[Cite as *State v. Timofeev*, 2009-Ohio-3007.]

STATE OF OHIO	)	IN THE COURT OF APPEALS
	)ss:	NINTH JUDICIAL DISTRICT
COUNTY OF SUMMIT	)	

STATE OF OHIO	C. A. No. 24222
Appellee	
v.	APPEAL FROM JUDGMENT ENTERED IN THE
EUGUENI A. TIMOFEEV	COURT OF COMMON PLEAS COUNTY OF SUMMIT, OHIO
Appellant	CASE No. CR 07 11 3679(F)

DECISION AND JOURNAL ENTRY

Dated: June 24, 2009

CARR, Judge.

{¶1} Appellant, Eugueni Timofeev, appeals his conviction from the Summit County Court of Common Pleas. This Court affirms.

I.

{¶2} Timofeev was originally indicted by the Summit County Grand Jury on one count of illegal manufacture of drugs, in violation of R.C. 2925.04(A), a felony of the second degree, and one count of illegal assembly or possession of chemicals for the manufacture of drugs, in violation of R.C. 2925.041(A), a felony of the third degree.

{¶3} On October 31, 2007, the Akron Police Department Street Narcotics Uniform Detail Unit ("S.N.U.D. Unit") was conducting surveillance of a residence located at 152 Fulmer Street in Akron, Ohio. The surveillance effort was in response to a tip that the Akron police had received on October 26, 2007, from an unidentified informant. According to the tip, the residence contained an active methamphetamine laboratory. Undercover officers conducted

surveillance of the home while uniform officers, in marked cruisers, provided backup by waiting out-of-sight in the immediate area. Detective Ted Male and Detective Donnie Williams were two of the officers working backup. At approximately 9:30 p.m., these officers heard an undercover officer make a radio call regarding a red pick-up truck. Detective Michael Schmidt, an undercover officer conducting surveillance, observed a red pick-up truck containing three individuals pull into the driveway of 152 Fulmer. Detective Schmidt then observed one individual exit the passenger's side of the truck, enter the residence for a few minutes and then quickly return to the vehicle. The pick-up truck left promptly after the individual returned. Detective Williams testified that, based on his training and experience, this type of short-term traffic is indicative of drug activity.

{¶4} One of the plainclothes detectives on the surveillance team witnessed the vehicle pull into a parking lot of a closed business, park for several minutes, and then exit the parking lot. Both Detective Williams and Detective Male, based on their individual training and experience, were suspicious of drug activity. Based on a concern that drugs purchased at 152 Fulmer Street were being consumed in the vehicle, Detective Male and several other uniformed officers initiated a traffic stop as the vehicle exited the parking lot and traveled westbound on East Market Street. As Detective Male approached the vehicle, he observed the rear seat passenger making furtive movements. Timofeev was in the front passenger seat. The rear passenger in the vehicle was Timofeev's girlfriend, Ashley Cumberledge. Detective Male asked Cumberledge what she had placed in her purse. Cumberledge denied placing anything in her purse. Detective Male asked if he could search the purse and Cumberledge granted him permission. Detective Male looked in the purse and found a small bindle containing a small amount of off-white powder.

{¶5} Detective Male proceeded to conduct a field test on the contents of the bindle. The field test indicated that methamphetamine was present in the substance. During the stop, Cumberledge was upset, emotional and crying. She proceeded to make statements to law enforcement. Detective Williams would testify at the suppression hearing that Cumberledge told law enforcement officials she moved into the Fulmer Street residence because she believed it would serve as a safe place while she recovered from her heroin addiction. Instead, she found that the residence was a "party house" where methamphetamine was actively being cooked in the basement. Detective Williams would further attest that Cumberledge said she had been told not to enter the basement and had been threatened with death if she disobeyed that directive. Cumberledge went on to tell law enforcement that she and her boyfriend, Timofeev, were heroin addicts living at the Fulmer Street residence.

{¶6} In light of the information obtained by law enforcement at the traffic stop, uniformed officers went to the 152 Fulmer Street residence. Upon arriving, Detective Male knocked on the door and observed an individual wearing just boxer shorts peer out the door, observe the presence of police, and then run back inside the house. Detective Williams would testify that, based on the information obtained at the traffic stop and this individual's behavior, the officers determined there was a substantial risk and forcibly entered the house. Upon entering the home, the officers were overwhelmed by an odor which is distinctive to an active methamphetamine laboratory. Due to the combustible nature of methamphetamine laboratories, the premises was secured and the Clandestine Lab Enforcement Team ("C.L.E.T.") responded to the scene.

