of each of the indicted offenses, which the jurors were instructed to consider separately from one another. (R. pp. 238-242; pp. 244-245). Furthermore, the trial judge expressly emphasized to the jurors their verdict had to be "based on the evidence that was presented in trial and the law that ha[d] been given to [them]" and could *not* be based on sympathy, conjecture, caprice, bias, or prejudice. (R. pp. 245-246).

Subsequently, following the presentation of his jury instructions, the trial judge submitted the case to the jury, and, after deliberations, the jury convicted Appellant of manufacturing methamphetamine. (R. pp. 267-268). However, the jury determined Appellant was not guilty of disposal of methamphetamine waste and acquitted him of that offense. (R. pp. 267-268).

STANDARD OF REVIEW

On appeal, an appellate court reviewing a solicitor's remarks during opening statement or closing argument will review the allegedly improper comments in the context of the entire record and must determine whether those comments so infected the trial with unfairness such that the resulting conviction was a denial of the defendant's due process rights. State v. Rudd, 355 S.C. 543, 550, 586 S.E.2d 153, 157 (Ct. App. 2003); see State v. Patterson, 324 S.C. 5, 17, 482 S.E.2d 760, 766 (1997) ("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."). When conducting that particular analysis, an appellate court should be "careful and critical" in finding allegedly improper statements of counsel to warrant reversal, and "[e]very case must necessarily depend upon its own particular circumstances." State v. Gilstrap, 205 S.C. 412, 415, 32 S.E.2d 163, 164 (1944). In order for a solicitor's remarks to rise to the level of reversible error, it is not enough for the remarks to be "undesirable or even universally condemned." Darden v. Wainwright, 477 U.S. 168, 181 (1986) (internal quotations omitted). Instead, once a trial judge has allowed the particular remarks of a solicitor to stand, the appellant bears the burden of proving those remarks denied him a fair determination of guilt or innocence and rendered his trial unfair. State v. Rice, 375 S.C. 302, 315, 652 S.E.2d 409, 415 (Ct. App. 2007), overruled on other grounds by State v. Byers, 392 S.C. 438, 710 S.E.2d 55 (2011); see Simmons v. State, 331 S.C. 333, 338, 503 S.E.2d 164, 166 (1998) ("The appellant has the burden of proving he did not receive a fair trial because

of the alleged improper argument."). Ultimately, absent a clear abuse of discretion, an appellate court will not disturb a trial court's ruling regarding the propriety of a solicitor's opening statement or closing argument remarks. Rudd, 355 S.C. at 548, 586 S.E.2d at 156; see Patterson, 324 S.C. at 17, 482 S.E.2d at 766 (recognizing a trial judge's rulings on the propriety of a solicitor's argument remarks "ordinarily" will not be disturbed on appeal).

ANALYSIS

In criminal cases tried in South Carolina, opening statements serve as an introduction to the trial and are traditionally used by the solicitor and defense counsel "to inform the jury of the general nature of the action and defenses involved in a case so they will be better prepared to understand the evidence presented." State v. Brown, 277 S.C. 203, 204, 284 S.E.2d 777, 778 (1981); see Butler v. United States, 191 F.2d 433, 435 (4th Cir. 1951) ("The very purpose of an opening statement is to inform the jury how the case developed, its background and what will be attempted to be proved."). Relatedly, closing arguments are a basic and important element of the adversarial fact-finding process in a criminal trial, and such arguments serve "to sharpen and clarify the issues for resolution by the trier of fact in a criminal case" while also providing both the solicitor and defense counsel with an opportunity to advocate for their respective positions, argue for certain inferences to be drawn from the evidence presented, and identify the weaknesses in the other side's positions. Herring v. New York, 422 U.S. 853, 862 (1975).

When presenting an opening statement or closing argument, a solicitor generally possesses "wide latitude" as to the substance of his remarks to the jury and is fully permitted to prosecute with earnestness and vigor. Bates v. Lee, 308 F.3d 411, 422 (4th Cir. 2002); Berger v. United States, 295 U.S. 78, 88 (1935) ("[A prosecutor] may prosecute with earnestness and vigor—indeed, he should do so."); see also United States v. Isaacs, 493 F.2d 1124, 1164 (7th Cir.

