

STATE OF OHIO                     )  
  )ss:  
COUNTY OF MEDINA            )

IN THE COURT OF APPEALS  
NINTH JUDICIAL DISTRICT

STATE OF OHIO

C.A. No.       10CA0008-M

Appellee

v.

ERICK M. HASH

APPEAL FROM JUDGMENT  
ENTERED IN THE  
COURT OF COMMON PLEAS  
COUNTY OF MEDINA, OHIO  
CASE No.     08CR0076

Appellant

DECISION AND JOURNAL ENTRY

Dated: February 28, 2011

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CARR, Presiding Judge.

{¶1} Appellant, Erick Hash, appeals his conviction out of the Medina County Court of Common Pleas. This Court affirms.

I.

{¶2} On February 21, 2008, Hash was indicted on one count of illegal manufacture of drugs in the vicinity of a school in violation of R.C. 2925.04(A)(C)(2), a felony of the first degree; 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; and one count of possession of drugs (methamphetamine) in violation of R.C. 2925.11(A)(C)(1)(a), a felony of the fifth degree. Hash pleaded not guilty to the charges. On March 19, 2008, a supplemental indictment was filed, charging Hash with one count of possession of drugs (methamphetamine) in violation of R.C. 2925.11(A)(C)(1)(b), a felony of the third degree. Hash pleaded not guilty to the supplemental charge.

{¶3} On April 7, 2008, Hash filed a motion to suppress. The State filed a brief in opposition. The trial court held a hearing on the motion. On July 22, 2008, the trial court denied the motion to suppress and scheduled the matter for trial. Hash filed a motion in limine to exclude certain evidence, including pseudoephedrine logs from local pharmacies dated prior to January 15, 2008. Prior to trial, the trial court denied the motion in limine and the matter proceeded to trial.

{¶4} On January 15, 2009, Hash filed a post-trial motion to dismiss count two, the charge of illegal assembly or possession of chemicals for the manufacture of drugs in violation of R.C. 2925.041(A), alleging that the State had willfully destroyed evidence in violation of R.C. 2925.52. Specifically, Hash argued that he was denied the right and ability to test evidence found at the scene for fingerprints. The jury returned guilty verdicts on all counts. Prior to sentencing, Hash filed a motion for acquittal pursuant to Crim.R. 29(C) in regard to count two based on the same grounds alleged in the motion to dismiss. On March 13, 2009, the trial court issued a judgment entry in which it found that the destroyed evidence constituted merely potentially useful evidence and that Hash, therefore, had to establish that the State destroyed the evidence in bad faith. On March 27, 2009, the trial court held a hearing on Hash's motion for acquittal. Subsequently, the trial court denied the motion for acquittal.

{¶5} The trial court sentenced Hash to four years in prison. Hash filed a timely appeal, raising four assignments of error for review.

## II.

### **ASSIGNMENT OF ERROR I**

“THE TRIAL COURT ERRED IN DENYING ERICK M. HASH’S MOTION TO SUPPRESS EVIDENCE[.]”

{¶6} Hash argues that the trial court erred by denying his motion to suppress because the affidavit underlying the search warrant failed to establish probable cause to search “all persons” at the address to be searched. This Court disagrees.

{¶7} “The review of a motion to suppress presents a mixed question of fact and law for an appellate court.” *State v. Farris*, 9th Dist. No. 03CA0022, 2004-Ohio-826, at ¶7, quoting *State v. Long* (1998), 127 Ohio App.3d 328, 332. This Court must accept the trial court’s factual determinations made during the suppression hearing, as long as they are supported by competent and credible evidence. *Farris* at ¶7; *State v. Robinson* (Oct. 25, 2000), 9th Dist. No. 19905. This Court, however, must review the trial court’s application of the law to those facts de novo. *Farris* at ¶7; *State v. Searls* (1997), 118 Ohio App.3d 739, 741. Moreover, “this Court reviews a probable cause determination de novo.” *State v. Sunday*, 9th Dist. No. 22917, 2006-Ohio-2984, at ¶28, citing *State v. Salas*, 9th Dist. No. 21891, 2004-Ohio-6274, at ¶17.

{¶8} The Fourth Amendment to the United States Constitution prohibits unreasonable searches and seizures, not every search and seizure.

{¶9} This Court has stated that “[b]efore an arrest warrant may issue, the complaint must establish probable cause that the defendant committed the offense charged. Crim.R. 4(A)(1); and *Whitely v. Warden* (1971), 401 U.S. 560.” *State v. Moore* (1985), 28 Ohio App.3d 10, 11. The United States Supreme Court in *Whitely* held that “before a warrant for either arrest or search can issue [the Fourth Amendment probable-cause requirements] require that the judicial officer issuing such a warrant be supplied with sufficient information to support an independent judgment that probable cause exists for the warrant.” *Id.* at 564.

{¶10} In discussing the propriety of an “all persons” search warrant, the Ohio Supreme Court has held:

“A search warrant authorizing the search of ‘all persons’ on a particular premises does not violate the Fourth Amendment requirement of particularity if the supporting affidavit shows probable cause that every individual on the subject premises will be in possession of, at the time of the search, evidence of the kind sought in the warrant.” *State v. Kinney* (1998), 83 Ohio St.3d 85, syllabus.