{¶7} The officers proceeded to conduct a security sweep of the home and found several occupants, including one of the co-defendants in this case, John Hajjar, hiding in the closet.

Hajjar would testify that his sister, who owned the residence at 152 Fulmer Street, had moved to Florida and left him in charge of the house. He also testified that there was a methamphetamine laboratory in the basement. Both Hajjar and David Shuman, another man staying at the house, would testify that Timofeev knew of the methamphetamine lab and, on one occasion, put Shuman in contact with someone who could obtain a chemical necessary in manufacturing the drug.

{¶8} Officer Christopher Crockett, who works with C.L.E.T., would testify regarding numerous items which were found inside the residence and the dangers associated therewith. Officer Crockett would confirm that there was an active methamphetamine lab in the house and further stated that the odor from the lab was so strong that it permeated every room in the house.

{¶9} On November 29, 2007, Timofeev filed a motion to suppress the evidence obtained as a result of the stop, search, and seizure. Following a hearing, the motion to suppress was denied. The case proceeded to jury trial on April 14, 2008. Prior to the commencement of trial, at the request of the State, the charge of illegal assembly or possession of chemicals for the manufacture of drugs was amended to attempted illegal assembly or possession of the chemicals for the manufacture of drugs. This amendment was made over the objection of Timofeev. Following trial, Timofeev was found guilty of the amended charge of attempted illegal assembly or possession of chemicals for the manufacture of drugs, a felony of the fourth degree. He was found not guilty of the illegal manufacture of drugs charge. Timofeev was subsequently sentenced to a term of incarceration of sixteen months in the Ohio Department of Rehabilitation and Correction.

{¶10} Timofeev raises six assignments of error.

II.

ASSIGNMENT OF ERROR I

"THE COURT ERRED IN PERMITTING THE STATE TO AMEND THE INDICTMENT IN COUNT TWO TO 'ATTEMPT' AS IT CHANGED THE PENALTY AND DEGREE OF THE OFFENSE INDICTED BY THE GRAND JURY AND THUS CHANGED THE IDENTITY OF THE OFFENSE. STATE OF OHIO VS. DAVIS, SLIP OPINION NO. 2008-OHIO-4537[.]"

{¶11} Timofeev contends the trial court erred in permitting the State to amend the charge of illegal assembly or possession of chemicals for the manufacture of drugs, in violation of R.C. 2925.041(A), a felony of the third degree, to attempted illegal assembly or possession of the chemicals for the manufacture of drugs, a felony of the fourth degree.

{¶12} In support of his first assignment of error, counsel for Timofeev cites *State v. Davis*, 121 Ohio St.3d 239, 2008-Ohio-4537, at ¶9, in which the Supreme Court of Ohio held that Crim.R. 7(D) does not permit the amendment of an indictment when the amendment changes the penalty or degree of the charged offense, because such a change alters the identity of the offense. Under Crim.R. 7(D), "[t]he court may at any time before, during, or after trial amend the indictment***provided no change is made in the name or identity of the crime charged." In deciding *Davis*, the High Court relied on its ruling in *State v. Headley* (1983), 6 Ohio St.3d 475, 479, which held that an amendment to an indictment which increased the severity of the offense was improper. The Court also relied on its ruling in *State v. O'Brien* (1987), 30 Ohio St.3d 122, 123, which held that it was permissible to amend an indictment which had originally omitted the mens rea element of an offense because adding the correct mens rea element did not change the name or identity of the offense charged in the original indictment.

{¶13} This Court reads the Supreme Court of Ohio's ruling in *Davis* in concert with its rulings which have interpreted R.C. 2945.74 and Crim.R. 31(C).

{¶14} R.C. 2945.74 states:

> "The jury may find the defendant not guilty of the offense charged, but guilty of an attempt to commit it if such attempt is an offense at law. When the indictment or information charges an offense, including different degrees, or if other offenses are included within the offense charged, the jury may find the defendant not guilty of the degree charged but guilty of an inferior degree thereof or lesser included offense."

{¶15} Crim.R 31(C) similarly states:

> "The defendant may be found not guilty of the offense charged but guilty of an attempt to commit it if such an attempt is an offense at law. When the indictment, information, or complaint charges an offense including degrees, or if lesser offenses are included within the offense charged, the defendant may be found not guilty of the degree charged but guilty of an inferior degree thereof, or of a lesser included offense."

