[Cite as *State v. Wickersham*, 2015-Ohio-2756.]

IN THE COURT OF APPEALS OF OHIO
FOURTH APPELLATE DISTRICT
MEIGS COUNTY

STATE OF OHIO,	:	
Plaintiff-Appellee,	:	Case No. 13CA10
vs.	:	
TIMOTHY W. WICKERSHAM,	:	DECISION AND JUDGMENT ENTRY
Defendant-Appellant.	:	

APPEARANCES:

COUNSEL FOR APPELLANT:	Timothy Young, Ohio Public Defender, and Carrie Wood, Ohio Assistant Public Defender, 250 East Broad Street, Suite 1400, Columbus, Ohio 43215
COUNSEL FOR APPELLEE:	Colleen S. Williams, Meigs County Prosecuting Attorney, and Jeremy L. Fisher, Meigs County Assistant Prosecuting Attorney, 117 West Second Street, Pomeroy, Ohio 45769

CRIMINAL CASE FROM COMMON PLEAS COURT
DATE JOURNALIZED:6-26-15
ABELE, J.

{¶ 1} This is an appeal from a Meigs County Common Pleas Court judgment of conviction and sentence. A jury found Timothy W. Wickersham, defendant below and appellant herein, guilty of the (1) illegal manufacture of methamphetamine in violation of R.C. 2925.04(A); (2) illegal assembly or possession of chemicals for the manufacture of methamphetamine in violation of R.C. 2925.041(A); and (3) child endangering in violation of R.C. 2919.22(B)(6).

{¶ 2} Appellant assigns the following errors for review:

FIRST ASSIGNMENT OF ERROR:

"THE TRIAL COURT COMMITTED PLAIN ERROR WHEN IT ENTERED A JUDGMENT ENTRY ORDERING THAT POSTRELEASE CONTROL AND COMMUNITY CONTROL SENTENCES RUN CONSECUTIVELY WHEN THE TRIAL COURT PREVIOUSLY STATED DURING THE SENTENCING HEARING THAT THEY WERE TO RUN CONCURRENTLY."

SECOND ASSIGNMENT OF ERROR:

"THE TRIAL COURT VIOLATED MR. WICKERSHAM'S RIGHT TO DUE PROCESS AND A FAIR TRIAL WHEN, IN THE ABSENCE OF SUFFICIENT EVIDENCE, IT FAILED TO GRANT HIS CRIM.R. 29 MOTIONS AS TO THE ILLEGAL MANUFACTURING OF METHAMPHETAMINES [sic], THE ILLEGAL ASSEMBLY OR POSSESSION OF CHEMICALS FOR THE MANUFACTURE OF DRUGS (METHAMPHETAMINES [sic]), AND ENDANGERING CHILDREN."

THIRD ASSIGNMENT OF ERROR:

"THE TRIAL COURT VIOLATED MR. WICKERSHAM'S RIGHTS TO DUE PROCESS AND A FAIR TRIAL WHEN IT ENTERED A JUDGMENT OF CONVICTION FOR THE ILLEGAL MANUFACTURE OF METHAMPHETAMINE, THE ILLEGAL ASSEMBLY OR POSSESSION OF CHEMICALS FOR THE MANUFACTURE OF METHAMPHETAMINE, AND ENDANGERING CHILDREN, WHICH WAS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE."

{¶ 3} On April 12, 2013, Meigs County Children Services (MCCS) investigator Elizabeth King and two Meigs County Sheriff's deputies went to 303 Fifth Avenue in Racine, Ohio. The deputies had a warrant for appellant's arrest and believed that he would be found at this residence. When they arrived, Stacey Holter answered the door. King asked if she could come inside the residence and speak with Holter.[1] One deputy obtained Holter's permission to perform a safety

[1] King did not specify why she wanted to speak with Holter.

sweep of the home. While doing so, he observed syringes, which he believed indicated that drug activity was occurring in the home. The deputies thus secured the home and obtained a search warrant. A subsequent search of the residence revealed numerous items used to manufacture methamphetamine and drug paraphernalia, including uncovered multiple syringes, digital scales, broken cell phones, pseudoephedrine, Coleman fuel, "liquid fire," coffee filters, cold packs, rock salt, razor blades, and multiple lithium batteries that had the lithium strips removed. Officers also found reactionary vessels in the back of a pickup truck parked next to the residence.

