[Cite as *State v. Waller*, 2018-Ohio-2014.]

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

STATE OF OHIO,	:	
Plaintiff-Appellee,	:	Case No. 17CA1044
vs.	:	
NATHANIEL WALLER,	:	DECISION AND JUDGMENT ENTRY
Defendant-Appellant.	:	

APPEARANCES:

Timothy Young, Ohio Public Defender, and Katherine R. Ross-Kinzie, Assistant State Public Defender, Columbus, Ohio, for appellant.

David Kelley, Adams County Prosecutor, and Kris D. Blanton, Adams County Assistant Prosecuting Attorney, West Union, Ohio, for appellee.

CRIMINAL APPEAL FROM COMMON PLEAS COURT
DATE JOURNALIZED:5-10-18
ABELE, J.

{¶ 1} This is an appeal from an Adams County Common Pleas Court judgment of conviction and sentence. A jury found Nathaniel Waller, defendant below and appellant herein, guilty of (1) the illegal manufacture of drugs in violation of R.C. 2925.04(A), a second-degree felony, and (2) the illegal assembly or possession of chemicals for the manufacture of drugs in violation of R.C. 2925.041(A), a third-degree felony.

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

FIRST ASSIGNMENT OF ERROR:

> "THE TRIAL COURT VIOLATED MR. WALLER'S RIGHTS 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, AND THE ILLEGAL ASSEMBLY OR POSSESSION OF CHEMICALS FOR THE MANUFACTURE OF DRUGS (METHAMPHETAMINE). FIFTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION; ARTICLE I, SECTION 16 OF THE OHIO CONSTITUTION; CRIM.R. 29; TRIAL TRANSCRIPT P. 307, 310; MARCH 27, 2017 JUDGMENT ENTRY ON SENTENCE)"
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> SECOND ASSIGNMENT OF ERROR:
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> "MR. WALLER'S CONVICTION [SIC.} FOR ILLEGAL MANUFACTURING AND ILLEGAL ASSEMBLY WERE AGAINST THE MANIFEST WIGHT OF THE EVIDENCE IN VIOLATION OF MR. WALLER'S RIGHT TO DUE PROCESS OF LAW UNDER THE FIFTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION, AND ARTICLE I, SECTION 10 OF THE OHIO CONSTITUTION. (MARCH 27, 2017 JUDGMENT ENTRY ON SENTENCE) "
>
> THIRD ASSIGNMENT OF ERROR:
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> "THE TRIAL COURT COMMITTED REVERSIBLE ERROR WHEN IT DID NOT ALLOW DEFENSE COUNSEL TO ADMIT RELEVANT EVIDENCE AND THUS IMPEDED MR. WALLER'S ABILITY TO DEFEND HIMSELF AGAINST THE CHARGES LEVIED AGAINST HIM, IN VIOLATION OF HIS FIFTH, SIXTH, AND FOURTEENTH AMENDMENT RIGHTS UNDER THE UNITED STATES CONSTITUTION, AND ARTICLE I, SECTIONS 10 AND 16 OF THE OHIO CONSTITUTION. (TRIAL TRANSCRIPT P. 280)"

{¶ 3} On August 4, 2016, an Adams County Grand Jury returned an indictment that charged appellant with (1) one count of knowingly manufacturing or engaging in a part of the production of methamphetamine, a Schedule II controlled substance, in violation of R.C. 2925.04(A), a second-degree felony, and (2) one count of knowingly assembling or possessing one or more chemicals that may be used to manufacture a controlled substance in Schedule II, to wit: starting

fluid, drain cleaner and sulfuric acid, with the intent to manufacture a Schedule II controlled substance, to wit: Methamphetamine, in violation of R.C. 2925.041(A), a third-degree felony.

