

**IN THE COURT OF APPEALS OF OHIO
SECOND APPELLATE DISTRICT
MONTGOMERY COUNTY**

STATE OF OHIO	:	
	:	Appellate Case No. 23398
Plaintiff-Appellee	:	
	:	Trial Court Case No. 2008-CR-3766
v.	:	
	:	
DAN PARSON	:	(Criminal Appeal from
	:	Common Pleas Court)
Defendant-Appellant	:	
	:	

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OPINION

Rendered on the 12th day of March, 2010.

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FAIN, J.

{¶ 1} Defendant-appellant Don Parson appeals from his conviction and sentence for Illegal Manufacturing of Methamphetamine, Illegal Possession of Chemicals for the Manufacture of Drugs, Aggravated Possession of Drugs, and Inducing Panic. He contends that the trial court erred by denying his motion to

suppress evidence found in his apartment. He further contends that the State did not present evidence sufficient to support his conviction for Illegal Manufacturing or Inducing Panic. Finally, he claims that the trial court erred with regard to the introduction of numerous evidentiary items.

{¶ 2} We conclude that the motion to suppress was properly denied and that the record contains sufficient evidence to support the convictions. Finally, we conclude that the trial court did not abuse its discretion with regard to the admission of evidence. Accordingly, the judgment of the trial court is affirmed.

I

{¶ 3} In September, 2008, Dayton Police Detectives Thomas Harshman and Joe Myers responded to a call regarding a female shoplifter at a Kroger located in Dayton. After her arrest, the shoplifter, Nicole Shackelford, indicated that she had information regarding the location of a methamphetamine laboratory. She directed the detectives to an apartment building where she had been staying with a man named "Dan." Shackelford was not able to give an apartment number, but described which apartment he lived in. Shackelford stated that she had been assisting Dan in manufacturing methamphetamine, and that Dan had asked her to visit different stores in order to purchase Sudafed, to be used for making the drug. Shackelford also indicated that she was working with the "DEA" out of Butler County.

{¶ 4} The subject apartment building is a three-story building with twenty apartment units located on each floor. The apartments share a common hallway.

Parson opened his apartment in response to a knock by the Detectives. As soon as the door was open, Harshman smelled a strong chemical odor and noted that Parson, who had a dazed appearance, acted as though under the influence of some substance. While standing at the entryway of the apartment, Harshman was able to observe what he recognized as being paraphernalia used in the manufacturing of methamphetamine.

{¶ 5} Based upon his experience with drug labs, Harshman was fearful that the chemicals would harm someone or cause a fire. Therefore, the police entered the apartment for the sole purpose of looking for other occupants. The police were in the apartment for about one minute, during which time Harshman observed other drug-manufacturing equipment in plain sight. Parson and the other tenants in the building were evacuated. The police guarded Parson's apartment until a search warrant was obtained and the Dayton Fire Department, Regional HazMat Response Unit and the DEA responded to the scene in order to dismantle and dispose of the items located in Parson's apartment.

{¶ 6} Parson was arrested and indicted on one count of Illegal Manufacturing of Methamphetamine in violation of R.C. 2925.04(A)(C)(3)(b), one count of Illegal Possession of Chemicals for the Manufacture of Drugs in violation of R.C. 2925.041(A), one count of Aggravated Possession of Drugs in violation of R.C. 2925.11(A), and one count of Inducing Panic in violation of R.C. 2917.31(A)(3). Following a jury trial, Parson was convicted of all charges and sentenced accordingly.

{¶ 7} From his conviction and sentence, Parson appeals.

{¶ 8} Parson's First Assignment of Error states as follows:

{¶ 9} "WHETHER THE WARRANTLESS SEARCH OF DEFENDANT'S APARTMENT BASED ON UNSUBSTANTIATED INFORMATION FROM AN INFORMANT OF UNKNOWN CREDIBILITY VIOLATED DEFENDANT'S CONSTITUTIONAL RIGHT TO BE FREE FROM UNREASONABLE SEARCHES AND SEIZURES UNDER THE FOURTH AND FOURTEENTH AMENDMENT OF THE UNITED STATES CONSTITUTION AND ARTICLE I SECTION 10 OF THE OHIO STATE CONSTITUTION."

{¶ 10} Parson contends that the warrantless search of his apartment was illegal and that the trial court should therefore have ruled that the items found during the search were not admissible at trial. In support, Parson claims that the police were acting on the uncorroborated information of an unreliable informant, rendering the search unlawful. Parson contends that the trial court erred by overruling his motion to suppress, given that Shackelford did not testify at the suppression hearing, thereby requiring the trial court to base its decision solely upon hearsay testimony provided by the police.