{¶16} In interpreting R.C. 2945.74 and Crim.R. 31(C), the Supreme Court of Ohio has held, "a jury may consider three groups of lesser offenses on which, when supported by the evidence at trial, it must be charged and on which it may reach a verdict: (1) attempts to commit the crime charged, if such an attempt is an offense at law; (2) inferior degrees of the indicted offense; (3) lesser included offenses." *State v. Deem* (1988), 40 Ohio St.3d 205, paragraph one of the syllabus. If R.C. 2945.74 and Crim.R. 31(C) permit the jury to reach a verdict on an attempt to commit a crime even when the attempted crime was not included in the indictment, it follows that the State would be permitted to amend the indictment to charge a defendant with an attempt to commit a crime, if such an attempt were an offense at law, if the completed violation of that same crime was charged in the original indictment. The original indictment in this case charged Timofeev with illegal assembly or possession of chemicals for the manufacture of drugs in violation of R.C. 2925.041(A). The amended indictment charged Timofeev with an attempt to violate the same criminal statute. Such an amendment which charges the defendant with an attempt to commit the crime charged in the original indictment does not violate Crim.R. 7(D).

{¶17} It should be noted that in *Davis*, the amendment to the indictment allowed for the degree of the crime charged and the severity of the penalty to be increased. *Davis* at ¶2-3. The degree of the offense and the severity of the penalty cannot be increased when the indictment is amended to charge an attempt to commit the same crime which was charged in the original indictment. Here, the amendment resulted in the degree of the offense being reduced from a felony of the third degree to a felony of the fourth degree.

{¶18} An amendment to an indictment which charges the defendant with an attempt to commit the crime charged in the original indictment does not violate Crim.R. 7(D). Timofeev's first assignment of error is overruled.

ASSIGNMENT OF ERROR II

> "THE TRIAL COURT ERRED TO THE PREJUDICE OF THE DEFENDANT BY DENYING HIS MOTION TO SUPPRESS EVIDENCE OBTAINED BY THE AKRON SNUD UNIT IN VIOLATION OF THE FOURTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION; §2933.33 AND APPLICATION OF *STATE VS. WHITE* TO DEFENDANT IS A VIOLATION OF DEFENDANT'S CONSTITUTIONAL RIGHTS."

{¶19} Counsel for Timofeev filed a motion to suppress at the trial court seeking to suppress the stop of the truck in which the defendant was riding and the evidence obtained therefrom, as well as the warrantless entry into, and search of, the house at 152 Fulmer Street. The trial court denied the motion by written order. Counsel for Timofeev now urges this Court to reconsider its interpretation of R.C. 2933.33 and narrow its ruling in *State v. White*, 175 Ohio App.3d 302, 2008-Ohio-657.

{¶20} A motion to suppress presents a mixed question of law and fact:

> "When considering a motion to suppress, the trial court assumes the role of trier of fact and is therefore in the best position to resolve factual questions and evaluate the credibility of witnesses. Consequently, an appellate court must accept the trial court's findings of fact if they are supported by competent,

> credible evidence. Accepting these facts as true, the appellate court must then independently determine without deference to the conclusion of the trial court, whether the facts satisfy the applicable legal standard."(Internal citations omitted.) *State v. Burnside*, 100 Ohio St.3d 152, 2003-Ohio-5372, at ¶8.

{¶21} Prior to analyzing whether law enforcement had the authority to enter the house on Fulmer Street, this Court must first consider whether the traffic stop and subsequent search of Ashley Cumberledge's purse were permissible. It is well settled that an investigative traffic stop does not violate the Fourth Amendment of the U.S. Constitution where an officer has reasonable suspicion that the individual is engaged in criminal activity. *Maumee v. Weisner* (1999), 87 Ohio St.3d 295, 299. "'If the specific and articulable facts available to an officer indicate that a driver may be committing a criminal act,* * *the officer is justified in making an investigative stop.' *State v. Shook* (June 15, 1994), 9th Dist. No. 93CA005716." *State v. Birney*, 9th Dist. 06CA008955, 2007-Ohio-1623, at ¶8.

{¶22} After receiving the tip from the unidentified informant that the home located at 152 Fulmer Street contained a methamphetamine laboratory, the S.N.U.D. Unit for the City of Akron Police Department began conducting surveillance of the residence. A member of the surveillance team working undercover observed a red pick-up truck containing three individuals pull into the driveway around 9:30 p.m. on October 31, 2007. The undercover officer then observed one individual exit the passenger's side of the truck, enter the residence for not more than a minute or two and then return to the vehicle. The pick-up truck promptly left the property when the individual returned.