{¶ 4} On April 22, 2013, a Meigs County Grand Jury returned an indictment that charged appellant with the (1) illegal manufacture of methamphetamine in violation of R.C. 2925.04(A); (2) illegal assembly or possession of chemicals for manufacture of methamphetamine in violation of R.C. 2945.041(A); (3) endangering children in violation of R.C. 2919.22(B)(6); and (4) trafficking in methamphetamine in violation of R.C. 2925.03.[2]

{¶ 5} On August 7, 2013, the court held a jury trial. Meigs County Sheriff's Deputy Brody Davis testified that he responded to Holter's residence and participated in the subsequent search of the house. Deputy Davis stated that in the upstairs bedroom, the deputies found liquid fire, Coleman fuel, syringes, razor blades, rock salt, digital scales, multiple batteries, and coffee filters. He further explained that the deputies also found several orange syringe caps in a drawer filled with white socks.[3] Deputy Davis testified that in the attic, which was located by the bedroom, the deputies found cold packs, syringes, "water baggies," a battery, and the bottom of a

[2] This count was later dismissed.

[3] The prosecutor asked Deputy Davis if the socks appeared to be men's or women's socks, but appellant's counsel objected. The prosecutor then asked Deputy Davis to describe the socks, and he described them as "white socks."

pop can. Deputy Davis explained that the bottom of the pop can commonly is used to "melt down different drugs and use them." The deputies also discovered reactionary vessels in the pickup truck. Deputy Davis stated that the search additionally uncovered multiple syringes in a trash can, a bag of Sudafed, and multiple plastic bags filled with salt.

{¶ 6} Deputy Davis testified that appellant was not at the home during the search, and that they found him a few days later at a different residence. Deputy Davis further stated that the pickup truck was not registered or titled to appellant, but instead, was registered to Lee Fitzpatrick. Defense counsel asked the deputy if he took any photographs of men's clothing or toiletries, and Deputy Davis stated that he "had no reason to take any photos of men's clothing [or toiletries] at that time." He explained that he "honestly didn't pay attention" to whether the residence contained any men's clothing. Defense counsel also asked if the deputy found any letters in the house that listed appellant's address as 303 Fifth Avenue. The deputy stated no. Defense counsel further asked the deputy about cell phones listed in an inventory report attached to individuals with the last names of Ball, Young, and Barney. Deputy Davis explained that these cell phones were obtained from individuals who "showed up at the scene."

{¶ 7} Meigs County Sheriff's Deputy Joseph Barnhart testified that he responded to 303 Fifth Street because they had a warrant for appellant's arrest. Holter answered the door and they explained that they were there due to a children services related call. Holter allowed them inside and Barnhart obtained permission to see if appellant was at the residence. Deputy Barnhart stated that upon walking through the residence, he observed "drug paraphernalia" and "syringes in a bag * * * in the upstairs bedroom along with some other materials * * * that would raise an alarm as to possible drug use in relation to what the call was about." Deputy Barnhart testified that the

deputies obtained a search warrant and, during the search, they discovered "several items indicative of a Methamphetamine lab" in the upstairs bedroom. He explained that they discovered cut bags of ice packs, Coleman fuel, battery pieces, pieces of lithium batteries that were cut open, and syringes. The deputies then called a methamphetamine technician for assistance.

{¶ 8} Middleport Police Department Patrolman Shannon Smith testified that he is a clandestine lab practitioner and that he helped to neutralize the methamphetamine materials found at the residence. Patrolman Smith stated that he found precursors within the residence that led him to believe that an active methamphetamine lab may be on the premises. He stated that "[t]here were several precursors scattered throughout * * * the house, including lithium batteries that had the lithium strips removed and cold packs containing ammonium nitrate scattered throughout the attic." Patrolman Smith testified that he also discovered bladders that had been removed from the cold packs "scattered throughout the house." He explained that the bladder is punctured to make the reaction with ammonium nitrate. Patrolman Smith additionally discovered pseudoephedrine and ammonium nitrate separated into plastic sandwich bags, three bottles of Coleman fuel, and two bottles of liquid fire.

{¶ 9} Patrolman Smith stated that he found two reactionary vessels and a gas generator bottle in the back of the pickup truck. Inside one of the reactionary vessels, he noticed the presence of ammonium nitrate, lithium strips, and Coleman fuel. Patrolman Smith explained that a gas generator typically contains some type of salt, and either one or two types of acid–muriatic acid or sulfuric acid. The gas generator transfers the liquid methamphetamine into a powdered form. Once combined, a tube drains the liquid so that it can become a dry form.