{¶ 11} "In a motion to suppress the trial court assumes the role of the trier of facts. In reviewing the trial court's decision on a motion to suppress, the court of appeals is bound to accept the trial court's findings of fact if they are supported by competent, credible evidence in the record. Accepting the facts as found by the trial court as true, the court of appeals must then independently determine as a matter of law, without deference to the trial court's conclusion, whether those facts meet the applicable legal standard." *State v. Leifheit*, Champaign App. No. 09CA17,

2090-Ohio-6268, ¶ 4.

{¶ 12} At the suppression hearing, Harshman testified that he and some other officers went to Parson's apartment upon Shackleford's statement that Parson was running a methamphetamine lab. He testified that the police knocked upon the door, which was opened by Parson. When Parson opened the door, Detective Harshman noticed a Pepsi bottle with a tube in it and some aluminum foil on a table that was visible from the doorway. Harshman also noted a "very strong chemical" smell that "blasted out of the door." Harshman testified that he recognized the smell, based upon his training and experience, as "the same odor [he] had encountered at other meth labs." Harshman further testified that Parson appeared "dazed," and under the influence. At that time, Harshman determined that Parson was operating a methamphetamine lab in the apartment. Harshman further determined that he needed to clear the apartment of any possible occupants, due to the risk of explosion and harm from inhaling the fumes. Harshman testified that he did not know whether there was anyone beside Parson in the apartment. Harshman conducted a sweep of the apartment in "less than a minute," and noted that there were "some acetone bottles on the kitchen floor." Harshman testified that they then "locked down" the apartment and evacuated the building. The apartment was not searched any further until the police had obtained a search warrant.

{¶ 13} Parson contends that the police did not have sufficiently reliable information justifying the warrantless search. Specifically, he claims that the police had no information to indicate whether Shackleford was a reliable informant, and that they therefore had no reasonable grounds for instituting a search.

{¶ 14} The argument ignores the fact that the police did not need probable cause to initiate contact with Parson. The police acted in a permissible manner when they knocked upon the apartment door. Once Parson voluntarily opened the door, the police were able to observe his appearance, the chemical odor, and the equipment that was in plain view. At that point, the police had probable cause to obtain a search warrant.

{¶ 15} Moreover, we conclude that the trial court did not err in determining that there were exigent circumstances permitting the police to enter the apartment prior to obtaining a search warrant. There is competent, credible evidence in the record that the odor, Parson's appearance, and the equipment, caused the police, based upon their training and experience, reasonably to believe that Parson was operating a methamphetamine lab. There is also competent, credible evidence to support Harshman's testimony that he believed that the operation in the apartment constituted a threat to the safety of the occupants of the apartment as well as the other tenants of the building. Based upon the assessed threat, Harshman was justified in his decision to determine whether there were any other occupants in Parson's apartment.

{¶ 16} R.C. 2933.33 states:

{¶ 17} "(A) If a law enforcement officer has probable cause to believe that particular premises are used for the illegal manufacture of methamphetamine, for the purpose of conducting a search of the premises without a warrant, the risk of explosion or fire from the illegal manufacture of methamphetamine causing injury to the public constitutes exigent circumstances and reasonable grounds to believe that

there is an immediate need to protect the lives, or property, of the officer and other individuals in the vicinity of the illegal manufacture.”

{¶ 18} The Ohio Ninth District Court of Appeals has applied this statute to permit officers to enter a residence without a warrant where they have probable cause to believe a methamphetamine lab is inside. *State v. Eugeni A. Timofeev*, Summit App. No. 24222, 2009-Ohio-3007.

{¶ 19} This court has stated that “exigent circumstances are a well-established exception to the warrant requirement of the Fourth Amendment.” *State v. Jones*. Miami App. No. 2008 CA 26, 2009-Ohio-4606.

{¶ 20} The police were also acting permissibly when they entered the apartment to determine whether any other individuals might be exposed to the risks posed by the methamphetamine lab reasonably believed to have been in the apartment.

{¶ 21} The trial court did not err in overruling Parson’s motion to suppress. The First Assignment of Error is overruled.