{¶ 4} Appellant entered not guilty pleas and filed a motion to suppress evidence and asserted that law enforcement authorities improperly seized evidence during the search of his office. The trial court overruled the motion and the matter proceeded to trial. At the jury trial, the evidence revealed that on July 26, 2016 at 2:30 a.m., officers received a tip and visited Timber Ridge Apartments. Adams County Sheriff's Deputy Brandon Asbury testified that he noticed lights on in the apartment administration building and a strong chemical odor that appeared to get stronger as he approached the building. Deputy Asbury recognized the smell of starting fluid and noticed that it emanated from the lighted administration building, where he could also see appellant and two females inside the building. From his training and experience, Deputy Asbury knew that the odor typically indicated the manufacture of methamphetamine. Deputy Asbury then detained the three suspects outside of the building and informed them of their *Miranda* rights.

{¶ 5} When Deputy Asbury and Sergeant Michael Mills entered the building, they found "a two liter bottle that had been cut off sitting on the table. There was some lithium batteries. There was some Drain-O. Some starting fluid. Most of the components that I mentioned earlier that are used in the manufacturing of methamphetamine I located inside of that room." In addition, Deputy Asbury testified that they also found lye, salt and ammonia nitrate pellets from cold packs in what appeared to be a break room. Deputy Asbury also testified that when he found appellant, he did not appear to be performing any type of maintenance work at 2:30 that morning.

{¶ 6} Sergeant Michael Mills testified that during nightly patrols, he would glance at the apartment office and, although the lights were usually off in the early morning hours, on July 26,

2016 the lights were on. Sergeant Mills stated that, after he arrived, he immediately noticed meth lab odor. He also investigated a van as it left the parking lot while Deputy Asbury investigated the office. Sergeant Mills spoke to the van driver, who allowed him to search the vehicle. After Sergeant Mills determined that the van had nothing to do with the apartments, he let the driver go and joined Deputy Asbury.

{¶ 7} Inside, Sergeant Mills found a plastic two liter soft drink bottle with the top cut off, with liquid around and inside the bottle. "There was a baggy of white beads which are extracted from a cold pack, with the ammonia nitrate that they use." In addition, Sergeant Mills testified that they located a porcelain jar next to the refrigerator, and chemicals on a shelf in the break room. Sergeant Mills indicated that the bottle had a smell that he associated with the manufacture of methamphetamine, and a powdery substance in and around it, which is the methamphetamine. Sergeant Mills also found Double Mint Gum wrappers on the desk.

{¶ 8} Sergeant Mills further testified that another officer found a plastic bucket inside of a privacy fence, with access from the break room to the bucket's location. Inside the bucket, officers found an actual meth lab with chemicals mixed together. On top of the bucket was the top portion of the two liter bottle, with a Double Mint Gum packet wrapped around the opening. Also, the top portion of the bottle is consistent with the cutting of the bottom portion of the bottle found inside the break room.

{¶ 9} On cross-examination, counsel inquired about the occupants of the van located in the parking lot that Sergeant Mills investigated prior to his entry into the apartment office. Sergeant Mills testified that Billy Rein drove the van, and when he questioned the occupants about their activities, they stated that they had visited the apartments to see a female friend. Sergeant Mills also

stated that when he approached appellant inside the building, he noticed the overwhelming smell of methamphetamine emanating from appellant. The state also called West Union Police Department Officer Kendra Young to testify. She entered the building with Deputy Asbury and located the blue five-gallon bucket about twenty feet outside of the building. Officer Young photographed the evidence, both inside and outside the building, and called for officers to clean the scene. Among other things, Officer Young identified several photographs that she had taken, including the bucket meth lab, a photograph of Thrust Starting Fluid, crystal drain opener, another crystal opener by Robic, Morton salt and some batteries.

{¶ 10} Next, the state called Adams County Sheriff's Deputy Jeffrey Vickers. Deputy Vickers is certified to clean clandestine meth labs, and did do so on July 26, 2016. Deputy Vickers described the process of making methamphetamine in a bottle and clean up process. Deputy Vickers stated that he tested the lab as he broke it down, and the lab tested positive for the components necessary to manufacture methamphetamine and, in fact, was in the process of actively cooking the methamphetamine. Officer Vickers also testified about sending liquid to the Bureau of Criminal Investigation for testing.