{¶ 10} Gallia County Sheriff's Sergeant Chris Gill testified that he helped neutralize the

methamphetamine lab. Gill stated that the officers found two "one pot" reactionary vessels and one gas generator. Gill testified that the "one pot" method is used to manufacture methamphetamine and he explained it as follows. The cook places "[a]mmonium [n]itrate, [s]odium [h]ydroxide, or some kind of lye, with Coleman fuel, or some kind of solvent," with "ground up Sudafed cold medicine and lithium batteries * * * that are stripped * * * with a small amount of water inside" a reactionary vessel, usually "a Gatorade sports drink or soda bottle." The reaction can take twenty-five minutes to one hour. The Coleman fuel is extracted and placed in another container. Sodium chloride or another type of salt is then mixed with sulfuric acid in another vessel with a tube coming out to capture hydrogen chloride gas. The gas is bubbled through the Coleman fuel or solvent that was removed from the first vessel, which causes the methamphetamine that is "in oil base to become a salt which is then filtered out and dried." The finished product is methamphetamine.

{¶ 11} MCCS investigator King testified that she had attempted to visit 303 Fifth Street four or five times before April 12, 2013. On one of those occasions (March 7), she spoke with appellant on the telephone. She stated that a neighbor had called appellant "to tell him that I had been at his house so he had called me * * * to find out why I was at his house. And * * * to let me know that he was working out of town at that point in time." King testified that appellant indicated that he was residing at 303 Fifth Street.

{¶ 12} Pamela Diddle testified that she leased the premises to Holter and that she frequently saw appellant at the residence. She believed that appellant lived with Holter as her "significant other." Diddle further related that she had observed appellant working on the pickup truck in which the officers discovered the reactionary vessels and gas generator.

{¶ 13} Appellant moved for a Crim.R. 29 judgment of acquittal and asserted that the state did not present sufficient evidence "to even create any kind of reasonable doubt that [appellant] was in that house on that day and did certain things and asse[mbled] certain kinds of chemicals and made * * * the [m]eth." Appellant noted that the state presented circumstantial evidence that appellant "was there on occasion," but did not sufficiently show that on April 12, 2013 appellant knowingly manufactured methamphetamine or knowingly possessed any chemicals used to manufacture methamphetamine. The court overruled appellant's motion, reasoning that the "landlord's testimony of seeing [appellant] about the premises is sufficient to overcome" appellant's motion. Subsequently, the jury found appellant guilty of the illegal manufacture of methamphetamine, the illegal assembly or possession of chemicals for manufacture of methamphetamine, and endangering children. On August 8, 2013, the court merged the illegal assembly and child endangering counts with the illegal manufacture count and sentenced appellant to serve nine years in prison.[4] This appeal followed.

{¶ 14} On July 23, 2014, this court granted appellant's motion to supplement the record with the sentencing entries in case numbers 09CR112 and 09CR126. In case numbers 09CR112 and 09CR126, the trial court revoked appellant's community control and continued his community control for five years. The trial court ordered that appellant's sentences be served consecutively to the sentence imposed for his illegal manufacture of methamphetamine conviction.

I

{¶ 15} In his first assignment of error, appellant asserts that the trial court erred by ordering

[4] The trial court merged the child endangering count with the illegal manufacture count, but it was not required to do so. State v. Greer, 4th Dist. Jackson No. 13CA2, 2014-Ohio-2174, ¶11.

that the postrelease and community control sentences imposed in case numbers 09CR112 and 09CR126 be served consecutively to the sentence imposed for his illegal manufacture of methamphetamine conviction. Appellant asserts that the trial court stated at the sentencing hearing that the sentences imposed in case numbers 09CR112 and 09CR126 would be served concurrently to the sentence imposed for illegal manufacture of methamphetamine. Appellant requests that we vacate the two judgments from case numbers 09CR112 and 09CR126 and order the trial court to enter nunc pro tunc entries to reflect that the sentences be served concurrently to the sentence imposed for his illegal manufacture of methamphetamine conviction.

{¶ 16} Appellant, however, did not file notices of appeal from case numbers 09CR112 and 09CR126. Our review is limited to the case appellant appealed. State v. Steers, 4th Dist. Washington No. 11CA33, 2013-Ohio-3266, ¶17. We therefore may not consider any errors that may have occurred in case numbers 09CR112 and 09CR126. Id.

{¶ 17} Accordingly, we hereby overrule appellant's first assignment of error.

II

{¶ 18} Appellant's second and third assignments of error raise the related, but legally distinct, arguments that sufficient evidence does not support his conviction and that his conviction is against the manifest weight of the evidence. For ease of analysis, we have combined our review of the assignments of error.

