[Cite as *State v. Kirkby*, 2015-Ohio-1520.]

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

STATE OF OHIO Appellee v. ROBERT KIRKBY Appellant	C.A. Nos. 27381 27399 APPEAL FROM JUDGMENT ENTERED IN THE COURT OF COMMON PLEAS COUNTY OF SUMMIT, OHIO CASE No. CR 2013 07 1776

DECISION AND JOURNAL ENTRY

Dated: April 22, 2015

SCHAFER, Judge.

{¶1} Defendant-Appellant, Robert J. Kirkby, appeals from his convictions in the Summit County Court of Common Pleas. For the reasons set forth below, we affirm.

I.

{¶2} On September 2, 2013, the Akron Police Department received a phone call from a known information source, Jessica Clark, reporting a dispute at 464 Eastland Avenue in Akron, Ohio. Law enforcement investigated Ms. Clark's complaint after identifying 464 Eastland Avenue as a location with prior methamphetamine activity. Upon arriving at the address, Ms. Clark informed the police that the home's owner, Robert J. Kirkby, had taken her cell phone. She also stated that she believed there to be methamphetamine materials inside of the home.

{¶3} Officer LeMonier and Lieutenant Simcox, who are both trained in detecting clandestine methamphetamine labs, subsequently knocked on the residence's front door for several minutes and Mr. Kirkby eventually answered. Mr. Kirkby returned Ms. Clark's cell

phone and gave the officers consent to enter and search the residence. The result of the officers' search revealed a methamphetamine lab and numerous items used to manufacture methamphetamine. Additionally, an investigation revealed that Mr. Kirkby had purchased pseudoephedrine eight times in the month prior to September 2, 2013. The officers then placed Mr. Kirkby under arrest. Despite Mr. Kirkby's insistence that Ms. Clark and a Ms. Heather Diaz were responsible for making the meth, neither woman was charged as the officers did not find Mr. Kirkby's allegations to be credible.

{¶4} Mr. Kirkby was indicted on illegal manufacture of drugs, illegal assembly or possession of chemicals for the manufacture of drugs, aggravated possession of drugs, illegal use or possession of drug paraphernalia (case no. 2013-09-2392), as well as possessing criminal tools and theft (case no. 2013-07-1776). The matter proceeded to a joint jury trial. The jury convicted Mr. Kirkby on all counts. For sentencing purposes, the trial court merged the theft and possession of criminal tools counts and merged the remaining drug-related counts, but declined to merge the manufacturing and assembly counts. The trial court sentenced Mr. Kirkby to three mandatory years for manufacturing a controlled substance and two years for assembly, which were run concurrently. The court also sentenced Mr. Kirkby to nine months for theft, which is to run consecutive to his other sentences.

{¶5} Mr. Kirkby now appeals and raises four assignments of error for this Court's review.

II.

ASSIGNMENT OF ERROR I

THE TRIAL COURT COMMITTED REVERSIBLE ERROR WHEN IT DENIED DEFENSE COUNSEL'S MOTION FOR CONTINUANCE AFTER A SUBPOENAED WITNESS FAILED TO APPEAR.

{¶6} In his first assignment of error, Mr. Kirkby argues that the trial court erred in not granting defense counsel's request for a hearing or continuance when a subpoenaed defense witness, Heather Diaz, failed to appear and testify. We disagree.

{¶7} "The grant or denial of a continuance is a matter which is entrusted to the broad, sound discretion of the trial judge." *State v. Unger*, 67 Ohio St.2d 65 (1981), syllabus. An appellate court must not reverse the denial of a continuance absent an abuse of discretion. *Id*. at 67. An abuse of discretion "implies that the court's attitude is unreasonable, arbitrary or unconscionable." *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219 (1983). When applying the abuse of discretion standard, an appellate court may not substitute its judgment for that of the trial court. *See id.*

{¶8} In the present case, Mr. Kirkby subpoenaed Heather Diaz, a known meth manufacturer who occasionally looked after Mr. Kirkby's house, to be a witness. However, Ms. Diaz did not appear, but instead phoned the court to inform them that she was unwilling to testify because she did not want to lie under oath. Trial counsel made a motion for a continuance, but the trial court denied the motion. In arguing that the trial court's denial of the motion was reversible error, Mr. Kirkby fails to demonstrate that Ms. Diaz's absence from trial was prejudicial to his defense. In chambers at trial, Mr. Kirkby's attorneys stated that they had never met or spoken with Ms. Diaz and had no means of contacting her other than a mailing address. Later, Mr. Kirkby's trial counsel admitted that he did not know what Ms. Diaz was going to say on the witness stand. As such, we conclude that the trial court did not abuse its discretion in denying Mr. Kirkby's motion for continuance. Mr. Kirkby's first assignment of error is overruled.

ASSIGNMENT OF ERROR II

> THE TRIAL COURT COMMITTED REVERSIBLE ERROR WHEN IT DENIED DEFENSE COUNSEL'S MOTION FOR MISTRIAL AFTER THE TRIAL COURT RECEIVED INFORMATION THAT A JUROR IMPROPERLY RESEARCHED THE DEFINITION OF "ACCOMPLICE."