{¶23} Detective Donnie Williams and Detective Ted Male are members of the City of Akron Police Department's S.N.U.D. Unit. Detective Williams and Detective Male were in marked uniform vehicles communicating with the undercover surveillance team on the radio. An undercover officer who observed the events at 152 Fulmer Street relayed the information to

Detective Williams and Detective Male via radio. Detective Williams would testify at the suppression hearing that, based on his training and experience, the short-term traffic activity which occurred at 152 Fulmer Street was indicative of drug activity. The truck was under constant surveillance as it left the residence. The truck pulled into the parking lot of a closed business and parked. After just minutes, the truck proceeded to leave the parking lot. Detective Williams testified he was suspicious of drug activity because people who obtain drugs often make short-term stops to consume the drugs. Detective Male testified that, based on his training and experience, this activity made him suspicious of drug trafficking. Detective Male and several other uniformed officers initiated a traffic stop of the truck as it left the parking lot. In light of the original tip and the multiple short-term stops made by the vehicle, this Court concludes the traffic stop was based on a reasonable suspicion that drugs purchased at 152 Fulmer Street were being consumed in the vehicle.

{¶24} As Detective Male approached the truck, he observed Cumberledge making furtive movements in the rear of the truck. Timofeev was in the front passenger seat. Detective Male proceeded to ask Cumberledge what she had placed in her purse. Cumberledge denied placing anything in her purse. Detective Male testified that he then asked Cumberledge if he could look in the purse and she answered in the affirmative. Detective Male found a small bindle in the purse containing an off-white powder. A field test of the substance indicated the powder contained methamphetamine. Cumberledge was placed in the back of the police cruiser where she was questioned by Detective Williams. At the suppression hearing, Detective Williams testified that Cumberledge, who at this point was upset, emotional and crying, told law enforcement that drugs were being cooked at the Fulmer Street residence. Detective Williams went on to testify at the suppression hearing that Cumberledge stated there was an active

methamphetamine laboratory in the basement of the Fulmer Street residence. Cumberledge also stated that she had been told not to enter the basement and had been threatened with death if she did not comply.

{¶25} The information gathered by law enforcement at the traffic stop informs our discussion of the warrantless entry into the home at 152 Fulmer Street. The Fourth Amendment to the United States Constitution protects people from unreasonable searches and seizures. The Ohio Constitution contains a similar provision. Section 14, Article I, Ohio Constitution. State trial courts must exclude all evidence obtained in violation of that right. *Mapp v. Ohio* (1961), 367 U.S. 643, 655. "A warrantless entry into a home to make a search or arrest is per se unreasonable, and the burden of persuasion is on the state to show the validity of the search." *State v. Nields* (2001), 93 Ohio St.3d 6, 15. However, exigent circumstances may justify a warrantless entry. *State v. Applegate* (1994), 68 Ohio St.3d 348 at syllabus. R.C. 2933.33(A) states:

> "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 methamphetamines 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."

{¶26} This Court has held that clandestine methamphetamine laboratories pose a per se danger to occupants, officers, and the community, and law enforcement officers need only a reasonable belief that a structure contains a methamphetamine laboratory to justify a search under the emergency-aid exception set forth in R.C. 2933.33(A). *White* at ¶19-20; *State v. Sandor*, 9th Dist. No. 23353, 2007-Ohio-1482, at ¶10. The arguments advanced by Timofeev have not persuaded this Court to revisit its interpretation of R.C. 2933.33(A) or its holding in

White. The combustible nature of methamphetamine laboratories poses a grave danger to occupants of the dwelling, neighbors, law enforcement and the community at large. The existence of an active methamphetamine laboratory is, as a matter of law, an emergency which threatens life and limb that supports an objectively reasonable belief that immediate action is necessary to protect life or property. *White* at ¶19.

{¶27} Here, law enforcement officials had a reasonable belief that the 152 Fulmer Street residence contained an active methamphetamine laboratory. The tip from the unidentified informant indicated that there was a methamphetamine laboratory in the house. The field test performed on the off-white powder found in Cumberledge's purse indicated that methamphetamine was present in the substance. Cumberledge then told law enforcement that drugs were being cooked in the basement of the Fulmer Street residence. Upon arriving at the home, Detective Male knocked on the door and observed a man wearing just his boxer shorts peer out the door, observe the law enforcement officials and then run back inside the house. These facts, viewed in their totality, allowed members of the S.N.U.D. Unit to reasonably conclude that exigent circumstances existed and that entry into the residence was necessary. The second assignment of error is overruled.

ASSIGNMENT OF ERROR III

"APPELLANT'S CONVICTION WAS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE AND BASED ON INSUFFICIENT EVIDENCE."

{¶28} Timofeev argues that his conviction for attempted illegal assembly or possession of the chemicals for the manufacture of drugs was not supported by sufficient evidence and was against the manifest weight of the evidence. Specifically, Timofeev contends the evidence does not support the jury's conclusion that he participated in a plan to obtain iodine. This Court disagrees.