The *Kinney* court adopted some guidelines to assist a magistrate in the determination of probable cause within the context of an “all persons” warrant, including, for example, a consideration of the following: the size of the area to be searched; the neighborhood; whether the premises are public or private; means of access to the premises; the nature of the suspected illegal activity; the number and behaviors of persons observed; the times of day or night when such behaviors were observed; whether persons completely unconnected with the suspected illegal activity have been observed at the premises; and the necessity for an “all persons” search. *Id.* at 95. The Supreme Court emphasized, however, that the determination of the sufficiency of the affidavit in support of probable cause should not be based on hypertechnical considerations. *Id.* Instead, a magistrate’s determination of probable cause “still require[s] practical, commonsense decisionmaking[.]” *Id.* This Court has applied these guidelines and commonsense approach in our analyses to determine whether an “all persons” search warrant was supported by probable cause. See, e.g., *State v. Perkins*, 9th Dist. No. 21322, 2003-Ohio-3156; *State v. Shaulis*, 9th Dist. No. 01CA0044, 2002-Ohio-759.

{¶11} The *Kinney* court noted that certain factors supported a determination of probable cause. For example, drug trafficking typically implicates the presence of multiple persons, often armed, on the premises to facilitate the preparation and sale of illegal drugs. *Kinney*, 83 Ohio St.3d at 90. Accordingly, safety concerns mitigate in favor of an inclusive search. *Id.* In addition, the high court recognized that an “all persons” search warrant is less reasonable in a public place where there exists “the substantial likelihood that a person with no connection to

criminal wrongdoing might be subjected to search[.]” Id. at 91. On the other hand, a search of a private residence, particularly where illicit drug activity is likely, renders a search of all persons on the premise reasonable. Id.

{¶12} In this case, Agent John Stayrook of the Medina County Drug Task Force executed the affidavit in support of the search warrant. He averred that he had five years of law enforcement experience and that he had completed 170 hours of specialized training in the investigation of violations of laws governing controlled substances. He detailed his participation in numerous investigations which gave rise to his familiarity with the methods of operation utilized by drug traffickers.

{¶13} Agent Stayrook averred that the Brunswick Police Department (BPD) dispatch center informed him of an anonymous call regarding the existence of a methamphetamine lab being run by several Cubic brothers in the garage of the Cubic residence at 1829 Rocklyn Drive, Brunswick, Ohio. He described the residence as a single-story, single-family dwelling with two attached two-car garages. Medina County Auditor property records, attached to the affidavit, indicated that the residence consisted of 914 square feet, while the garage areas consisted of 1334 square feet.

{¶14} Agent Stayrook averred that he conducted surveillance on the residence on four separate dates during which multiple vehicles were observed arriving at the residence and departing shortly thereafter. He averred that he conducted two “trash pulls” on the residence, finding, among other things, mail addressed to 1829 Rocklyn Drive; burnt foil; pieces of plastic bags; a broken smoking device with residue; and green/brown vegetable matter which tested positive for the presence of marijuana.

{¶15} Agent Stayrook further averred in the affidavit that he knows, based on his training and experience, that pseudoephedrine is the main component used to manufacture methamphetamine. He averred that he and another agent conducted an audit of pseudoephedrine transaction logs at six area pharmacies, and that logs from two pharmacies indicated that three persons with the last name of Cubic (brothers Jason, Dale, and Phillip) purchased 4,436 pills containing pseudoephedrine and three boxes of an unknown amount of pills containing pseudoephedrine over a 16-month period from October 9, 2006, to January 30, 2008.

{¶16} Agent Stayrook averred that, based on his training and experience, persons present where drugs are being used and/or sold conceal contraband and currency on their persons; that persons involved in drug trafficking use motor vehicles to transport and conceal evidence of criminal activity; and that drug traffickers possess and utilize firearms and other weapons in furtherance of illicit activity. He averred, therefore, that it was necessary to search all persons present at the place to be searched. In addition, he requested a nighttime search warrant in the interest of safety to allow officers to approach the residence undetected, and in the interest of preservation of evidence to prevent the occupants from destroying or concealing contraband.

{¶17} Based on the information contained in the affidavit, the judge had a substantial basis for determining that probable cause existed for the issuance of an “all persons” search warrant. The premises to be searched were small and private. The suspected illegal activity involved drug activity. Trash pulls indicated the presence of illegal drugs on the premises. Surveillance indicated short-term traffic in and out of the residence, indicative of drug trafficking. Pharmacy logs indicated that multiple persons with ties to the home had been purchasing large quantities of pseudoephedrine, the main component in the manufacturing of

methamphetamine. The police requested permission to search at night, allowing the judge to conclude that “there was no significant possibility that innocent people would be present in the [residence] at the time of the search.” See *Kinney*, 83 Ohio St.3d at 96. According the proper deference to the probable cause determination of the issuing judge, this Court concludes that the “all persons” warrant and resulting search did not violate the Fourth Amendment prohibition against unreasonable searches and seizures. Hash’s first assignment of error is overruled.