{¶9} In his second assignment of error, Mr. Kirkby argues that the trial court erred in not granting defense counsel's request for a hearing and Crim.R. 33(A)(2) motion for a new trial[1] on the Illegal Manufacture of Drugs charge after learning that a juror had conducted independent research about the case. Specifically, the juror consulted a dictionary to look up the definition of the word "accomplice." In the alternative, Mr. Kirkby argues that Evid.R. 606(B), which prohibits jurors from impeaching a verdict absent outside evidence, is an unconstitutional denial of his due process rights. We disagree with both assertions.

{¶10} Mr. Kirkby's first argument is that the trial court erred by applying Evid.R. 606(B) and concluding that a hearing on his motion for a new trial was not warranted. "This court will not disturb the trial court's decision on whether the motion for new trial warrants a hearing absent a clear showing that the trial court abused its discretion." *State v. Mosey*, 9th Dist. Summit No. 16048, 1993 WL 164784, *1 (May 19, 1993), citing *Toledo v. Stuart*, 11 Ohio App.3d 292, 293 (6th Dist.1983).

{¶11} "Evid.R. 606(B) governs the competency of a juror to testify at a subsequent proceeding concerning the original verdict." *State v. Schiebel*, 55 Ohio St.3d 71, 75 (1990). Evid.R. 606(B) states, in part, that:

> Upon an inquiry into the validity of a verdict or indictment, a juror may not testify as to any matter or statement occurring during the course of the jury's

[1] Appellate counsel's second assignment of error states that the trial judge erred in denying Mr. Kirkby's motion for a mistrial. After reviewing the record, it appears Mr. Kirkby filed a motion for a new trial. As such, this Court will construe appellate counsel's argument to reflect the true nature of Mr. Kirkby's post-trial motion.

> deliberations or to the effect of anything upon his or any other juror's mind or emotions as influencing him to assent to or dissent from the verdict or indictment or concerning his mental processes in connection therewith. A juror may testify on the question whether extraneous prejudicial information was improperly brought to the jury's attention or whether any outside influence was improperly brought to bear on any juror, *only after some outside evidence of that act or event has been presented.*

(Emphasis added.) This requirement of outside evidence of misconduct is the aliunde rule, which, as stated in the syllabus of *Wicker v. City of Cleveland*, 150 Ohio St. 434 (1948), provides that:

> In the absence of evidence aliunde, the verdict of a jury may not be impeached by the testimony of a juror concerning the alleged misconduct of a member thereof.

Thus, in order to permit juror testimony to impeach a verdict, "a foundation of extraneous, independent evidence must first be established. This foundation must consist of information from sources other than the jurors themselves * * * and the information must be from a source which possesses firsthand knowledge of the improper conduct." *Schiebel* at 75. The purpose for requiring evidence aliunde is to preserve the integrity of the jury process, to prevent an opportunity to tamper with a member of the jury who may be later dissatisfied with the verdict previously assented to, and to close the door against endless attacks upon jury verdicts. *See State v. Adams*, 141 Ohio St. 423, 427 (1943); *Lund v. Kline*, 133 Ohio St. 317, 319 (1938).

{¶12} In this case, the record reflects that the trial court learned of the juror's independent research after the trial judge spoke with the jury at the conclusion of the case. As such, we find that the juror's admission that he consulted a dictionary to find an alternative definition of "accomplice" is not extraneous, independent evidence that would justify potentially disrupting the jury's verdict. Because Mr. Kirkby failed to present evidence independent of the juror's statement, the trial court did not commit an error of law in regard to the aliunde rule, and

this Court will not disturb the trial court's ruling on Mr. Kirkby's request for a hearing and motion for a new trial.

{¶13} Moreover, we conclude after reviewing the record that Mr. Kirkby failed to contest the constitutionality of Evid.R. 606(B) at the post-trial hearing on his motion for a new trial. Therefore, he has forfeited all but plain error on appeal. *See State v. Quarterman*, 140 Ohio St.3d 464, 2014-Ohio-4034, ¶ 15, citing *State v. Awan*, 22 Ohio St.3d 120 (1986), syllabus. However, Mr. Kirkby has not developed any plain error argument on appeal, and we decline to create one for him. *See* App.R. 16(A)(7); *Cardone v. Cardone*, 9th Dist. Summit No. 18349, 1998 WL 224934, *8 (May 6, 1998) (noting that it is not this Court's duty to create an appellant's argument).

{¶14} Therefore, Mr. Kirkby's second assignment of error is overruled.

ASSIGNMENT OF ERROR III

> ROBERT [KIRKBY]'S CONVICTIONS ARE NOT SUPPORTED BY SUFFICIENT EVIDENCE AND ARE AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE.