{¶ 19} In his second assignment of error, appellant asserts that the trial court erred by overruling his Crim.R. 29 motion for judgment of acquittal. Appellant contends that the state failed to present sufficient evidence that he knowingly assembled, possessed, or manufactured methamphetamine. He contends that even if the evidence shows that he lived at the residence and

sometimes worked on the pickup truck that contained the methamphetamine lab, the state did not present any evidence that appellant knew that methamphetamine precursors were present in the house or that he was aware the methamphetamine lab was located in the back of the pickup truck. Appellant also asserts that the state failed to present sufficient evidence to support his R.C. 2919.22(B)(6) child endangering conviction. Appellant claims that the state did not present sufficient evidence to show that he knew that a violation of R.C. 2925.04 or 2925.041 was occurring on the premises.

{¶ 20} In his third assignment of error, appellant argues that even if the state presented sufficient evidence to establish the elements of each offense, his conviction is against the manifest weight of the evidence. Appellant contends that the greater weight of the evidence fails to show that he knowingly assembled, possessed, or manufactured methamphetamine. Appellant asserts that there is a "lack of evidence showing the location where the precursors were recovered * * * and any evidence connecting [appellant] to those locations" and a "lack of evidence demonstrating [appellant]'s knowledge of the reactionary vessels" located in the back of the pickup truck.

A

{¶ 21} We initially observe that although the jury found appellant guilty of three offenses, the trial court merged the child endangering and illegal assembly offenses with the illegal manufacturing offense. Thus, if sufficient evidence supports appellant's illegal manufacturing conviction and if the conviction is not against the manifest weight of the evidence, erroneous verdicts on the merged counts would be harmless. State v. Powell, 49 Ohio St.3d 255, 263, 552 N.E.2d 191 (1990) ("Since the trial court merged the kidnapping convictions with one another, [the defendant] received only one sentence for kidnapping and an erroneous verdict on Count Three

would be harmless beyond a reasonable doubt."); State v. Wolff, 7th Dist. Mahoning No. 07MA166, 2009-Ohio-2897, ¶70 ("When a trial court dispatched with a count through merger, any error in the jury's verdict on the merged count is rendered harmless beyond a reasonable doubt."); see State v. Williams, 4th Dist. Scioto No. 11CA3408, 2012-Ohio-4693, ¶54 (concluding that because a trial court does not impose a sentence for merged offenses, a defendant is not "convicted" of merged offenses and thus there is no "conviction" on merged offenses for appellate court to vacate). Consequently, if we determine that sufficient evidence supports appellant's illegal manufacture of methamphetamine and that it is not against the manifest weight of the evidence, we need not address appellant's sufficiency and manifest weight of the evidence arguments regarding the two merged offenses. We therefore first address appellant's arguments regarding the illegal manufacture of methamphetamine conviction.

B

{¶ 22} A claim of insufficient evidence invokes a due process concern and raises the question whether the evidence is legally sufficient to support the verdict as a matter of law. State v. Thompkins, 78 Ohio St.3d 380, 386, 678 N.E.2d 541 (1997). When reviewing the sufficiency of the evidence, our inquiry focuses primarily upon the adequacy of the evidence; that is, whether the evidence, if believed, reasonably could support a finding of guilt beyond a reasonable doubt. Thompkins, syllabus. The standard of review is whether, after viewing the probative evidence and inferences reasonably drawn therefrom in the light most favorable to the prosecution, any rational trier of fact could have found all the essential elements of the offense beyond a reasonable doubt. Jackson v. Virginia, 443 U.S. 307, 319, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979); State v. Jenks, 61 Ohio St.3d 259, 273, 574 N.E.2d 492 (1991). Furthermore, a reviewing court is not to assess

"whether the state's evidence is to be believed, but whether, if believed, the evidence against a defendant would support a conviction." Thompkins, 78 Ohio St.3d at 390 (Cook, J., concurring).

{¶ 23} Thus, when reviewing a sufficiency-of-the-evidence claim, an appellate court must construe the evidence in a light most favorable to the prosecution. State v. Hill, 75 Ohio St.3d 195, 205, 661 N.E.2d 1068 (1996); State v. Grant, 67 Ohio St.3d 465, 477, 620 N.E.2d 50 (1993). A reviewing court will not overturn a conviction on a sufficiency-of-the-evidence claim unless reasonable minds could not reach the conclusion that the trier of fact did. State v. Tibbetts, 92 Ohio St.3d 146, 162, 749 N.E.2d 226 (2001); State v. Treesh, 90 Ohio St.3d 460, 484, 739 N.E.2d 749 (2001).

{¶ 24} "Although a court of appeals may determine that a judgment of a trial court is sustained by sufficient evidence, that court may nevertheless conclude that the judgment is against the weight of the evidence." Thompkins, 78 Ohio St.3d at 387.