III

{¶ 22} Parson’s Second Assignment of Error is:

{¶ 23} “WHETHER DEFENDANT’S CONVICTIONS AND SENTENCE WERE SUPPORTED BY SUFFICIENT QUALITATIVE AND QUANTITATIVE EVIDENCE, ERRONEOUS AS A MATTER OF LAW, AND THEREBY VIOLATED DEFENDANT’S CONSTITUTIONAL RIGHT TO DUE PROCESS UNDER THE FIFTH AND FOURTEENTH AMENDMENT OF THE UNITED STATES CONSTITUTION AND ARTICLE I SECTION 10 OF THE OHIO STATE CONSTITUTION.”

{¶ 24} Parson contends that the record lacks sufficient evidence to support his convictions for Illegal Manufacturing of Methamphetamine and Inducing Panic. In support, he argues that the State failed to present evidence of “key components that were or would be essential” to the manufacture of methamphetamine. He further argues that any actions that induced panic were performed by the police.

{¶ 25} A sufficiency of the evidence argument challenges whether the State has presented adequate evidence on each element of the offense to allow the case to go to the jury or sustain the guilty verdict as a matter of law. *State v. Thompkins* (1997), 78 Ohio St.3d 380. The proper test to apply to such an inquiry is the one set forth in paragraph two of the syllabus of *State v. Jenks* (1991), 61 Ohio St.3d 259:

{¶ 26} “An appellate court's function when reviewing the sufficiency of the evidence to support a criminal conviction is to examine the evidence admitted at trial to determine whether such evidence, if believed, would convince the average mind of the defendant's guilt beyond a reasonable doubt. The relevant inquiry is whether, after viewing the evidence in a light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt.”

{¶ 27} We begin with Parson’s argument that certain components of a meth lab were not shown by the State to have been in his apartment. The State presented the following testimony of Raymond Dratt, a special agent of the Drug Enforcement Agency with ten years of experience:

{¶ 28} “Q: And inside [Parson’s apartment], what did you see inside that was consistent or relevant to a meth lab?”

{¶ 29} “A: There was aluminum foil, a gas generator, one gallon pitchers, there was a blender, there was multiple solvents, there were other things I don’t recall.

{¶ 30} “ ***

{¶ 31} “Q: Can you please describe for the jury the process to manufacture methamphetamine?

{¶ 32} “A: There’s two predominant methods that we see in the southern district of Ohio. First and foremost is what’s called the anhydrous method. And it’s basically where they use anhydrous ammonia in the manufacture of methamphetamine. The other is called the Red P method in which they use red phosphorus as a heat source in the manufacture. *** [T]he majority of them are anhydrous ammonia.

{¶ 33} “There’s also another method that’s becoming more common. And it’s called the one pot method.

{¶ 34} “Basically instead of breaking it down into steps, you know, step one is you obviously have to create the base. It’s called the extraction where they take Sudafed, they extract the filler from the ephedrine and that’s called making the base.

{¶ 35} “The intermediate step in the anhydrous method is where they would mix solvents, lithium, anhydrous ammonia, and the base and typically associated with that particular step is a significant odor. ***

{¶ 36} “And then the last step in the process is the salting out process which is where they generate hydrochloric gas and bubble it into the mixture, the gas generation process.

{¶ 37} “ ***

{¶ 38} “Q: You discussed this a little bit so I want to follow up on it. As far as these different steps in the process, in these over 100 labs that you’ve investigated, do you typically find evidence of all three steps in one particular location?”

{¶ 39} “A: No, Ma’am. We typically – unless you’re in the middle of a field we rarely find all of the required equipment in one location. The manufacturing of the base which is the pill or tablet extraction, because you need to grind up the pills so you have to have a grinder. You could have a battery operated grinder, but typically it’s done where there’s electricity.

{¶ 40} “Once they do that they need to evaporate the solvents. It’s usually an alcohol that they use to separate the ephedrine from the filler in the pills. Well, that has to be evaporated. You can let it air out and evaporate, but they typically heat that to speed the process up. So once again you need utilities.

{¶ 41} “The anhydrous or the intermediate step, you can do that in the middle of the woods because you don’t need anything. The actual – the catalyst, which the catalyst creates heat, is the reaction for the lithium metal. Lithium in camera batteries, when it reacts to water it’s very explosive. It creates heat. So you don’t need anything. ***

{¶ 42} “For the gas generation you could do that anywhere. You know, there’s – hydrochloric gas is very toxic but, you know, it doesn’t really have good warning properties. You don’t really smell it.

{¶ 43} “The red phosphorus method the same thing. The pill extraction you still need utilities. For the red phosphorus you actually need to heat that so once again you need utilities. And then the gas generation is the same.

{¶ 44} “For the one pot method you can do that anywhere. And what I refer to a one pot method basically they take a soda bottle, a 2 liter or whatever they have, they’ll put all the required chemicals in this bottle and agitate it and then burp it and that can be done anywhere.”