{¶29} An appellate court's review of the sufficiency of the State's evidence and the manifest weight of the evidence adduced at trial are separate and legally distinct determinations. *State v. Gulley* (Mar. 15, 2000), 9th Dist. No. 19600. "While the test for sufficiency requires a determination of whether the state has met its burden of production at trial, a manifest weight challenge questions whether the state has met its burden of persuasion." Id., citing *State v. Thompkins* (1997), 78 Ohio St.3d 380, 390 (Cook J., concurring). When reviewing the sufficiency of the evidence, this Court must review the evidence in a light most favorable to the prosecution to determine whether the evidence before the trial court was sufficient to sustain a conviction. *State v. Jenks* (1991), 61 Ohio St.3d 259, 279.

> "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." (Citation omitted.) Id. at paragraph two of the syllabus.

{¶30} However, when determining whether a conviction is against the manifest weight of the evidence, the Court is not permitted to view the evidence in the light most favorable to the State in analyzing whether the State has met its burden of persuasion. *State v. Love*, 9th Dist. No 21654, 2004-Ohio-1422, at ¶11.

> "In determining whether a criminal conviction is against the manifest weight of the evidence, an appellate court must review the entire record, weigh the evidence and all reasonable inferences, consider the credibility of the witnesses and determine whether, in resolving conflicts of evidence, the trier of fact clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered." *State v. Otten* (1986) 33 Ohio App.3d 339, paragraph one of the syllabus.

This discretionary power should be exercised only in exceptional cases where the evidence presented weighs heavily in favor of the defendant and against conviction. Id. at 340.

{¶31} This Court has stated that "[s]ufficiency is required to take a case to the jury[.] * * * Thus, a determination that [a] conviction is supported by the weight of the evidence will also be dispositive of the issue of sufficiency." (Emphasis omitted.) *State v. Roberts* (Sept. 17, 1997), 9th Dist. No. 96CA006462.

{¶32} Timofeev was convicted of attempted illegal assembly or possession of the chemicals for the manufacture of drugs. In Ohio, the attempt statute, R.C. 2923.02(A), provides, "[n]o person, purposely or knowingly, and when purpose or knowledge is sufficient culpability for the commission of an offense, shall engage in conduct that, if successful, would constitute or result in the offense." The underlying offense in this case is outlined in R.C. 2925.041(A), which states, "[n]o 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."

{¶33} "Knowingly" is defined in R.C. 2901.22(B), which states, "[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."

{¶34} "Possess" means "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).

{¶35} "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).

{¶36} A "controlled substance" is "a drug, compound, mixture, preparation, or substance included in Schedule I, II, III, IV, or V." R.C. 3719.01(C). Methamphetamine is classified as a controlled substance. R.C. 3719.41 Schedule II (C)(2).

{¶37} In analyzing whether the verdict was against the manifest weight of the evidence, we must consider the evidence presented by the State at trial to determine if the jury clearly lost its way in convicting Timofeev in light of the aforementioned legal standards. The State relied primarily on the testimony of John Hajjar and David Shuman to demonstrate their theory that Timofeev set up a meeting where iodine was to be obtained for the purpose of manufacturing methamphetamine. The State also called Detective Christopher Crocket, a member of the C.L.E.T., to show that iodine was a necessary component in manufacturing methamphetamine.

{¶38} At the time of the raid, Timofeev and Cumberledge were staying with John Hajjar at the residence located at 152 Fulmer Street. Hajjar testified that drugs were consumed at the house on a daily basis. Hajjar further testified there was an active methamphetamine laboratory in the basement of the residence. Hajjar indicated that while the primary "cooks" who were responsible for the methamphetamine laboratory were two other men staying at the house, David Shuman and Nicolas Stewart, Hajjar had personally observed Timofeev's presence in the basement. On the day of the raid, Timofeev instructed Hajjar that Stewart was in the basement and that nobody was to enter the basement. Hajjar ignored Timofeev's instructions and went down into the basement where he observed Stewart and the methamphetamine laboratory. Hajjar went on to testify that if you lived in the house, "[t]here was probably no way that you could live there and not know" there was a methamphetamine laboratory in the basement. Hajjar explained that Stewart and Shuman would ask "pretty much anybody they could to help obtain stuff they needed for the meth lab."