> "'Weight of the evidence concerns "the inclination of the greater amount of credible evidence, offered in a trial, to support one side of the issue rather than the other. It indicates clearly to the jury that the party having the burden of proof will be entitled to their verdict, if, on weighing the evidence in their minds, they shall find the greater amount of credible evidence sustains the issue which is to be established before them. Weight is not a question of mathematics, but depends on its effect in inducing belief."'"

Eastley v. Volkman, 132 Ohio St.3d 328, 2012–Ohio–2179, 972 N.E.2d 517, ¶12, quoting Thompkins, 78 Ohio St.3d at 387, quoting Black's Law Dictionary 1594 (6th ed.1990).

{¶ 25} When an appellate court considers a claim that a conviction is against the manifest weight of the evidence, the court must dutifully examine the entire record, weigh the evidence, and consider the credibility of witnesses. The reviewing court must bear in mind, however, that credibility generally is an issue for the trier of fact to resolve. State v. Issa, 93 Ohio St.3d 49, 67,

752 N.E.2d 904 (2001); State v. Murphy, 4th Dist. Ross No. 07CA2953, 2008–Ohio–1744, ¶31. "'Because the trier of fact sees and hears the witnesses and is particularly competent to decide "whether, and to what extent, to credit the testimony of particular witnesses," we must afford substantial deference to its determinations of credibility.'" Barberton v. Jenney, 126 Ohio St.3d 5, 2010-Ohio-2420, 929 N.E.2d 1047, ¶20, quoting State v. Konya, 2nd Dist. Montgomery No. 21434, 2006-Ohio-6312, ¶6, quoting State v. Lawson, 2nd Dist. Montgomery No. 16288 (Aug. 22, 1997). As the Eastley court explained:

> "'[I]n determining whether the judgment below is manifestly against the weight of the evidence, every reasonable intendment must be made in favor of the judgment and the finding of facts. * * *
> If the evidence is susceptible of more than one construction, the reviewing court is bound to give it that interpretation which is consistent with the verdict and judgment, most favorable to sustaining the verdict and judgment.'"

Eastley at ¶21, quoting Seasons Coal Co., Inc. v. Cleveland, 10 Ohio St.3d 77, 80, 461 N.E.2d 1273 (1984), fn.3, quoting 5 Ohio Jurisprudence 3d, Appellate Review, Section 60, at 191–192 (1978). Thus, an appellate court will leave the issues of weight and credibility of the evidence to the fact finder, as long as a rational basis exists in the record for its decision. State v. Picklesimer, 4th Dist. Pickaway No. 11CA9, 2012-Ohio-1282,¶24; accord State v. Howard, 4th Dist. Ross No. 07CA2948, 2007-Ohio-6331, ¶6 ("We will not intercede as long as the trier of fact has some factual and rational basis for its determination of credibility and weight.").

{¶ 26} Once the reviewing court finishes its examination, the court may reverse the judgment of conviction only if it appears that the fact-finder, when resolving the conflicts in evidence, "'clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered.'" Thompkins, 78 Ohio St.3d at 387, quoting

State v. Martin, 20 Ohio App.3d 172, 175, 485 N.E.2d 717 (1st Dist. 1983). A reviewing court should find a conviction against the manifest weight of the evidence only in the "'exceptional case in which the evidence weighs heavily against the conviction.'" Id., quoting Martin, 20 Ohio App.3d at 175; State v. Lindsey, 87 Ohio St.3d 479, 483, 721 N.E.2d 995 (2000).

{¶ 27} When an appellate court concludes that the weight of the evidence supports a defendant's conviction, this conclusion necessarily includes a finding that sufficient evidence supports the conviction. State v. Pollitt, 4th Dist. Scioto No. 08CA3263, 2010–Ohio–2556, ¶15. "'Thus, a determination that [a] conviction is supported by the weight of the evidence will also be dispositive of the issue of sufficiency.'" State v. Lombardi, 9th Dist. Summit No. 22435, 2005–Ohio–4942, ¶9, quoting State v. Roberts, 9th Dist. Lorain No. 96CA006462 (Sept. 17, 1997). In the case sub judice, therefore, we first consider appellant's argument that his conviction is against the manifest weight of the evidence.

C

{¶ 28} In the case at bar, appellant does not challenge that law enforcement officers discovered an active methamphetamine lab and precursors at Holter's residence. Rather, appellant asserts that the evidence fails to show that he is the individual responsible for manufacturing the methamphetamine. Appellant contends that the state's evidence fails to demonstrate a nexus between appellant and the methamphetamine being produced and fails to show that he knowingly participated in any conduct that could be construed as manufacturing methamphetamine.