1974) ("The closing argument of a prosecutor need not be confined to such detached exposition as would be appropriate in a lecture . . . because to shear him of all oratorical emphasis, while leaving wide latitude to the defense, is to load the scales of justice." (citations and internal quotations omitted)). However, in presenting arguments to the jury, a solicitor must avoid appeals to the personal biases of the jurors and must not attempt to arouse the passions or prejudices of the jurors. State v. Linder, 276 S.C. 304, 312, 278 S.E.2d 335, 339 (1981). Significantly, "[i]t is as much [the prosecutor's] 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." Berger, 295 U.S. at 88.

Importantly though, the solicitor is generally permitted to use his opportunities to speak directly to the jurors to appeal to them to do their full duty in enforcing the law, urge them to return the verdict desired by the prosecution, employ any legitimate means of impressing upon them their responsibilities, and "dwell on the evil results of crime[.]" State v. Durden, 264 S.C. 86, 92, 212 S.E.2d 587, 590 (1975) (citation and internal quotations omitted). Likewise, the solicitor is unquestionably permitted in arguments to the jury to state and discuss the State's version of the testimony, to comment on the weight to be given to such testimony, and to point out the matters the jury should and should not consider in arriving at a verdict. Humphries v. State, 351 S.C. 362, 373, 570 S.E.2d 160, 166 (2002); see Durden, 264 S.C. at 92, 212 S.E.2d at 590 ("[The prosecuting attorney] may argue with reference to any matters which the jurors may properly consider in arriving at their verdict, and may point out as well the matters which they should not consider." (citation and internal quotations omitted)). Furthermore, the solicitor is permitted to use the available opportunities for jury argument to call into question the credibility

of the defenses that have been identified or raised by the opposing side. State v. Liberte, 336 S.C. 648, 653, 521 S.E.2d 744, 746 (Ct. App. 1999).

When evaluating the propriety of a solicitor's remarks to the jury, "[i]t is sometimes difficult to draw the line between proper and improper argument[.]" State v. Edgeworth, 239 S.C. 10, 14, 121 S.E.2d 248, 250 (1961). "However, some latitude must necessarily be allowed and it must, to a large extent, be left to the wide discretion of the" trial judge. Id. For that reason, trial judges have broad discretion in regard to both the range and scope of arguments, and, ordinarily, their decisions on such matters will *not* be disturbed. State v. Raffaldt, 318 S.C. 110, 114-115, 456 S.E.2d 390, 393 (1995); see State v. Northcutt, 372 S.C. 207, 222, 641 S.E.2d 873, 881 (2007) ("A trial judge is vested with broad discretion in dealing with the range of propriety of closing argument, and *ordinarily his rulings on such matters will not be disturbed.*" (emphasis added)); State v. Copeland, 321 S.C. 318, 324, 468 S.E.2d 620, 624 (1996) ("The trial court has broad discretion when dealing with the propriety of the solicitor's argument.").

In the case at bar, Appellant was charged with two distinct crimes—manufacturing methamphetamine and disposal of methamphetamine waste—that the solicitor was required to prove to the jury beyond a reasonable doubt. In order for that heavy burden to be met, it was important for the jury to understand *why* Appellant's actions were unlawful, which was particularly important in regard to the charge of disposal of methamphetamine waste in light of the fact a person without knowledge of the harmfulness of the substances involved in methamphetamine production might not comprehend why the offense was actually outlawed. See Old Chief v. United States, 519 U.S. 172, 199 (1997) (recognizing doubt as to the criminality of conduct may influence the jury during deliberations); see generally BLACK'S LAW

DICTIONARY 1045 (9th ed. 2009) (defining "malum prohibitum" as "[a]n act that is criminal merely because it is prohibited by statute, although the act itself is not necessarily immoral").