{¶ 11} Finally, the state called Ohio Bureau of Criminal Investigation forensic scientist Michelle Taylor who testified about testing three bottles that contained liquid and a plastic bag that contained an off-white substance. Taylor stated that the three bottles contained liquid weighing 17.32 grams and the off-white substance weighed .25 grams, all found to be methamphetamine. At the conclusion of the state's case, appellant made a Crim.R. 29 motion for a directed verdict. However, the trial court reviewed the evidence and denied both motions.

{¶ 12} Appellant then presented evidence. Jeanie Oppy, manager at Timber Ridge

Apartments when appellant was the maintenance person, testified that appellant worked there three and a half years, and that she and appellant purchased cleaning supplies, including drain cleaner. In addition, Oppy indicated that appellant purchased lithium batteries for thermostats and smoke alarms. Oppy also testified that she had been told that "people were suspecting that there were meth labs being made down through the fence line," but appellant told her that "he went out there and didn't see no kind of evidence of it." Oppy also stated that she had also been aware of a police investigation in July for a meth lab. She explained that prior to the incident, the storage shed at the complex had been broken into and they moved some items into the office to avoid theft. Oppy also testified that appellant gave tenants bags of drain cleaner when they had clogged drains.

{¶ 13} Melissa Barnes testified for the defense and stated that in late July 2016, she stayed with appellant at the apartment complex. Barnes testified that on the night of July 26, she saw Billy Rein and Phil Fetters in the administrative office.

{¶ 14} Last, Diana Hansen testified that she is a property manager for the complex. Hansen is also appellant's mother. Hansen stated that the cleaning supplies, including the drain cleaner and batteries, are used to maintain the property and are typically kept in the office.

{¶ 15} After hearing the evidence adduced during the two-day trial, the jury found appellant guilty of both counts. The trial court (1) sentenced appellant to serve a mandatory prison term of seven years on count one and thirty months on count two, with the prison terms to be served concurrently; (2) notified appellant that post-release control is mandatory for a period of three years, and (3) ordered appellant to pay mandatory fines of $7,500 for count one and $5,000 for count two, but waived the fines due to the timely filing of an affidavit of indigency. This appeal followed.

I.

{¶ 16} Because the arguments in appellant's first two assignments of error are interrelated, we first consider appellant's second assignment of error where he asserts that his convictions are against the manifest weight of the evidence.

{¶ 17} 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. Clark*, 4th Dist. Highland No. 14CA20, 2015-Ohio-5003, ¶ 7, citing *State v. Wickersham*, 4th Dist. Meigs No 13CA10, 2015-Ohio-2756, ¶ 25; *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. "In 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." *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 603, 91-192 (1978). An appellate court will generally leave the issues of evidence weight and credibility to the fact finder, as long as a rational basis exists in the record for its decision. *Clark* at ¶ 8, quoting *State v. Picklesimer*, 4th Dist. Pickaway No. 11CA9, 2012-Ohio-1282, ¶ 24. Thus, 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.'" *Wickersham, supra*, at ¶ 9, quoting *State v.*

Thompkins, 78 Ohio St.3d 380, 387, 678 N.E.2d 541, quoting *State v. Martin*, 20 Ohio App.3d 172, 175, 485 N.E.2d 717 (1st Dist.1983). Finally, 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).

{¶ 18} In the case sub judice, appellant violated R.C. 2925.04, which provides: "(A) No person shall knowingly cultivate marijuana or knowingly manufacture or otherwise engage in any part of the production of a controlled substance." "Manufacturing 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). And, "[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.

{¶ 19} Appellant also violated R.C. 2925.041, illegal assembly or possession of chemicals for manufacture of drugs, which provides: "(A) No person shall knowingly assemble or possess one or more chemicals that may be used to manufacture a controlled substance in schedule I or II with the intent to manufacture a controlled substance in schedule I or II in violation of section 2925.04 of the Revised Code." Further, R.C. 2925.041(B) states: "In a prosecution under this section, it is not necessary to allege or prove that the offender assembled or possessed all chemicals necessary to manufacture a controlled substance in schedule I or II. The assembly or possession of a single chemical that may be used in the manufacture of a controlled substance in schedule I or II, with the

intent to manufacture a controlled substance in either schedule, is sufficient to violate this section."