{¶ 29} R.C. 2925.04 states: "No person shall knowingly * * * manufacture or otherwise engage in any part of the production of a controlled substance." Thus, in order to sustain appellant's conviction, the greater weight of the evidence must show that appellant (1) knowingly

(2) manufactured or (3) otherwise engaged in the production of (4) a controlled substance, i.e., methamphetamine.

{¶ 30} "A person acts knowingly, regardless of his purpose, when he is aware that his conduct will probably cause a certain result or will probably be of a certain nature. A person has knowledge of circumstances when he is aware that such circumstances probably exist." R.C. 2901.22(B). "With regard to the ability to prove an offender's intentions, the Ohio Supreme Court has recognized that 'intent, lying as it does within the privacy of a person's own thoughts, is not susceptible [to] objective proof.'" State v. Wilson, 12th Dist. Warren No. CA2006-01-007, 2007-Ohio-2298, ¶41, quoting State v. Garner, 74 Ohio St.3d 49, 60, 656 N.E.2d 623 (1995). Thus, "whether a person acts knowingly can only be determined, absent a defendant's admission, from all the surrounding facts and circumstances * * *." State v. Huff, 145 Ohio App.3d 555, 563, 763 N.E.2d 695 (1st Dist. 2001).

{¶ 31} "'Manufacture' means to plant, cultivate, harvest, process, make, prepare, or otherwise engage in any part of the production of a drug, by propagation, extraction, chemical synthesis, or compounding, or any combination of the same, and includes packaging, repackaging, labeling, and other activities incident to production." R.C. 2925.01(J).

{¶ 32} In the case sub judice, we do not believe that appellant's illegal manufacture conviction weighs heavily against conviction. Instead, we conclude, after our review of the evidence, that the evidence leads to a rational conclusion that appellant knew that methamphetamine was being manufactured at the residence and that appellant knowingly engaged in some part of the manufacturing process by extraction and other activities incident to production.

{¶ 33} To show appellant's knowledge of and connection to the precursors and

methamphetamine, the state relied upon the landlord's and the children services investigator's testimony that appellant lived at Holter's residence. The landlord testified that appellant lived at the residence with Holter as Holter's "significant other." The MCCS investigator stated that appellant indicated that he lived at Holter's residence. The record contains no evidence that any other adults lived on the premises, or regularly frequented the premises. The evidence, if believed, leads to a logical conclusion that appellant had a significant connection to the premises as Holter's live-in boyfriend. The evidence further shows that appellant knew, or probably knew, that methamphetamine was being manufactured on the premises. A search of the premises revealed drug paraphernalia and copious amounts of materials used to manufacture methamphetamine in the bedroom appellant shared with Holter and in the attic located near the bedroom. State v. Kirkby, 9th Dist. Summit Nos. 27381 and 27399, 2015-Ohio-1520, ¶23 and ¶25 (concluding that defendant's illegal manufacture of methamphetamine conviction not against the manifest weight of the evidence and noting that premises contained "copious amounts of chemicals, residue, drug paraphernalia" and "an active one-pot meth lab"). The search also uncovered active methamphetamine production in a truck parked next to the premises. The amount of chemicals and paraphernalia found in the bedroom suggests that appellant knew that methamphetamine was being produced on the premises.

{¶ 34} Additionally, the evidence suggests that appellant engaged in some part of the manufacture of methamphetamine. Some of the ingredients necessary to produce methamphetamine were prepared inside the residence. The officers discovered stripped lithium batteries and cold pack bladders throughout the bedroom and attic. The officers testified that both are precursors to the manufacture of methamphetamine. A logical inference is that someone in

Holter's residence prepared the lithium batteries and cold packs so that they could be used to produce methamphetamine. The evidence presented shows that Holter lived at the residence with appellant, a four-month-old child, and a twelve-year-old child. No evidence suggests that others had access to the bedroom and attic, stripped the lithium batteries, and removed the bladders from the cold packs. Holter did not testify, so the state did not present any direct evidence that appellant is the individual who stripped the lithium batteries or removed the bladders from the cold packs. The state did, however, present ample circumstantial evidence that appellant did so.