### **ASSIGNMENT OF ERROR II**

“THE TRIAL COURT ERRED IN DENYING ERICK M. HASH’S MOTION TO DISMISS COUNT TWO OF THE INDICTMENT WHERE THE APPELLANT DEMONSTRATED THAT THE MEDINA COUNTY TASK FORCE DESTROYED POTENTIALLY USEFUL EVIDENCE IN BAD FAITH[.]”

{¶18} Hash argues that the trial court erred by denying his post-verdict Crim.R. 29 motion for acquittal in regard to count two of the indictment, the charge of illegal assembly or possession of chemicals with intent to manufacture methamphetamine in violation of R.C. 2925.041. This Court disagrees.

{¶19} Subsequent to the jury’s rendering guilty verdicts on all four counts, Hash filed a motion for acquittal pursuant to Crim.R. 29(C). He alleged that the State failed to comply with R.C. 2925.52 before destroying evidence, specifically glass jars which might have been tested for fingerprints, found in the alleged methamphetamine lab. Hash argued, therefore, that the State destroyed evidence in bad faith, thereby depriving him of his constitutional rights to due process and the effective assistance of counsel. The trial court held a hearing on the motion. On April 22, 2009, the trial court denied the motion for acquittal, concluding that there was no evidence of bad faith by the State because the glass jars found at the scene might have produced inculpatory, rather than exculpatory, evidence.

{¶20} Hash brought this issue to the trial court by way of a post-verdict Crim.R. 29 motion for acquittal. The trial court issued its judgment on a “Crim.R. 29 motion.” Although Hash invoked the due process clause of the United States Constitution, he did not argue for dismissal of the charge on the basis of a constitutional violation. Rather, he argued from the perspective of a statutory violation. Hash urged the trial court to dismiss the second count in the indictment by arguing that the State disregarded the procedure set out in R.C. 2925.52 for the destruction of chemicals used to produce methamphetamine and that such disregard in effect constituted per se bad faith.

{¶21} R.C. 2925.52 states:

“(A) If a person is charged with a violation of section 2925.041 of the Revised Code or with any violation of this chapter or Chapter 3719. of the Revised Code that is based on the possession of chemicals sufficient to produce methamphetamine, the law enforcement agency that has custody of the chemicals may file a motion with the court in which the charges are pending requesting the court to order the chemicals destroyed in accordance with this division. If a law enforcement agency files a motion of that type with a court, the court may issue an order that requires the containers in which the chemicals are contained be photographed, orders the chemicals forfeited, and requires that the chemicals be destroyed.

“(B) If the court issues an order under division (A) of this section, the court may include in the order a requirement that the chemicals be sampled prior to their destruction and that the samples be preserved.”

{¶22} Although Hash argues that the State’s failure to comply with R.C. 2925.52 constituted destruction of evidence in bad faith, the plain language of the statute does not support his argument. The statute states only that the State “may” move the trial court for an order directing the destruction of chemicals allegedly used in the production of methamphetamine, not that it must.

{¶23} Hash complains that glass jars found at the scene were not preserved as evidence. He argues that he was deprived of the ability to have those jars tested for fingerprints. Hash



asserts that his fingerprints would not have been found on any jars found in the Cubic garage, thereby proving that he had not assembled or possessed any chemicals which might have been in those jars. Hash fails to explain, however, how the State's failure to comply with R.C. 2925.52 would have ensured him the opportunity to test the jars for fingerprints.

{¶24} First, the statute addresses only the destruction of chemicals, not paraphernalia or other physical evidence found at the scene. While the statute provides that the trial court may require that the State photograph the containers in which the chemicals are stored prior to their destruction, there is nothing to indicate that those storage containers are the same containers in which the chemicals were found by law enforcement at the scene. In fact, the containers would not be those found at the scene. As Agent Michael Barnhardt, head of the Medina County Drug Task Force, testified, federal regulations mandate the destruction of all evidence seized from suspected methamphetamine labs after law enforcement has taken samples of chemicals for analysis. Agent Barnhardt testified that the regulations ensure that all hazardous materials are sampled as necessary, removed from the scene, then immediately destroyed in the interest of safety.

{¶25} Second, compliance with R.C. 2925.52 would not have provided Hash with the opportunity he claims he was denied. Had the State moved for an order to destroy the chemicals seized, if granted, the statute provides only that the trial court may further order that the containers be photographed. The statute provides no authority for the trial court to order the preservation of the containers themselves. At most, the trial court may direct the preservation of samples of the chemicals, not their containers. Accordingly, the State's compliance with the statute would not have allowed Hash to test any containers for fingerprints.

{¶26} For the reasons articulated above, Hash's second assignment of error is overruled.

**ASSIGNMENT OF ERROR III**

“THE JURY’S VERDICTS AS TO COUNTS ONE, TWO AND FOUR OF THE INDICTMENT WERE NOT SUPPORTED BY SUFFICIENT EVIDENCE AND WERE AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE[.]”