{¶ 20} In the case sub judice, after our review of the evidence adduced at trial, we recognize that the evidence that connects appellant to the offenses is largely circumstantial. However, it is well-established that "a defendant may be convicted solely on the basis of circumstantial evidence." *Wickersham* at ¶ 39, quoting *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." *State v. Jenks*, 61 Ohio St.3d 259, 574 N.E.2d 492 (1991), 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 (5th Ed.1979) 221.

{¶ 21} Appellant asserts that the materials the authorities found involved in methamphetamine production was not located in the building, but outside the complex office. Appellant also contends that the state failed to prove the essential culpable mental state element of knowingly, arguing that no connection exists between appellant and the five-gallon bucket found outside the office or the Pepsi bottle. Appellant claims that, although as the maintenance person he had a key to the administration office, along with access to the desk and many supplies, he did not have exclusive access to the office. In fact, appellant maintains that the testimony revealed that a door key is kept under the door mat and is known to many other employees at the complex. Furthermore, appellant argues that, although he had access to the cleaning products and equipment, Manager Oppy is responsible for purchasing the items. Finally, appellant notes that the items were not found grouped together, but found in various places around the room, in their natural locations.

{¶ 22} "Possession" is generally defined as "having control over a thing or substance, but may not be inferred solely from mere access to the thing or substance through ownership or occupation of the premises upon which the thing or substance is found." R.C. 2925.01(K). Possession may be actual or constructive. *State v. Gavin*, 4th Dist. Scioto No. 3592, ¶ 35, quoting *State v. Moon*, 4th Dist. Adams No. 08CA875, 2009-Ohio-4830, ¶ 19. While actual possession exists when circumstances indicate that an individual has or had an item within his immediate physical possession, *State v. Kingsland*, 177 Ohio App.3d 655, 2008-Ohio-4148, 895 N.E.2d 633, ¶ 13 (4th Dist.), constructive possession exists when an individual knowingly exercises dominion and control over an object, even though that object may not be within his immediate physical possession. *Gavin, supra*, quoting *State v. Hankerson*, 70 Ohio St.2d 87, 434 N.E.2d 1362 (1982), syllabus. For constructive possession to exist, the state must show that the defendant was conscious of the object's presence. *State v. Meddock*, 4th Dist. Pike No. 16CA864, 2017-Ohio-4414, ¶ 56, citing *Gavin, supra*; *Hankerson* at 91. Both dominion and control, and whether a person is conscious of an object's presence, may be established through circumstantial evidence. *Gavin, supra; State v. Brown*, 4th Dist. Athens No. 09CA3, 2009-Ohio-5390 at ¶ 19.

{¶ 23} In the case at bar, the jury heard evidence that (1) appellant, as the maintenance person at the complex, worked in the building where the drugs and components were found; (2) it is very unusual for appellant to work at 2:30 a.m.; (3) the two female visitors had no permission to be in the maintenance building; (4) appellant had access to all of the components necessary to manufacture methamphetamine, (5) three law enforcement officers testified to the strong odor of methamphetamine in the building; (6) one officer testified that the odor emanated from appellant; (7) officers found a two liter bottle with the top cut off sitting on the table in the office, and in the

immediate vicinity lithium batteries, starting fluid, drain cleaner, lye, salt and ammonia nitrate pellets from cold packs; and (8) Officer Young testified that he observed the active meth lab in the five-gallon bucket just feet from the administrative building. Also, the Double Mint gum wrappers on the desk inside the building appeared to match the Double Mint gum wrappers found wrapped around the opening of the two liter bottle. In addition, the jury received multiple exhibits, including: (1) a photograph of the bottom half of the two liter Pepsi bottle with the top cut off, (2) a photograph of Crystal Heat Drain Opener, (3) lithium batteries in their original package, (4) a photograph of Thrust Starting Fluid, (5) a sulfuric acid drain cleaner, (6) gum wrappers, (7) a photograph of a bag of ammonia nitrate, (8) a photograph of the top portion of the Pepsi bottle, (9) a photograph of the gum wrapper found on the lid of the bottle, (10) a photograph of all of the items in the breakdown of the meth lab, (11) a photograph of the officers disassembling the active meth lab, and (12) the BCI&I report.