{¶ 35} The state also introduced into evidence photographs of the upstairs bedroom and attic where numerous chemicals, batteries, and cold packs were discovered. The photographs also show syringes and razor blades laying on a table in the bedroom in plain view. Another photograph shows a drawer full of white socks with orange syringe caps scattered throughout. Although the state did not present a witness to testify that the white socks belonged to appellant, the jury could have used its collective common sense to determine that the white socks are men's socks and belonged to appellant. From this, the jury could have inferred that appellant was aware of the drug activity and methamphetamine production occurring at Holter's residence. The jury also could have reasonably inferred that the presence of multiple syringe caps in the sock drawer, the prevalence of precursors and drug paraphernalia located in the bedroom and attic, and his romantic relationship with Holter indicated that appellant not only knew about the methamphetamine manufacturing, but actually engaged in the manufacturing process. Even though the evidence does not suggest that the syringe caps are used in the manufacturing process, the number of syringe caps in the drawer suggests that appellant used syringes and used them for a purpose other than a medical condition.

{¶ 36} The jury also could have inferred, from the prevalence of chemicals and materials used to make methamphetamine and appellant's and Holter's relationship, that the two were partners in a romantic sense and partners in manufacturing methamphetamine.[5] Given the parties' romantic relationship and prevalence of precursors located in the bedroom and in the attic (which was accessed via the bedroom), the jury could have reasonably inferred that appellant engaged in the manufacture of methamphetamine. See State v. Jackson, 9th Dist. Summit Nos. 22378 and 22394, 2005-Ohio-5184 (determining that cohabitating man and woman held to each have constructive possession of cocaine found in plain view in closet of only bedroom, where both male and female clothes were located); State v. Smith, 3rd Dist. Paulding No. 11-95-7 (Nov. 17, 1995) (observing that large quantity of narcotics found throughout house, including defendant's bedroom, constituted circumstantial evidence of defendant's knowledge of and control over those narcotics). Thus, this is not a case in which the only evidence of appellant's guilt is his status as a resident of the premises. See State v. Haynes, 25 Ohio St.2d 264, 270, 267 N.E.2d 787 (1971) (concluding that when law enforcement officers seize narcotics from jointly occupied premises the defendant's status as a resident or lessee, standing alone, creates no inference of guilt).

{¶ 37} Additionally, simply because appellant was not on the premises when the officers discovered the active methamphetamine lab and precursors does not mean that the state failed to

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[5] The state did not charge appellant under the complicity statute and the trial court did not give the jury a complicity instruction. We recognize that R.C. 2923.03(F) permits a conviction upon proof that a defendant was complicit in the offense, even though the indictment is stated in terms of the principal offense and does not mention complicity. State v. Chandler, 4th Dist. Highland No. 14CA11, 2014-Ohio-5215, ¶19. Appellate courts cannot, however, "'consider evidence of a defendant's complicity in a criminal act if the jury was not instructed on complicity since this would violate the defendant's Sixth Amendment right to a jury trial.'" State v. Martin, 4th Dist. Gallia No. 09CA19, 2012-Ohio-1519, ¶34, quoting State v. Peterson, 7th Dist. Columbiana No. 06CO50, 2007-Ohio-4979, ¶23. Consequently, we are limited to considering whether the evidence supports appellant's conviction as the principal offender. Id.

show that appellant knowingly manufactured methamphetamine. The state is not required to prove that appellant is the individual who assembled all of the materials located in the pickup truck the evening of April 12, 2013, and started the process of manufacturing methamphetamine. Instead, the state needed only to prove that appellant engaged in any part of the production of methamphetamine, which includes extraction and other activities incident to production. R.C. 2929.01(J).

{¶ 38} Extracting lithium strips and ammonium nitrate from cold packs is a necessary part of the production of methamphetamine and, thus, falls within the definition of "manufacturing." As we stated above, the state presented evidence showing that appellant engaged in part of the production of methamphetamine by extracting lithium strips and ammonium nitrate from cold packs. Thus, even if the evidence does not support a finding that appellant assembled the materials in the pickup truck and started the manufacturing process, the evidence still supports a finding that he engaged in some part of the manufacturing process.

{¶ 39} We recognize appellant's concern with the lack of direct evidence to connect him to the methamphetamine lab in the truck and to the materials in Holter's home. It is well-established, however, that "a defendant may be convicted solely on the basis of circumstantial evidence." State v. Nicely, 39 Ohio St.3d 147, 151, 529 N.E.2d 1236 (1988). "Circumstantial evidence and direct evidence inherently possess the same probating value." Jenks, paragraph one of the syllabus. "Circumstantial evidence is defined as '[t]estimony not based on actual personal knowledge or observation of the facts in controversy, but of other facts from which deductions are drawn, showing indirectly the facts sought to be proved. * * *'" Nicely, 39 Ohio St.3d at 150, quoting Black's Law Dictionary (5 Ed.1979) 221.