{¶27} Hash argues that his convictions on certain counts were not supported by sufficient evidence and were against the manifest weight of the evidence. This Court disagrees.

{¶28} A 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.” *Id.* at paragraph two of the syllabus.

{¶29} A determination of whether a conviction is against the manifest weight of the evidence, however, does not permit this Court to view the evidence in the light most favorable to the State to determine whether the State has met its burden of persuasion. *State v. Love*, 9th Dist. No. 21654, 2004-Ohio-1422, at ¶11. Rather,

“an appellate court must review the entire record, weigh the evidence and all reasonable inferences, consider the credibility of witnesses and determine

whether, in resolving conflicts in the 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, 340.

“Weight of the evidence concerns the tendency of a greater amount of credible evidence to support one side of the issue more than the other. *Thompkins*, 78 Ohio St.3d at 387. Further when reversing a conviction on the basis that it was against the manifest weight of the evidence, an appellate court sits as a ‘thirteenth juror,’ and disagrees with the factfinder’s resolution of the conflicting testimony. *Id.*” *State v. Tucker*, 9th Dist. No. 06CA0035-M, 2006-Ohio-6914, at ¶5.

This discretionary power should be exercised only in exceptional cases where the evidence presented weighs heavily in favor of the defendant and against conviction. *Thompkins*, 78 Ohio St.3d at 387.

{¶30} Hash was charged with the illegal manufacture of drugs (methamphetamine) in the vicinity of a school in violation of R.C. 2925.04(A) which provides in relevant part: “No person shall \*\*\* knowingly manufacture or otherwise engage in any part of the production of a controlled substance.” Where the drug involved is methamphetamine, a violation of this statute constitutes a felony of the first degree.

{¶31} R.C. 2901.22(B) 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.”

{¶32} 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 Schedule II controlled substance and a stimulant. R.C. 3719.41 Schedule II (C)(2). “Methamphetamine” is defined as “methamphetamine, any salt, isomer, any salt of an isomer of methamphetamine, or any compound, mixture, preparation, or substance containing

methamphetamine or any salt, isomer, or any salt of an isomer of methamphetamine.” R.C. 2925.01(JJ).

{¶33} Hash was charged with illegal assembly or possession of chemicals for the manufacture of methamphetamine in violation of R.C. 2925.041(A) which states that “[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.”

{¶34} “Possess” or “possession” 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). A person may constructively possess a thing or substance when he “knowingly exercises dominion or control over an object, even though that object may not be within his immediate physical possession.” *State v. Hankerson* (1982), 70 Ohio St.2d 87, syllabus.

{¶35} Hash was charged with possession of methamphetamine in violation of R.C. 2925.11(A)(C)(1)(b) which states in relevant part: “No person shall knowingly obtain, possess, or use a controlled substance \*\*\* [i]f the amount of the drug involved equals or exceeds the bulk amount but is less than five times the bulk amount[.]” “Bulk amount” is defined, in relevant part, as “[a]n amount equal to or exceeding three grams of a compound, mixture, preparation, or substance that is or contains any amount of a schedule II stimulant \*\*\*.” R.C. 2925.01(D)(1)(g).

#### Sufficiency

{¶36} At trial, Agent Michael Barnhardt, the director of the Medina County Drug Task Force, testified regarding his vast experience in recognizing and dismantling methamphetamine labs. He detailed the necessary chemicals and materials, as well as the four-phase process, used

to manufacture methamphetamine. Some of those chemicals and materials include pseudoephedrine tablets, iodine, glass jars, and rubber tubing. One of the manufacturing phases results in the creation of bi-level liquids whereby methamphetamine base oil is separated. The agent discussed the dangers associated with methamphetamine labs, including the risk of combustion and deadly gasses. He further testified that the bulk amount for methamphetamine is three grams.

{¶37} Agent Barnhardt testified that he was involved in the investigation into a suspected methamphetamine lab at 1829 Rocklyn Drive, Brunswick in Medina County. He testified that he checked local pharmacy pseudoephedrine logs for names of family members and associates of the persons suspected of running the lab because he typically discovers that several people involved with a lab all buy pseudoephedrine on the same day at various stores. He testified that he observed that pattern in this case.

{¶38} Agent Barnhardt further testified as follows. He led a team during the search of 1829 Rocklyn. He described the residence as having a rear garage and a front garage which was accessible only through a large overhead door and a “man door” on the side. There was no door leading from the living portion of the residence directly into the garage, although the garage was attached to the home. The garage door had a lock on it and a surveillance camera mounted above the man door. The agent’s team first entered the rear garage of the residence and then the front garage, where they encountered Jason Cubic and Hash. Immediately inside the garage was a partition which blocked the view into the garage. A television and VCR were on a work bench. Both the surveillance camera and television were on when the police executed the search warrant, and the agent saw that the camera monitored part of the street, the driveway, and the approach to the garage’s man door.

{¶39} Agent Barnhardt testified that he searched Hash for weapons and contraband after he exited the garage. He testified that he found a small bag in one of Hash's pockets. The agent performed a presumptive NIC test on the substance inside the bag which tested positive for the presence of methamphetamine.