{¶ 24} We recognize that a defendant's mere presence in an area where drugs are located does not conclusively establish constructive possession. *State v. Cuffman*, 3rd Dist. Crawford Nos. 3-11-01, 3-11-02, 2011-Ohio-4324, ¶ 32, *Cincinnati v. McCartney*, 30 Ohio App.2d 45, 48, 281 N.E.2d 855 (1st Dist.1971). However, "readily usable drugs found in very close proximity to a defendant may constitute circumstantial evidence and support a conclusion that the defendant had constructive possession of such drugs." *State v. Barr*, 86 Ohio App.3d 227, 235, 620 N.E.2d 242 (8th Dist.1993), citing *State v. Pruitt*, 18 Ohio App.3d 50, 480 N.E.2d 499 (8th Dist.1984). The state points out that although others may have had access to the building and to the chemicals used to make methamphetamine, Jeanie Oppy, the supervising manager of the apartment complex, testified that appellant had general access to the chemicals. More important, it is not typical for appellant to

work on apartment tasks at two in the morning, nor to be in the administration building, especially with guests, at that hour.

{¶ 25} Finally, appellant argues that conflicting evidence was adduced regarding the contents of the bag that contained ammonia nitrate. The state responds that three witnesses testified that the substance is ammonia nitrate, and the witness who testified that the suspected ammonia nitrate is drain opener is appellant's mother. Moreover, even assuming that her testimony is correct and the substance in the bag is drain cleaner, drain cleaner is a component used to manufacture methamphetamine.

{¶ 26} Once again, we point out that the state presented evidence to establish that (1) appellant had access to the administrative building; (2) appellant was found in that building at 2:30 a.m. with two females; (3) officers noticed the odor of methamphetamine at the complex immediately upon exiting their vehicle; (4) appellant had access to the necessary components to manufacture methamphetamine; (5) appellant smelled of methamphetamine manufacture and (6) a methamphetamine lab was found within feet of the building. The jury, after having the opportunity to hear witness testimony and to consider the physical evidence, concluded that the prosecution established that appellant did, in fact, violate the pertinent statutory provisions. Generally, it is the duty of the trier of fact to resolve witness credibility issues. Here, the jury obviously opted to believe the prosecution's version of the facts.

{¶ 27} Consequently, after our review of the record, we conclude that the jury neither lost its way nor created a manifest miscarriage of justice. Accordingly, the jury's verdict is not against the manifest weight of the evidence and we overrule appellant's second assignment of error.

II.

{¶ 28} In his first assignment of error, appellant asserts that the trial court violated his rights to due process and to 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 methamphetamine, and the illegal assembly or possession of chemicals for the manufacture of drugs in violation of his Fifth and Fourteenth Amendment rights.

{¶ 29} Criminal Rule 29(A) provides: "The court on motion of a defendant or on its own motion, after the evidence on either side is closed, shall order the entry of a judgment of acquittal of one or more offenses charged in the indictment, information or complaint, if the evidence is insufficient to sustain a conviction of such offense or offenses." "A motion for acquittal under Crim.R. 29(A) is governed by the same standard as the one for determining whether a verdict is supported by sufficient evidence." *State v. Wright*, 2016-Ohio-7654, 74 N.E. 3d 695, ¶ 21, quoting *State v. Tenace*, 109 Ohio St.3d 255, 2006-Ohio-2417, 847 N.E.2d 386, ¶ 37; *State v. Colley*, 4th Dist. Scioto No. 16CA3740, 2017-Ohio-4080, ¶ 39. "When a court reviews a record for sufficiency, '[t]he 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.'" *Wright* at ¶ 22, quoting *State v. Maxwell*, 139 Ohio St.3d 12, 2014-Ohio-1019, 9 N.E.3d 930, ¶ 146, quoting *Jenks*, *supra*, paragraph two of the syllabus. In making its ruling, a court does not weigh the evidence, but simply determines whether the evidence, if believed, is adequate to support a conviction. In other words, the motion does not test the rational persuasiveness of the State's case, but merely its legal adequacy. *State v. Reyes-Rosales*, 4th Dist. Adams No. 15CA1010, 2016-Ohio-3338, ¶ 15.