{¶ 40} Appellant argued to the jury that he was not found on the premises when the officers discovered the active methamphetamine lab and precursors. He further asserted that the state lacked direct evidence to (1) tie him to the premises, (2) show that he knew methamphetamine was being manufactured on the premises, and (3) demonstrate that he is the individual who manufactured the methamphetamine located in the truck. During his closing argument, appellant's counsel pointed to the lack of direct evidence to tie appellant to the premises and the lack of direct or physical evidence to show that he touched any of the precursors or manufactured methamphetamine. Thus, the jury was well-aware of the circumstantial nature of the state's case and appellant's claim that he is not responsible for the offense. Furthermore, we note that during deliberations, the jury requested the court to define "knowingly," "possess," and "illegal manufacture of methamphetamine." The record shows, therefore, that the jury carefully considered the evidence and appellant's arguments. We do not conclude that the jury committed a manifest miscarriage of justice by convicting appellant of illegal manufacture of methamphetamine.[6]

{¶ 41} In sum, we believe that the evidence supports appellant's conviction. The evidence and reasonable inferences show the following: (1) stripping lithium batters and removing bladders from cold packs is part of the production of methamphetamine; (2) stripped lithium batteries and cold pack bladders were located in and near a bedroom appellant shared with Holter; (3) someone with access to the bedroom and attic stripped the batteries and removed the cold packs; (4) appellant and Holter share a romantic relationship and are the only adults living on the premises;

[6] This is not to suggest that a defendant's conviction is unsustainable if a jury does not submit a question to the trial court during deliberations.

(5) appellant and Holter are the only adults with access to both the bedroom and the attic; (6) nothing suggests that other individuals had access to the bedroom and attic area where the precursors were discovered; (7) syringe caps were found in a sock drawer containing men's socks, presumably appellant's; and (8) due to the prevalence of precursors found in the bedroom, appellant was aware that methamphetamine was being manufactured on the premises. Therefore, the jury could have rationally determined that given these circumstances, appellant engaged in some part of the manufacture of methamphetamine. Additionally, the jury may have considered that Holter's four-month-old child would have demanded much of her attention and that appellant, therefore, played the larger, if not the only, role in the manufacturing process. By process of elimination, the jury reasonably could have deduced that appellant–either with or without Holter's help–manufactured methamphetamine. Consequently, we do not believe that the jury committed a manifest miscarriage of justice by convicting appellant of illegal manufacture of methamphetamine.

{¶ 42} Our decision that appellant's conviction is not against the manifest weight of the evidence also disposes of his claim that sufficient evidence fails to support his conviction. Additionally, because appellant's illegal manufacture of methamphetamine conviction is not against the manifest weight of the evidence or unsupported by sufficient evidence, any error the jury may have committed by finding appellant guilty of the two merged offenses is harmless and we need not consider appellant's assignments of error as they related to the merged offenses.

{¶ 43} Accordingly, based upon the foregoing reasons, we hereby overrule appellant's second and third assignments of error and affirm the trial court's judgment.

JUDGMENT AFFIRMED.

Harsha, J., concurring in part and dissenting in part:

{¶ 44} I concur in affirming the trial court's judgments except for appellant's conviction for manufacturing methamphetamine. That conviction is based upon too little evidence and too many inferences to pass the sufficiency of the evidence test. Therefore, I dissent from that portion of our judgment.

JUDGMENT ENTRY

It is ordered that the judgment be affirmed and that appellee recover of appellant the costs herein taxed.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Meigs County Common Pleas Court to carry this judgment into execution.

If a stay of execution of sentence and release upon bail has been previously granted, it is continued for a period of sixty days upon the bail previously posted. The purpose of said stay is to allow appellant to file with the Ohio Supreme Court an application for a stay during the pendency of the proceedings in that court. The stay as herein continued will terminate at the expiration of the sixty day period.

The stay will also terminate if appellant fails to file a notice of appeal with the Ohio Supreme Court in the forty-five day period pursuant to Rule II, Sec. 2 of the Rules of Practice of the Ohio Supreme Court. Additionally, if the Ohio Supreme Court dismisses the appeal prior to the expiration of said sixty days, the stay will terminate as of the date of such dismissal.

A certified copy of this entry shall constitute that mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

Hoover, P.J.: Concurs in Judgment & Opinion
Harsha, J.: Concurs in part & Dissents in part with Opinion

For the Court

BY:_____
Peter B. Abele, Judge

NOTICE TO COUNSEL

Pursuant to Local Rule No. 14, this document constitutes a final judgment entry and the time period for further appeal commences from the date of filing with the clerk.