To aid the jury in understanding the crimes charged and the evidence that would be introduced, the solicitor made several references during the course of his opening statement to the harmfulness of methamphetamine, which was a factor directly related to the unlawful nature of the indicted offenses. See Durden, 264 S.C. at 92, 212 S.E.2d at 590 (recognizing it is generally proper for a solicitor to discuss the evils of crime in arguing to the jury); see also United States v. McKoy, 129 F. App'x 815, 828 (4th Cir. 2005) (finding the prosecutor's characterization of cocaine and heroin as "poison" to be "within the proper bounds of closing argument"); State v. Knight, 63 N.J. 187, 193-194, 305 A.2d 793, 796 (N.J. 1973) ("Within reasonable limitations, we think that the prosecution should be permitted to emphasize the serious social consequences of narcotics as long as the jury is instructed by the trial court that its verdict must be based on the evidence presented."); cf. State v. Wise, 272 S.C. 384, 388, 252 S.E.2d 294, 296 (1979) (holding the trial judge did not abuse his discretion by permitting the solicitor to refer to the sale of drugs to children in the county as part of his closing argument remarks). After that, the solicitor introduced evidence, which was admitted without objection, that confirmed the harmfulness and destructiveness of methamphetamine before briefly reiterating his earlier remarks about methamphetamine's harmful nature during his closing argument. See Humphries, 351 S.C. at 373, 570 S.E.2d at 166 (finding a solicitor's argument to the jury not to be improper where it was "based on evidence already in the record"). Under those circumstances, the solicitor's remarks were simply proper and accurate statements that were designed to aid the jury's understanding of the charges and the evidence ultimately presented, and the trial judge committed no error by permitting those unprovocative and unremarkable

statements. See Butler, 191 F.2d at 435 (rejecting the contention it was improper for the prosecutor to discuss the harmfulness of narcotics and why narcotics cases are terrible and distressing during the course of his opening statement to the jury); see also State v. South, 285 S.C. 529, 536, 331 S.E.2d 775, 779 (1985) ("Viewed in context, this argument does not appear to be highly inflammatory. We will defer to the discretion of the trial judge, whose ruling will not ordinarily be disturbed."); cf. Woo v. United States, 73 F.2d 897, 899 (4th Cir. 1934) ("The remark of the district attorney that the unrestricted sale of opium would destroy the country, and that he (the district attorney) was one link in the chain provided by law to destroy this illegal traffic, cannot be construed as undue license in argument, but merely as an extension of the ideas of the legislative body in passing the act prohibiting the traffic and in providing for its enforcement.").

However, even assuming the solicitor's remarks to the jury were somehow improper, those remarks simply were not sufficiently inflammatory or prejudicial to render Appellant's trial fundamentally unfair. Looking to the solicitor's remarks in context, the solicitor never suggested the harmfulness of methamphetamine in general would warrant the jurors ignoring the reasonable doubt standard and, instead, emphasized to the jurors they had a duty to acquit Appellant unless the specific evidence against him met the State's burden of proof and left them firmly convinced of his guilt. Cf. Liberte, 336 S.C. at 656, 521 S.E.2d at 747 ("Because the prosecutor's improper argument invited the jury to disregard the reasonable doubt standard, we believe that the argument prevented the jury from fairly considering and evaluating the defense put forth by the Defendants."). Furthermore, the solicitor spent the vast majority of both his opening statement and closing argument focused on the specific evidence of Appellant's guilt and at no point urged the jury to convict Appellant in order to address the societal harms of

methamphetamine. See Knight, 63 N.J. at 193-194, 305 A.2d at 796 (finding no reversible error resulted from the prosecutor's characterization of heroin as a "curse" and "serious threat" to society where the prosecutor's summation was "largely devoted to a fair review of the evidence"); cf. Liberte, 336 S.C. at 654, 521 S.E.2d at 747 ("Far more troubling to this Court, however, is that the argument insinuated that the reasonable doubt standard is itself a threat to 'law and order.' "). Beyond that, looking to the instructions presented to the jury, the trial judge *repeatedly* advised the jurors throughout trial the arguments of counsel could not be considered as evidence, thoroughly instructed the jurors on the reasonable doubt standard and the burden of proof, and expressly advised the jurors their verdict must be based on the evidence and could not be based on sympathy, conjecture, caprice, bias, or prejudice. See Rice, 375 S.C. at 336, 652 S.E.2d at 426 (holding any potential prejudice resulting from the impropriety of the solicitor's closing argument was effectively cured by the trial judge's jury instructions, which stressed the State's burden of proof, explained the jurors could only consider the competent evidence before them, and instructed the jurors on their responsibilities in applying the law and evaluating the evidence); cf. State v. Bamberg, 270 S.C. 77, 81, 240 S.E.2d 639, 640 (1977) ("[T]he judge's charge that the State had the burden of showing the appellants were present and actually participated in the crime corrected any possible misapprehension on the part of the jury."). In light of the unprovocative nature of the solicitor's remarks and the thorough instructions presented by the trial judge, the solicitor's remarks about the harmfulness of methamphetamine—whether proper or not—could not have rendered Appellant's trial fundamentally unfair or denied Appellant a fair determination of his guilt or innocence.[14] See