{¶ 30} It is important to note that 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. *Wickersham* at ¶ 27, citing *State v. Pollitt*, 4th Dist. Scioto No. 08CA3263, 2010-Ohio-2556, ¶ 15. Thus, a determination that the weight of the evidence supports a conviction is also dispositive of the issue of sufficiency and, consequently, a Crim.R. 29 claim. *State v. Lombardi*, 9th Dist. Summit No. 22435, 2005-Ohio-4942, ¶ 9.

{¶ 31} Accordingly, having found no merit to appellant's argument that his convictions are against the manifest weight of the evidence, we also conclude that sufficient evidence supports his convictions. Thus, we overrule appellant's first assignment of error.

III.

{¶ 32} In his third assignment of error, appellant asserts that the trial court committed reversible error when it did not allow defense counsel to submit relevant evidence to the court, and thus impeded appellant's ability defend himself against the charges levied against him in violation of his Fifth, Sixth, and Fourteenth Amendment rights under the United States Constitution, and Article I, Sections 10 and 16 of the Ohio Constitution. In particular, appellant contends that the trial court erred when it did not allow defense counsel to present an alternative theory of guilt by introducing the subsequent conviction of Billy Rein, the driver of the van who was stopped leaving the property. Appellant also argues that four other individuals were in the immediate vicinity of the meth lab, either immediately before or when the police arrived, including the two women in the administrative building with appellant and the two men in the van who left the scene. The defense wanted to present an alternate theory of guilt and question one witness about Rein's subsequent arrest and conviction for manufacturing methamphetamine because six months after authorities found the lab at Timber Ridge, Rein had a one-pot meth lab cooking in the back of his truck.

{¶ 33} Generally, questions involving the admissibility of evidence are left to a trial court's sound discretion, and rulings on evidentiary issues will not be reversed on appeal absent an abuse of discretion and a showing that the accused suffered material prejudice. *State v. Sage*, 31 Ohio St.3d 173, 510 N.E.2d 343 (1987) paragraph two of the syllabus. *See also State v. Long*, 53 Ohio St.2d 91, 98, 372 N.E.2d 804 (1978). An abuse of discretion implies that a court's attitude is unreasonable, arbitrary or unconscionable. *Darby v. A-Best Products Co.*, 102 Ohio St.3d 410, 2004-Ohio-3720, 811 N.E.2d 1117. In applying the abuse of discretion standard, the appellate court should not substitute its judgment for that of the trial court. *Pons v. Ohio State Med. Bd.*, 66 Ohio St.3d 619, 621, 614 N.E.2d 748 (1993).

{¶ 34} In the instant case, the trial court determined that Rein's subsequent conviction is not relevant and the court did not allow the line of questioning. Appellant argues that while Rein's other-act evidence could not have been admitted to prove that he acted in conformity with the subsequent conviction, it should have been admitted to show that he had knowledge of methamphetamine because, as appellant's trial counsel argued, "it would show that he was involved with this kind of activity."

{¶ 35} Evid.R. 401 defines "relevant evidence" as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Evid.R. 402 provides that all relevant evidence is admissible, except as otherwise provided in the Rules of Evidence or other law. Evid.R. 403 states that "[a]lthough relevant, evidence is not admissible if its probative value is substantially outweighed by the danger of unfair prejudice, of confusion of the issues, or of misleading the jury."

{¶ 36} Evid.R. 404(B) provides that "[e]vidence of other crimes, wrongs, or acts is not

admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity or absence of mistake or accident." Appellant argues that the Billy Rein other-acts evidence could not have been admitted to prove he had acted in conformity with his subsequent conviction, but should have been admitted to show that he has knowledge regarding methamphetamine. Thus, appellant argues that the trial court should have admitted the evidence because it shows proof of motive, opportunity, intent, preparation, plan, knowledge, identity or absence of mistake or accident. The state, however, argues that the two events are completely unrelated, other than the fact that Billy Rein was at the apartment complex on the night in question.