{¶39} Hajjar further testified as follows. On one occasion, Timofeev put Shuman in contact with a friend in Kenmore named "Eric" who could obtain iodine. Eric was not identified by his full name during Hajjar's testimony. Timofeev was aware the iodine was needed for the methamphetamine lab. Hajjar, Shuman and Timofeev traveled together by car to Kenmore with Timofeev giving the directions to Eric's house. Upon arriving, Timofeev and Eric conversed for a short time before Shuman gave Eric money to obtain the iodine. Hajjar, Shuman and Timofeev then waited "for about two hours" before Eric returned. When Eric returned he indicated that he was unable to obtain the iodine and he gave the money back to Shuman.

{¶40} Shuman also testified on behalf of the State as follows. Timofeev had been with him in the basement of the 152 Fulmer Street residence when he was cooking methamphetamine. On one occasion, Timofeev had physically helped Shuman with the "gassing" process, one of the final steps in manufacturing methamphetamine. Shuman testified that Timofeev agreed to help him obtain iodine for the methamphetamine lab. Timofeev called a friend in Barberton named "Eric" who he thought might be able to "score" some iodine. Shuman did not identify Eric by his full name. Shuman's testimony indicates that Timofeev knew the iodine was needed to "cook and manufacture methamphetamine." Hajjar drove Timofeev and Shuman to meet with Timofeev's friend in Barberton. When they arrived, Timofeev went inside and spent forty-five minutes conversing with Eric. Timofeev and Eric eventually invited Hajjar and Shuman into the house. Eric then promptly left to obtain the iodine without accepting any money. Hajjar, Shuman and Timofeev then waited about an hour but Eric never returned.

{¶41} Officer Crockett testified on the subject of components that are necessary to create a methamphetamine lab. Officer Crockett had broken down between 120 and 160 methamphetamine laboratories in his career. According to Officer Crockett, iodine is a

necessary component of creating a methamphetamine laboratory. Officer Crockett also stated that based on his observations, it was clear that a methamphetamine laboratory was in existence at 152 Fulmer Street on the day of the raid.

{¶42} Joseph "Eric" Johnson testified on behalf of Timofeev at trial. Johnson testified that he and Timofeev were friends who visited frequently. While he had personally used methamphetamine, Johnson stated he did not know which chemicals were necessary to manufacture methamphetamines and he denied ever having agreed to a plan where he was to obtain chemicals for Timofeev or Shuman. Johnson also testified that he lived in Kenmore and that his house was ten minutes from Barberton.

{¶43} Timofeev also testified on his own behalf. Timofeev claimed he never knew that the home at 152 Fulmer Street contained a methamphetamine laboratory. According to Timofeev, nothing he experienced while staying in the house suggested the existence of a methamphetamine laboratory. Timofeev also testified that he never assisted David Shuman in trying to purchase chemicals from Eric Johnson. Timofeev stated under oath that he never got involved with the production or assembly of methamphetamine and further denied ever having been involved with someone who advised him on how methamphetamines are prepared.

{¶44} Ashley Cumberledge testified on behalf of Timofeev at trial. Cumberledge admitted to having a heroin addiction but denied ever using methamphetamine. She testified that while she lived on Fulmer Street, she knew that some of the other people staying at the house used methamphetamine but she had no knowledge of a laboratory in the basement. She further testified that she never saw Timofeev manufacture methamphetamine. After originally denying that she knew Eric Johnson, Cumberledge then testified that she had been to Johnson's house in Kenmore "maybe four times" with Timofeev. Cumberledge testified that she knew of Eric

Johnson as someone who used heroin and methamphetamine but she did not know of any instances where he had gathered chemicals for the purpose of manufacturing methamphetamine.

{¶45} While there was some conflicting evidence in this case, this Court will not disturb the factual determinations of the trier of fact because the trier of fact is in the best position to determine the credibility of the witnesses during trial. *State v. Crowe*, 9th Dist. No. 04CA0098-M, 2005-Ohio-4082, at ¶22. In addition, this Court will not overturn the trial court's verdict on a manifest weight of the evidence challenge only because the trier of fact chose to believe certain witnesses' testimony over the testimony of others. Id.

{¶46} Based on a careful review of the record, this Court concludes that this is not the exceptional case where the evidence weighs heavily in favor of the defendant. A careful review of the record compels this Court to find no indication that the jury lost its way and committed a manifest miscarriage of justice in convicting Timofeev of attempted illegal assembly or possession of the chemicals for the manufacture of drugs. Both Hajjar and Shuman testified that they had observed Timofeev in the basement of the Fulmer Street residence around the methamphetamine laboratory. Both witnesses indicated that Timofeev knew the methamphetamine laboratory existed. Both witnesses further testified that Timofeev had arranged a meeting with a friend named Eric who could obtain iodine. Finally, both witnesses testified that Timofeev had knowledge that the iodine was needed for the purpose manufacturing methamphetamine. While several witnesses gave testimony which contradicted the testimony of Hajjar and Shuman, the jury, as the trier of fact, was in the best position to determine the credibility of the witnesses and deal with any discrepancies which existed in the testimony. This Court is not inclined to conclude that the jury clearly lost its way in finding that Timofeev had

arranged a meeting with the aim of obtaining a chemical necessary to manufacture methamphetamine.