{¶40} Agent Barnhardt testified that he documented the scene by video and photographs. He testified that he made the decision as to which items from the suspected lab to sample. He personally collected all samples of liquids and residue at the scene. He testified as to items found at the scene, to wit: a hot plate; wood burner; trash can; empty boxes of pseudoephedrine pills; pill grinders; coffee filters; peroxide; iodine; solvents; glass containers containing liquids, bi-level liquids, and white substances; plastic bottles with rubber tubing protruding therefrom; rubber gloves; and road flares with red phosphorous striker plates, all of which are commonly used in the methamphetamine manufacturing process. In addition, several glass smoking devices and small plastic bags of the type commonly used to traffic drugs were found in the garage. Many of the items were found in drawers and cabinets, although some items were on top of counters. The agent testified that a jar containing a bi-level liquid was sitting on the garage floor near a drain. He testified that the drain was tinted yellow and red and that iodine will discolor items in that way. Agent Barnhardt testified that, based on the items and the state of those items found in the garage, there was an active methamphetamine lab at the site although the lab was not in the process of an "active cook." He described an active lab as one evidencing any phase of methamphetamine production, including mere pill grinding.

{¶41} Agent Barnhardt testified that no fingerprints were taken from any items at the scene. He testified, however, that Hash was inside an active methamphetamine lab at the time of the search, that Hash had methamphetamine on his person as he exited the lab, and that local

pharmacy pseudoephedrine logs indicated that Hash had been purchasing pseudoephedrine at the same times and places as others associated with this lab.

{¶42} Agent Jennifer Smith of the Medina County Drug Task Force testified that she is the agency's evidence custodian. She testified that eight samples were collected from the lab and that an expert for the defense independently tested five of the eight samples.

{¶43} Jeffrey Hauser of the Ohio Bureau of Criminal Identification and Investigation ("BCI") testified that he is a forensic scientist who analyzes evidence for the presence of controlled substances. He testified that he analyzed the eight samples taken from the scene associated with this case. He testified that five samples tested negative for controlled substances. He testified that white powder found on coffee filters tested positive for the presence of pseudoephedrine, while one liquid and residue taken from rubber tubing both tested positive for the presence of methamphetamine. He testified that pseudoephedrine gets converted through various processes into methamphetamine and that it constitutes a part of the methamphetamine molecule. Mr. Hauser testified that lab policy requires two separate positive tests to confirm a positive result for a controlled substance.

{¶44} Mr. Hauser testified that he performed both a gas chromatograph flame ionization detector test (a preliminary test) and a gas chromatograph, mass spectrometer test (a confirmatory test) on one of the liquids. He testified that both tests indicated the presence of methamphetamine and that he was one hundred percent certain based on a reasonable degree of scientific certainty that the sample contained methamphetamine. He further testified that the sample tested contained 3.2 grams of liquid.

{¶45} Mr. Hauser testified that he performed a gas chromatograph flame ionization detector test and a gas chromatograph, mass spectrometer test on residue removed from a sample

of rubber tubing found at the scene and that both tests indicated the presence of methamphetamine. He testified that the sample constituted a trace amount of residue and was, therefore, not weighable.

{¶46} Mr. Hauser testified that he works on only one case at a time and that no evidence leaves his personal work area during testing. He testified that all evidence related to his assigned cases is kept in an evidence locker under key held only by himself. He further explained that BCI protocol requires performing “blank” tests prior to the testing of evidence to ensure no cross-contamination of samples and to ensure that instruments are operating properly. He testified that lab instruments are “auto tuned” at the beginning of each week and that known drug standards are run at the beginning of each month to ensure the proper operation of both lab instruments and methods.

{¶47} Jill Hanacek testified that she is now married to Jason Cubic but that she was not at the time of the execution of the search warrant on February 8, 2008, at his part-time residence at 1829 Rocklyn. She testified that his brothers Dale and Phillip Cubic also stayed there. She testified that Jason spent most of his time in the garage at the Rocklyn address.

{¶48} Ms. Hanacek testified that she knows Hash as a friend of Jason Cubic. She testified that Hash would come to the Rocklyn address three to four times a week to help Jason in the garage. She testified that in November 2007, she overheard Hash, Jason, and his brother Phillip outside the garage at Rocklyn discussing their need for pseudoephedrine to make something. She also testified that she saw Jason, his brothers Dale and Phillip, Hash, Hash’s brother Jason, and Jonathan Russ hanging around the Rocklyn garage from 2007 until February 8, 2008. She testified that she has purchased pseudoephedrine and iodine for Jason at his



request. Ms. Hanacek denied using methamphetamine but she testified that she knew Jason Cubic had used it for about a year.

{¶49} Dale Cubic testified that he is the oldest of the Cubic brothers and that he had been living at 1829 Rocklyn at the time the police executed the search warrant on February 8, 2008. He testified that he saw his brother Jason cooking methamphetamine in Jill Hanacek's basement in 2005 or 2006 and that Hash and a man named Steve would stop by on numerous occasions. He testified that he had never used methamphetamine until his brother Jason gave him some in 2005 or 2006. He testified that he thereafter got methamphetamine for his personal use from Jason. He testified that he used methamphetamine in the Rocklyn garage with his brothers Jason and Phillip, and with Hash and his brother Jason.