{¶ 45} Basically Dratt testified that there are three methods for producing meth: (1) the anhydrous method; (2) the red phosphorus method; and (3) the one pot method. He further testified that there are three steps in the production of meth: (1) extraction of the base drug, ephedrine, from Sudafed pills; (2) evaporation of the solvents used for the base extraction; and (3) gas generation for the salting out of the final product. According to Dratt, the strong odor associated with meth labs occurs during the second step, evaporation of the solvents.

{¶ 46} Dratt further testified that there was a blender and coffee filters found in the apartment and solvents used in the first step of extraction of the base, which tested positive for meth. He testified that he recovered two soda bottles, one with tubing in it, as well as aluminum foil; both of which are used in the third step of gas generation for salting out. Dratt testified that he did not find any Sudafed or any items used in the second step – specifically lithium and anhydrous ammonia. However, he further testified that in the over 100 labs he has investigated he “rarely” finds all the required equipment in one location.

{¶ 47} The evidence shows that Parson had the required equipment for the first and third steps in the production of meth and that the apartment had an overwhelming odor known to be produced by the second step. Furthermore, given that some of the equipment tested positive for the presence of meth, it can

reasonably be inferred that Parson had, at some point, the base drug of ephedrine. Thus, we conclude that there is sufficient evidence in this record to support a conviction for the Illegal Manufacturing of Methamphetamine and Possession of Chemicals for the Manufacture of Drugs.

{¶ 48} We next turn to Parson’s claim that the offense of Inducing Panic was the result of the actions of the police in evacuating the apartment building

{¶ 49} R.C. 2917.31, which proscribes the offense of Inducing Panic, states in pertinent part:

{¶ 50} “(A) No person shall cause the evacuation of any public place, or otherwise cause serious public inconvenience or alarm, by doing any of the following:

{¶ 51} “ ***

{¶ 52} “(3) Committing any offense, with reckless disregard of the likelihood that its commission will cause serious public inconvenience or alarm.”

{¶ 53} We conclude that the record supports a finding that Parson engaged in the manufacture of methamphetamine in his apartment, and that this process is extremely dangerous in that it carries the risk of explosion or inhalation of toxic fumes. Based upon this finding, we further conclude that the police acted appropriately in evacuating the building until the lab could be contained. It was Parson’s actions in maintaining a meth lab in his apartment that recklessly created a likelihood of serious public inconvenience or alarm, since the evacuation of the building was a reasonably foreseeable consequence of Parson’s reckless act.

{¶ 54} Parson’s Second Assignment of Error is overruled.

{¶ 55} Parson's Third Assignment of Error states:

{¶ 56} "WHETHER DEFENDANT'S CONVICTIONS AND SENTENCE WERE A PRODUCT OF EVIDENCE THAT WAS HEARSAY, IRRELEVANT, IRREVERSIBLY TAINTED, AND EXCESSIVELY PREJUDICIAL SUFFICIENT TO PRECLUDE DEFENDANT'S CONSTITUTIONAL RIGHTS TO DUE PROCESS UNDER THE FIFTH AND FOURTEENTH AMENDMENT OF THE UNITED STATES CONSTITUTION AND ARTICLE I SECTION 10 OF THE OHIO STATE CONSTITUTION."

{¶ 57} In this assignment of error, Parson objects to the trial court's decision to permit the introduction of hearsay testimony and irrelevant evidence. Specifically, he contends that the trial court should not have permitted testimony regarding Shackelford's statements that she worked for the DEA, that Parson was operating a methamphetamine lab in his apartment, and that she purchased Sudafed for Parson for the production of meth. Parson also claims that the trial court erred by permitting the introduction of evidence that Shackelford had Sudafed in the trunk of her vehicle. He also claims that it was error to introduce a document found by another jail inmate purporting to be a copy of a meth recipe written by Parson. Finally, he contends that it was error to introduce evidence that the police found a starter pistol in his apartment.

{¶ 58} We begin with the introduction of statements made by Shackelford to the police following her arrest for shoplifting. We note that the State did present the testimony of an officer who testified that Shackelford had told them she was working for the DEA, that she knew that Parson was running a meth lab in his apartment, and

that she had purchased Sudafed for him to use in the manufacture of the drug. Parson contends that this constituted impermissible hearsay, which the trial court improperly allowed.