{¶47} Accordingly, Timofeev's conviction for attempted illegal assembly or possession of the chemicals for the manufacture of drugs is not against the manifest weight of the evidence. Having found that Timofeev's conviction is not against the manifest weight of the evidence, this Court further necessarily finds that there was sufficient evidence to support the jury's verdict. See *Roberts*, supra. Timofeev's third assignment of error is overruled.

ASSIGNMENT OF ERROR IV

> "THE COURT ERRED IN ALLOWING THE PROSECUTOR TO IMPEACH AND EXAMINE THE DEFENDANT WITH THE POLICE REPORT UNDERLYING DEFENDANT'S PRIOR MISDEMEANOR CONVICTION OF THEFT OF SUDAFED DRUGS AS AN IMPROPER ADMISSION OF 'PRIOR ACTS' EVIDENCE."

{¶48} In his fifth assignment of error, Timofeev consistently argues that the admission of the police report was an improper admission of prior bad acts evidence in violation of Evid.R. 404(B). A review of the trial transcript reveals that the police report was not offered as "other acts" evidence and does not merit analysis under Evid.R. 404(B). Rather, the police report was offered as extrinsic evidence for the purpose of impeachment to demonstrate that Timofeev misrepresented his testimony on direct examination. On direct examination, Timofeev admitted to having a misdemeanor conviction on his record. He went on to deny ever getting involved with the production or assembly of methamphetamine. He also denied ever being involved with anyone who advised him on how to prepare methamphetamine. The police report was offered to impeach Timofeev on the basis of this testimony. Timofeev's prior conviction was for shoplifting five boxes of Sudafed. This Court has acknowledged that Sudafed contains an ingredient that is used in the manufacture of methamphetamine. See, e.g., *State v. French*, 9th

Dist. No. 24252, 2009-Ohio-2342. The contents of the police report were introduced to specifically contradict Timofeev's denial that he had ever been involved with the production or assembly of methamphetamine.

{¶49} Because the police report was offered for impeachment purposes, this Court need not analyze the admission of the police report under Evid.R. 404(B). The fourth assignment of error is overruled.

ASSIGNMENT OF ERROR V

"THE COURT ERRED IN ALLOWING TESTIMONY AS TO THE RESULTS OF THE FIELD VALTOX TEST AS IT WAS UNDULY PREJUDICIAL TO THE JURY WITHOUT SCIENTIFIC BASIS."

{¶50} Counsel for Timofeev argues the results of the field test were unduly prejudicial and had no scientific basis and, therefore, were not relevant and inadmissible pursuant to Evid.R. 402. This Court disagrees.

{¶51} The decision to admit or exclude relevant evidence rests within the sound discretion of the trial court. *State v. Sage* (1987), 31 Ohio St.3d 173, 180. This Court reviews a trial court's decision to admit or exclude evidence for an abuse of discretion. *State v. Arnott*, 9th Dist. No. 21989, 2005-Ohio-3, at ¶35.

{¶52} Evid.R. 401 states that "relevant evidence" is 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 states, in part, "Evidence which is not relevant is not admissible." Evid.R. 403(A) states, "Although 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."

{¶53} The results of the field test were offered by the State as one of several pieces of evidence which showed that law enforcement was reasonable in concluding that there was an active methamphetamine lab at 152 Fulmer Street. Detective Ted Male testified on the topic of the October 31, 2007 traffic stop. Detective Male testified that he found a small bindle in the purse which contained a substance consisting of an off-white powder. Based on his experience, Detective Male testified that such bindles are often used to hold cocaine powder, methamphetamine powder and heroin powder. Detective Male proceeded to conduct a field test on the substance using what is called a NIK kit. The NIK kit is a specific test for methamphetamine. The results of the test indicated that the substance did, in fact, contain methamphetamine. Much of the powder which was necessary to conduct the field test was consumed in the administration of the test itself. The remaining sample was not large enough to be tested at a forensic laboratory.