{¶ 37} The Second District Court of Appeals addressed the application of Evid.R. 404(B) to third parties in *State v. Gillispie*, 2d Dist. Montgomery No. 24456, 2012-Ohio-2942, 985 N.E.2d 145. The *Gillispie* court points to the analysis of the Third Circuit Court of Appeals in *United States v. Stevens*, 935 F.2d 1380 (3d Cir.1991), where the court explained that "In contrast to ordinary 'other crimes' evidence, which is used to incriminate criminal defendants, 'reverse 404(b)' evidence is utilized to exonerate defendants." *Stevens*, 1401-1402. Also pointing to the New Jersey Supreme Court's decision in *State v. Garfole*, 76 N.J. 445, 388 A.2d 587 (1978), the Second District noted that a majority of federal circuits take the *Stevens* approach, but a few, including the Sixth Circuit Court of Appeals, hold that Fed.R. 404(b) "protects every person, not just the criminal defendant or a victim." *Wynne v. Renico*, 606 F.3d 867, 873 (6th Cir.2010) (Martin, J., concurring in the result based on precedent, but criticizing the Sixth Circuit Court of Appeals' former decision in *United States v. Lucas*, 357 F.3d 599 (6th Cir.2004), as illogical and having been wrongly

decided.).

{¶ 38} Regardless of the particular approach to this type of evidence, we agree with the trial court's conclusion that in the case at bar the danger of confusion of the issues or misleading the jury substantially outweighed the probative value of the evidence. Evid. R. 403. Unlike some of the cases that the Second District cites that involved crimes with unique patterns of criminal conduct and modus operandi, such as particular methods of sexual assaults, see *Gillispie*, *supra*, here the case involves the illegal manufacture of methamphetamine and the illegal assembly or possession of chemicals for the manufacture of methamphetamine. No evidence was advanced to establish a unique or particular method or "fingerprint" associated with Billy Rein's manufacturing method that could be connected to the method used in the instant case. Thus, the record does not show that the trial court's decision to prevent the appellant from using other-crimes evidence defensively is unreasonable, and the trial court did not act arbitrarily or unconscionably. Thus, the subsequent conviction of Billy Rein, who did not testify at trial, is irrelevant to the trial in the case at bar, and the introduction of such evidence would have likely confused or misled the jury.

{¶ 39} Accordingly, we find no abuse of discretion in the trial court's decision to exclude the evidence in question. Thus, we overrule appellant's final assignment of error and affirm the trial court's judgment.

JUDGMENT AFFIRMED.

Harsha, J., concurring:

I concur in the judgment and opinion but want to separately address his argument that " '[i]n order to prove an essential element of a crime the circumstantial evidence must be irreconcilable with any reasonable theory of the accused's innocence.' " *See* Ant. Brief, p. 8, quoting *State v. Hankerson*, 70 Ohio St.2d 87, 91, 434 N.E.2d 1362 (1982). In *Hankerson*, the Supreme Court of Ohio cited *State v. Kulig*, 37 Ohio St.2d 157, 309 N.E.2d 897 (1974), to support that proposition. But Waller's argument, has been meritless for *over 26 years*, i.e., *since 1991*, when the Supreme Court overruled *Kulig* and held that "[w]hen the state relies on circumstantial evidence to prove an essential element of the offense charged, there is no need for such evidence to be irreconcilable with any reasonable theory of innocence in order to support a conviction." *State v. Jenks*, 61 Ohio St.3d 259, 574 N.E.2d 492 (1991), paragraph one of the syllabus; *State v. Adams*, 144 Ohio St.3d 429, 2015-Ohio-3954, 45 N.E.3d 127, ¶ 247.

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 Adams 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 Supreme Court of Ohio 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 Supreme Court of Ohio in the forty-five day period pursuant to Rule II, Sec. 2 of the Rules of Practice of the Supreme Court of Ohio. Additionally, if the Supreme Court of Ohio 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 with Concurring 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.