{¶ 59} A review of the record demonstrates that the trial court admonished the jury that the statements made by Shackelford, and recited by the State's witness, were not to be considered to prove the truth of the matter asserted. Rather, the trial court continued, the statements were being admitted in order to explain why the officers took the actions they did. This court will presume, absent anything in the record suggesting the contrary, that the jury followed the trial court's instructions in this regard. *State v. Cover*, Huron App. No. H-08-033, 2010-Ohio-291, ¶ 41.

{¶ 60} Next, we address the claim that the trial court should have declared a mistrial when the prosecutor, during closing argument, stated that Shackelford "was getting all of this Sudafed to take to [Parson's] house." Defense counsel objected and requested a mistrial. The trial court sustained the objection, but denied the motion for a mistrial. The court also informed defense counsel that the jury could be given an additional admonishment regarding the limited purpose for the statements made by Shackelford. However, counsel deferred this issue to the trial court's discretion, indicating that the trial court was in the best position to determine whether the giving of an additional instruction concerning the limited purpose for this testimony, during the general instructions given to the jury, would likely do more harm than good. The trial court exercised the discretion reposed in it by defense counsel by declining to give a further instruction. Again, we presume that the jury followed the trial court's prior admonishment regarding the proper purpose of the testimony

regarding Shackleford's statements.

{¶ 61} We next turn to the claim that the trial court erred by permitting the introduction of a “jailhouse recipe.” During trial, the State presented the testimony of David Bragg, who was incarcerated with Parson. Bragg testified that he overheard Parson giving instructions to other inmates regarding the method for producing meth. Bragg also identified a document presented by the State as a meth “recipe distributed throughout the inmates in the *** jail.” Bragg testified that Parson had been writing the recipes and that the document presented by the State “pretty much looks like the same as the other ones that [Parson] wrote out.” Bragg testified that he found the document admitted at trial and turned it over to the State in the hope of getting the State to restore his driving privileges. However, Bragg also stated that the State did not promise him any actions in exchange for his testimony.

{¶ 62} We conclude that the trial court did not err in admitting this document. Although Bragg did not identify the “recipe” as having been one actually written by Parson, he testified that it was like the ones that he had witnessed Parson write out and give to other prisoners. This exhibit constitutes demonstrative evidence of something the witness observed, and thus is admissible in trial. There was no indication that the actual recipe the witness saw Parson write was available, as the best evidence on this point. Any issues regarding this exhibit could be explored or argued by defense counsel in the context of the proper weight to be given to this evidence.

{¶ 63} Next, Parson claims that the trial court erred by admitting testimony regarding a starter pistol that was recovered from his apartment during the execution

of the search warrant. Parson argues that “this left the jury with the unfair inference that it was evidence of [his] criminal intent as a drug dealer to be armed for protection.” He argues that any probative value of this evidence was outweighed by the likelihood of unfair prejudice.

{¶ 64} A review of the record shows that the testimony regarding the pistol was done as part of a recitation of evidence taken from the apartment. We conclude that this testimony is probative to show that Parson had a means of intimidating clients and or competitors. We cannot say that the probative value was outweighed by the potential for prejudice.

{¶ 65} Parson points out that the jury was never told that the pistol that was the subject of testimony was merely a starter pistol. This is troublesome. But we find it unlikely in the extreme that this misleading omission affected the outcome of the trial, considering the strong evidence of Parson’s guilt. Accordingly, any error posited by this misleading omission is harmless.

{¶ 66} Finally, we address the trial court’s decision to admit evidence that, after Parson was arrested, the police found Sudafed in the trunk of Shackleford’s vehicle. Parson contends that there was “no nexus between these drugs and [him, and that] their existence whether legally obtained, or not, cannot be relevant to [the charges against him].”

{¶ 67} The record shows that the State did not mention the Sudafed during its opening statement, nor elicit this information with its first witness. Indeed, it was first mentioned by defense counsel during cross-examination of the State’s first witness. Defense counsel appears to have been laying the groundwork for the argument that

it was Shackelford, not Parson, who was producing methamphetamine. We conclude that this opened the door to further testimony regarding the Sudafed.

{¶ 68} Furthermore, we cannot say that it was improper to introduce this testimony given Parson's frequent references to the fact that the police did not find any base, or ephedrine, in his apartment, since the evidence of the Sudafed supports the inference, when taken with Shackelford's knowledge of Parson's apartment layout, that she was involved in the production of the meth, and that she was supplying the base for the meth.

{¶ 69} Parson's Third Assignment of Error is overruled.

V

{¶ 70} All of Parson's assignments of error having been overruled, the judgment of the trial court is Affirmed.

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BROGAN and GRADY, JJ., concur.

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