{¶50} Dale testified that his brother Jason had the key to the garage at the Rocklyn residence and that he spent "almost every day, all the time" in the garage. He testified that he saw what he believed to be a methamphetamine lab in the garage, that he saw his brother Jason making methamphetamine in the garage 20 to 30 times, that he heard Jason discuss making methamphetamine while he was making it, and that Hash came over to the Rocklyn residence two to three times every week. Dale testified that he helped his brother make methamphetamine by buying iodine and more than 1000 pseudoephedrine pills and by washing the pills. He explained that iodine was used in the cooking process when making methamphetamine. He testified that he bought the type of pseudoephedrine pills requested by Jason, including "D"-type pills which would have contained a decongestant. He testified that he never made a profit by buying items for the lab, although he was sometimes paid in methamphetamine rather than in cash.

{¶51} Dale testified that several other people, including Hash, brought pseudoephedrine pills to the Rocklyn lab. He testified that Hash participated in making methamphetamine with Jason, and that the process typically began in the evening and lasted all night. Dale testified that Hash's role included buying, washing, and grinding pseudoephedrine pills, as well as getting other things together for the lab. He explained the "gassing" process incident to the manufacturing of methamphetamine, describing the attending "tear gas" smell, and testified that he saw Hash present at least once during the gassing phase. He testified that Hash handled items in the lab. In addition, Dale testified that he saw his brother Jason make methamphetamine in the garage at Hash's residence while Hash was present, although Hash did not help in the manufacture on that occasion.

{¶52} Dale testified that there was a cast iron stove and a 55-gallon drum type stove in the garage. He testified that the stoves were used both for heat and to burn trash from the methamphetamine lab, for example, pill boxes, coffee filters, and foil which was used to smoke the drug.

{¶53} Dale testified that there was no doubt that Hash knew that Jason Cubic was making methamphetamine in the Rocklyn garage. In fact, he testified that Hash assisted Jason in the manufacture of the drug. He testified that Jason owned a book describing the manufacturing process and that he kept that book, along with car manuals, on a work bench in the garage even when Hash was present. Dale testified that his brother Jason often would only allow Hash in the garage with him. He testified that, on many occasions, he heard the sound of pills being ground, as well as Jason's and Hash's voices through the wall between the garage and the living portion of the residence.

{¶54} Agent John Stayrook of the Medina County Drug Task Force testified that he conducted surveillance on 1829 Rocklyn after an anonymous tip that there was a methamphetamine lab in the garage. He testified that he observed short-term traffic in and out of the residence. He testified that he followed one vehicle that stayed a short period of time at the Rocklyn residence to Hash's residence. Agent Stayrook testified that he obtained pseudoephedrine logs from various local pharmacies, which indicated that the three Cubic brothers, Hash, Jonathan Russ, and others associated with the lab had made multiple purchases of pseudoephedrine pills. Store managers from Walgreen's and Discount Drug Mart in Brunswick authenticated the pseudoephedrine logs. The agent further testified that he participated in the search of the Rocklyn residence.

{¶55} Agent Stayrook testified that the pseudoephedrine logs from Walgreen's and Discount Drug Mart indicated that Hash bought 48 pseudoephedrine pills on January 18, 2008, and 96 pills on February 7, 2008. The logs indicated that he purchased more than 884 pills in 2007. The agent admitted that he could not determine whether Hash had purchased any of the pill boxes found at the scene.

{¶56} Agent Stayrook testified that he determined, based on a city engineer's official scaled map, that the methamphetamine lab at 1829 Rocklyn was within 1000 feet of Applewood School.

{¶57} Jonathan Russ testified that he began using methamphetamine with Phillip Cubic in early 2007. He testified that he smoked the drug in the garage at 1829 Rocklyn a couple times. He described the items in the Rocklyn garage and testified that he believed that the garage contained a methamphetamine lab. He testified that Jason Cubic was always in the garage and that he saw Hash in there with Jason on more than ten occasions. He testified that Jason Cubic

controlled all access to the garage. Russ testified that he purchased iodine and pseudoephedrine pills for the lab at Jason's request.

{¶58} Russ testified that Hash was present in the garage lab during operation. He testified that he saw Hash "do something" with mason jars in the area of the garage where the lab was operating. He testified that he did not know what was in the jars, however, believing "the less I knew, the better off I'd be."

{¶59} Reviewing the evidence in a light most favorable to the State, this Court concludes that any rational trier of fact could have found the essential elements of the charges of illegal manufacture of drugs (methamphetamine) in the vicinity of a school, illegal assembly or possession of chemicals for the manufacture of methamphetamine, and possession of methamphetamine were proved beyond a reasonable doubt. See *Jenks* at paragraph two of the syllabus. The State presented evidence that an active methamphetamine lab existed in the garage at 1829 Rocklyn prior to and as of the date of the execution of the search warrant on February 8, 2008. Hash stumbled out of the lab as the police were executing the search warrant. A surveillance camera mounted outside the door to the garage was on and a monitor inside the garage was displaying the live surveillance at the time of the execution of the search warrant. Witnesses testified that Hash helped Jason Cubic manufacture methamphetamine on a regular basis. There was evidence that Hash purchased pseudoephedrine pills during the time period referenced in the indictment. The evidence demonstrated that Jason Cubic controlled access to the garage and that Hash had been granted access at the time of the search. Various chemicals necessary for the manufacturing of methamphetamine were found in the garage at a time when only Jason Cubic and Hash were inside. The State presented evidence that bi-level liquids in the

lab at the time contained methamphetamine. Accordingly, the State presented sufficient evidence of the crimes.