{¶54} The fact that a forensic laboratory was not able to test the substance found in the bindle does not mean that the field test lacked validity and is not relevant evidence. During his testimony, Detective Male noted that the NIK kit is used specifically to test for methamphetamines, much like the valtox test is used to test for cocaine. Counsel for Timofeev took advantage of the opportunity to cross-examine Detective Male with regard to the scientific nature of the NIK kit test. Detective Male answered questions on cross-examination regarding his qualifications as well as how he administered the NIK kit test on the date in question. The results of the field test were offered for the purpose of determining whether law enforcement had a reasonable basis for believing there was a methamphetamine laboratory at the 152 Fulmer Street residence. Counsel for Timofeev has cited no authority which indicates a presumptive filed test cannot be admitted for this purpose.

{¶55} The trial court did not abuse its discretion in allowing Detective Male to testify about the results of the field test. It follows that the fifth assignment of error is overruled.

ASSIGNMENT OF ERROR VI

"THE COURT ERRED IN SENTENCING DEFENDANT TO 16 MONTHS IN PRISON GIVEN HIS PRIOR RECORD."

{¶56} Counsel for Timofeev argues the trial court abused its discretion by sentencing him to sixteen months in prison despite the fact he only had one prior misdemeanor conviction on his record. This Court disagrees.

{¶57} The Supreme Court of Ohio has held that, "trial courts have full discretion to impose a prison sentence within the statutory range and are no longer required to make findings or give their reasons for imposing maximum, consecutive, or more than the minimum sentences." *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856 at ¶100. The record indicates that both the prosecution and the defense presented arguments to the trial court prior to sentencing. The sentencing journal entry indicates that the trial court considered "the record, oral statements, as well as the principles and purposes of sentencing under O.R.C. 2929.11, and the seriousness and recidivism factors under O.R.C. 2929.12." Nothing in the record indicates that the trial court abused its discretion in sentencing Timofeev. The sixth assignment of error is overruled.

III.

{¶58} Timofeev's assignments of error are overruled. The judgment of the Summit County Court of Common Pleas is affirmed.

Judgment affirmed.

There were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the Court of Common Pleas, County of Summit, State of Ohio, to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App.R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App.R. 22(E). The Clerk of the Court of Appeals is instructed to mail a notice of entry of this judgment to the parties and to make a notation of the mailing in the docket, pursuant to App.R. 30.

Costs taxed to Appellant.

DONNA J. CARR
FOR THE COURT

DICKINSON, P. J.
CONCURS

BELFANCE, J.
DISSENTS, SAYING:

{¶59} I respectfully dissent. I would sustain Timofeev's second assignment of error as I believe the trial court erred in denying Timofeev's motion to suppress.

{¶60} The Fourth Amendment to the United States Constitution prohibits "unreasonable searches and seizures." See, also, *Terry v. Ohio* (1968), 392 U.S. 1, 8-9. *Terry* provides that a stop is a seizure under the Fourth Amendment. Id. at 16-17. "A police officer may stop a car if he has a reasonable, articulable suspicion that a person in the car is or has engaged in criminal activity." (Internal quotations omitted.) *State v. Wagner-Nitzsche*, 9th Dist. No. 23944, 2008-

Ohio-3953, at ¶10, quoting *State v. Kodman*, 9th Dist. No. 06CA0100-M, 2007-Ohio-5605, at ¶ 3, citing *State v. VanScoder* (1994), 92 Ohio App.3d 853, 855. "[T]he police officer must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion." *Terry*, 392 U.S. at 21. The standard is objective, and the question the Court must answer is: "[W]ould the facts available to the officer at the moment of the seizure or the search warrant a man of reasonable caution in the belief that the action taken was appropriate?" (Internal quotations omitted.) *Wagner-Nitzsche* at ¶10, quoting *Terry*, 392 U.S. at 21-22. Given the circumstances of this case, I would answer the question in the negative. Mere hunches are not sufficient to warrant a stop under *Terry*. *Terry*, 392 U.S. at 22.

{¶61} In this case, the tip related to activity in the house itself. There was no tip or other information concerning the activities of the persons in the truck. Thus, the question is whether the stop was proper under Terry where the officers observed persons enter a residence in which there is suspected drug activity, leave the residence and park briefly in a parking lot. Under the circumstances, officers did not point to "specific and articulable facts" that warranted the stop. Id. at 21. It is apparent that the officers' decision to stop was based on a hunch that the individuals in the truck might have purchased drugs and no more. Having reviewed the totality of the circumstances, I cannot conclude that the officers had reasonable suspicion to stop the truck, and thus it was error for the trial court to deny Timofeev's motion to suppress. See *Wagner-Nitzsche* at ¶15.

APPEARANCES:

RICHARD P. KUTUCHIEF, Attorney at Law, for Appellant.

SHERRI BEVAN WALSH, Prosecuting Attorney, HEAVEN R. DIMARTINO, and THOMAS J. KROLL, Assistant Prosecuting Attorneys, for Appellee.