[14] Strongly demonstrating Appellant's trial was not rendered fundamentally unfair by the solicitor's remarks to the jury, the jurors *acquitted* Appellant of one of the charges he was facing despite the fact that charge involved harmful actions related to methamphetamine. Cf. United

State v. Smith, 298 S.C. 482, 486, 381 S.E.2d 724, 726 (1989) ("[N]either of the solicitor's arguments rose to a level mandating reversal."); see also State v. Grovenstein, 335 S.C. 347, 353, 517 S.E.2d 216, 219 (1999) ("[J]urors are presumed to follow the law as instructed to them."); cf. State v. Plath, 281 S.C. 1, 17, 313 S.E.2d 619, 628 (1984) ("[Plath and Arnold] complain of rhetorical flourishes engaged in by the Solicitor in his summation . . . . An inelegant turn of phrase or momentary lapse of good taste will rarely constitute prejudicial error, nor does robust language necessarily inject an arbitrary factor into a trial such as this one. Finding no prejudice here, we dismiss these claims of error as frivolous.").

Because nothing supports a conclusion Appellant's trial was rendered fundamentally unfair by the solicitor's remarks, Appellant has failed to meet his burden of establishing reversible error based on those remarks, which were in no way inaccurate and were not highly inflammatory or extraordinary.[15] See State v. Lunsford, 318 S.C. 241, 247, 456 S.E.2d 918, 922 (Ct. App. 1995) ("Further, Lunsford failed to demonstrate as he was required to do, that the result of the solicitor's comment was to materially prejudice his right 'to obtain a fair and impartial trial.' " (citations omitted)); cf. Darden, 477 U.S. at 180-181 (concluding Darden's murder trial was not rendered fundamentally unfair by the prosecutor's closing argument remarks, which attempted to place some of blame on the Florida Department of Corrections for releasing Darden on weekend furlough prior to the incident, implied the death penalty was the

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States v. McGill, 815 F.3d 846, 921-922 (D.C. Cir. 2016) (finding the remarks of the prosecutor during closing argument, which included a characterization of illegal drugs as "poison" and a reference to the incalculable grief and devastation caused by drugs, not to warrant the grant of a new trial even assuming those remarks had been improper because, amongst other reasons, the jury's deliberations indicated the jurors were not swayed by any attempt to appeal to their passions and prejudices).

[15] Perhaps tellingly, Appellant has not even expressly argued in his appellate brief the solicitor's remarks to the jury were sufficiently egregious to render his trial fundamentally unfair. (App. Br. pp. 18-20).

only way to ensure Darden would not commit a future similar crime, employed the term "animal" to describe Darden, and expressed a personal desire for Darden to have been killed or be killed). Accordingly, there is simply no proper basis upon which to reverse the trial judge's discretionary decision to allow the solicitor's general remarks to the jury about the harmfulness of methamphetamine. See Copeland, 321 S.C. at 326, 468 S.E.2d at 625 (finding the trial judge did not abuse his discretion in regard to the solicitor's closing argument "[b]ecause Copeland has not established that she was deprived of a fair determination of her guilt or innocence" as a result of the argument); see also United States v. Young, 470 U.S. 1, 11 (1985) ("[A] criminal conviction is not to be lightly overturned on the basis of a prosecutor's comments standing alone, for the statements or conduct must be viewed in context; only by so doing can it be determined whether the prosecutor's conduct affected the fairness of the trial."). Appellant's conviction should be affirmed.

CONCLUSION

For all the foregoing reasons, it is respectfully submitted that the judgment and conviction of the lower court be affirmed.

Respectfully submitted,

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August 1, 2018

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Laurens County
Honorable Robin B. Stilwell, Circuit Court Judge
Appellate Case No. 2017-000532

THE STATE,

Respondent,

vs.

ROY ELLIS SMITH,

Appellant.

CERTIFICATE OF COUNSEL

The undersigned certifies 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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