Manifest weight of the evidence

{¶60} Hash presented evidence and the testimony of various witnesses in his case in chief.

{¶61} Brian Robbins testified that he hired Hash as an apprentice in his carpentry company in 2007. He testified that Hash worked out of town at remote job sites and that he never missed work. He testified that Hash sometimes worked ten hours a day for four days and other times worked eight hours a day for five days. Robbins could not say whether Hash was working out of town on Friday, January 18, 2008, a day when a local pharmacy pseudoephedrine log indicated he bought pills.

{¶62} Hash's father, Allen Hash, testified that his son had sinus and allergy problems as a child. He testified that Hash lived next door to him. He further testified that Hash and Jason Cubic were friends and that he understood that his son helped Jason work on cars.

{¶63} Dr. Neil Grabenstetter testified that he was Hash's family physician. He testified that he or his nurse saw Hash four times from 1998 through 2000 for congestion problems or bronchitis. In 2000, his nurse noted that Hash had possible allergy problems. Hash was not seen in Dr. Grabenstetter's office since August 2000.

{¶64} Benjamin Corpus testified that he is a toxicologist at Toxicology and Associates in Columbus, and that he performs analytical tests on substances as requested to determine the presence of drugs or the identity of the substance. He testified that the entirety of his training comes from on-the-job training as a result of shadowing a lab manager for six months to a year. He described his lab protocol as follows. Samples are stored in a lock box in a central location in

the lab. Samples are generally tested within 24 to 48 hours. Samples are compared to control standards which are 98-99 percent pure. Many tests are performed in the same area of the lab.

{¶65} Mr. Corpus testified that he was hired by defense counsel to analyze samples of evidence relevant to this case. He testified that he went to the Brunswick police station to obtain samples for testing. He testified that he poured samples of liquids into containers rather than transferring the liquids using pipettes. He testified that he obtained samples of rubber tubing with residue and a bag with white powder on it by cutting a portion of each with scissors he borrowed from the police department. He testified that he did not reseal the evidence bags from which he obtained his samples because he assumed that the Brunswick police would do that.

{¶66} Mr. Corpus testified that he removed the samples relevant to this case from his lab's vault one day but did not test the samples until two days later. He testified that he performed a gas chromatograph, mass spectrometry test on every sample. He testified that the residue on the rubber tubing tested positive for methamphetamine. However, he testified that the remaining five samples tested positive only for pseudoephedrine, but not methamphetamine. Mr. Corpus testified that he only performs a gas chromatograph, mass spectrometry test on samples because that is the "gold standard" of tests. He testified, in fact, that he believes that performing multiple tests on samples can make the results less reliable.

{¶67} 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 witness' testimony over the testimony of others. *State v. Crowe*, 9th Dist. No. 04CA0098-M, 2005-Ohio-4082, at ¶22.

{¶68} A review of the record indicates that this is not the exceptional case, where the evidence weighs heavily in favor of Hash. A thorough review of the record compels this Court to find no indication that the trial court lost its way and committed a manifest miscarriage of

justice in convicting Hash of illegal manufacture of drugs (methamphetamine) in the vicinity of a school, illegal assembly or possession of chemicals for the manufacture of methamphetamine, and possession of methamphetamine.

{¶69} The weight of the evidence supports the conclusion that Hash assembled or possessed chemicals used to manufacture methamphetamine. He purchased pseudoephedrine pills on numerous occasions, including in January and February 2008. Several witnesses testified that he helped Jason Cubic manufacture methamphetamine. Hash was present when an active methamphetamine lab was found in the garage at 1829 Rocklyn. Surveillance and other security measures were in use at the garage at that time. Hash was one of the very few persons that Jason Cubic trusted to be in the garage. A bi-level liquid found in the lab when Hash was present tested positive for the presence of methamphetamine pursuant to multiple tests performed by a toxicologist at BCI, although defense counsel's toxicologist did not detect methamphetamine in the liquid. The evidence demonstrated that lab protocols, as well as the obtaining and maintenance of samples, varied in the two analytical labs. The evidence indicated that, although Hash might have helped Jason Cubic repair cars in the garage on occasion, there was time to do so during one of phases of methamphetamine production. Accordingly, Hash's convictions are not against the manifest weight of the evidence. Hash's third assignment of error is overruled.

#### **ASSIGNMENT OF ERROR IV**

“THE TRIAL COURT ABUSED ITS DISCRETION IN ADMITTING INTO EVIDENCE PSEUDOEPHEDRINE LOGS THAT WERE NOT RELEVANT TO THE CHARGES AND CONSTITUTED EVIDENCE OF OTHER WRONGS, ACTS OR CRIMES IN VIOLATION OF EVID.R. 404(B)[.]”

{¶70} Hash argues that the trial court abused its discretion by admitting into evidence pharmacy pseudoephedrine logs evidencing his purchase of pseudoephedrine outside the time

parameters charged in the indictment. Specifically, Hash argues that the logs were not relevant to the charges and were admitted in violation of Evid.R. 404(B). This Court disagrees.

{¶71} The decision to admit or exclude evidence lies in the sound discretion of the trial court. *State v. Sage* (1987), 31 Ohio St.3d 173, 180. This Court, therefore, reviews the trial court’s decision regarding evidentiary matters under an abuse of discretion standard of review. An abuse of discretion is more than an error of judgment; it means that the trial court was unreasonable, arbitrary, or unconscionable in its ruling. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219. An abuse of discretion demonstrates “perversity of will, passion, prejudice, partiality, or moral delinquency.” *Pons v. Ohio State Med. Bd.* (1993), 66 Ohio St.3d 619, 621. When applying the abuse of discretion standard, this Court may not substitute its judgment for that of the trial court. *Id.*

{¶72} Evid.R. 402 provides that relevant evidence is generally admissible. Evid.R. 403 provides two exceptions to the general rule, including where exclusion of the evidence is mandatory:

“(A) 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.”

{¶73} Evid.R. 404(B), which addresses other crimes, wrongs or acts, states:

“Evidence of the 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.”

{¶74} The trial court did not abuse its discretion by admitting evidence of Hash’s pseudoephedrine purchases outside the time delineated in the charges pursuant to Evid.R. 404(B) because that rule is not applicable to the challenged evidence. Evid.R. 404 addresses the



admissibility of a person's character. Not every act implies something about a person's character. Evidence that a person stole certain items on prior occasions might prove a character for deceitfulness. However, evidence that a person legally bought the same items on prior occasions indicates nothing regarding character. Because evidence of Hash's pseudoephedrine purchases implied nothing relevant to his character, the trial court did not admit such evidence in violation of Evid.R. 404(B).

{¶75} Hash next argues that evidence of his prior purchases was irrelevant. In support, he argues that "[t]he probative value of any such purchases was outweighed by the prejudicial effect." This balancing test is only implicated, however, when the evidence is relevant. See Evid.R. 403(A).

{¶76} Hash was charged with illegal manufacture of methamphetamine during the time period "on or about the 15th day of January through the 8th day of February, [2008]," and with illegal assembly or possession of chemicals for the manufacture of methamphetamine during the time period "on or about the 18th day of January through the 8th day of February, [2008]." Nevertheless, the admission of evidence of Hash's purchases of pseudoephedrine prior to June 2007, and after February 8, 2008, was relevant to the charges based on Hash's theory of his defense. Hash attempted to demonstrate that he suffered from allergies and required pseudoephedrine for personal medical use. Implicit in this theory of his defense was that his purchases were reasonable. The extended history of his pseudoephedrine purchases, however, was relevant to show that the total amount of his purchases far surpassed any reasonable amount of pseudoephedrine one might purchase for personal use. Accordingly, the trial court did not abuse its discretion by admitting the challenged evidence on the grounds of relevancy.

{¶77} Assuming arguendo that the trial court improperly admitted the above testimony, any error was harmless error. Crim.R. 52(A) provides that “[a]ny error, defect, irregularity, or variance which does not affect substantial rights shall be disregarded.” Hash fails to explain how the admission of purchases prior to June 2007, and once after the time set forth in the indictment, affected any substantial right. He does not allege that the outcome of the trial would have been different but for the admission of the challenged evidence. Nor does he allege that the admission violated any constitutional right. Nevertheless, even where the admission of evidence constitutes constitutional error, the error is harmless “if the remaining evidence, standing alone, constitutes overwhelming proof of defendant’s guilt.” *State v. Williams* (1983), 6 Ohio St.3d 281, at paragraph six of the syllabus. The State’s evidence that Hash helped Jason Cubic manufacture methamphetamine, that Hash purchased pseudoephedrine close in time to the execution of the search of the active methamphetamine lab, and that Hash had methamphetamine on his person at the time of the search constituted overwhelming proof of Hash’s guilt. Accordingly, any error in the admission of evidence of purchases outside the time period relevant to the charges was harmless. Hash’s fourth assignment of error is overruled.

### III.

{¶78} Hash’s assignments of error are overruled. The judgment of the Medina County Court of Common Pleas is affirmed.

Judgment affirmed.

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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 Medina, 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.

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DONNA J. CARR  
FOR THE COURT

WHITMORE, J.  
CONCURS

MOORE, J.  
CONCURS IN JUDGMENT ONLY

APPEARANCES:

DAVID C. SHELDON, Attorney at Law, for Appellant.

DEAN HOLMAN, Prosecuting Attorney, and MICHAEL P. MCNAMARA, Assistant Prosecuting Attorney, for Appellee.