{¶15} In his third assignment of error, Mr. Kirkby challenges his conviction under R.C. 2925.04(A), arguing that the State failed to meet its burden of production and proving his guilt beyond a reasonable doubt. Specifically, Mr. Kirkby argues that because other known meth cooks had access to his home, and because the officers did not investigate whether those other meth cooks were responsible for manufacturing the meth that was discovered in his home, the State failed to prove that he "knowingly" manufactured the methamphetamine. We disagree.

Sufficient Evidence

{¶16} Whether a conviction is supported by sufficient evidence is a question of law this Court reviews de novo. *State v. Thompkins*, 78 Ohio St.3d 380, 386 (1997). In order to

determine whether the evidence before the trial court was sufficient to sustain a conviction, this Court must review the evidence in a light most favorable to the prosecution. *State v. Jenks*, 61 Ohio St.3d 259, 279 (1991). Furthermore:

> 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.

{¶17} A person is guilty of illegally manufacturing methamphetamine in violation of R.C. 2925.04(A) when he "knowingly manufacture[s] or otherwise engage[s] in any part of the production of a controlled substance." "A person acts knowingly, regardless of his purpose, when he is aware that his conduct will probably cause a certain result or will probably be of a certain nature. A person has knowledge of circumstances when he is aware that such circumstances probably exist." R.C. 2901.22(B). " '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).

{¶18} At trial, several law enforcement officers of the Akron Police Department testified on behalf of the State. Officer Adam LeMonier testified that he received a phone call on September 2, 2013 from Jessica Clark, an unpaid information source with a history of involvement with meth, reporting that she was involved in a fight with another individual over a cell phone at 464 Eastland Avenue. Officer LeMonier testified that he and Lieutenant Brian

Simcox, who are both trained in detecting clandestine meth labs, elected to investigate Ms. Clark's complaint because there had been prior methamphetamine activity at the residence.

{¶19} Officer LeMonier and Lieutenant Simcox both testified that upon arriving at 464 Eastland Avenue, Ms. Clark informed them that the home might contain materials used to produce methamphetamine. Officer LeMonier and Lieutenant Simcox then testified that Robert Kirkby, the homeowner, gave them consent to enter and search the residence. They also testified that a search of the residence uncovered large amounts of drug-related evidence, such as a glass bowl with white residue, ammonium nitrate, strips of lithium from a battery, coffee filters, a coffee bean grinder, pseudoephedrine blister packs, snort straws, a smoking pipe, Ronsonol lighter fluid, aluminum foil trays, a measuring cup, drain cleaner or lye, and cleaned-out two-liter soda bottles. Officer LeMonier testified that he also discovered a two-liter soda bottle standing upright with "pink sludge in the bottom," which he described as an active one-pot meth lab. Officer LeMonier also discovered a Walgreens receipt, dated August 11, 2013, for the Ronsonol lighter fluid.

{¶20} Officer LeMonier then testified that a National Precursor Law Enforcement Exchange (NPLEx) report on Robert Kirkby revealed that Mr. Kirkby purchased pseudoephedrine thirteen times between October 30, 2012 and August 26, 2013. Of those purchases, Mr. Kirkby purchased pseudoephedrine on eight separate occasions within one month of September 2, 2013, according to Officer LeMonier.

{¶21} Officer LeMonier also testified that a BCI forensic laboratory report revealed that white residue found on a coffee filter within Mr. Kirkby's home contained .01 grams of methamphetamine.

{¶22} Officer LeMonier also stated that there was no evidence of a woman residing within the home, such as female clothing or personal items in the bathroom. He further testified that, in his mind, the notion that Ms. Clark or Ms. Diaz had actually cooked the meth was not credible. Officer LeMonier conceded on cross-examination that a number of photographed items within the residence might be articles of female clothing.

{¶23} The State presented sufficient evidence to support Mr. Kirkby's conviction under R.C. 2925.04(A). According to the testimony of Officer LeMonier and Lieutenant Simcox, the police knew there had been prior methamphetamine activity at Mr. Kirkby's residence and discovered copious amounts of chemicals, residue, drug paraphernalia, and an active one-pot meth lab upon searching the residence. Moreover, Officer LeMonier testified that a NPLEx report on Mr. Kirkby shows that he purchased pseudoephedrine, a necessary precursor to the manufacture of meth, on multiple occasions in the month leading up to his arrest. This testimony, if believed, shows that Mr. Kirkby procured a necessary ingredient in order to manufacture meth, and that numerous drug-related ingredients, instruments, chemicals, and paraphernalia, along with an active one-pot meth lab, were found in Mr. Kirkby's home. Though the evidence presented here is circumstantial in nature, "[c]ircumstantial evidence and direct evidence inherently possess the same probative value[.]" *Jenks*, 61 Ohio St.3d at paragraph one of the syllabus. We believe this evidence is sufficient for a jury to conclude that Mr. Kirkby knowingly manufactured a controlled substance in violation of R.C. 2925.04(A). Accordingly, we find there to be sufficient evidence to support Mr. Kirkby's conviction for knowingly manufacturing methamphetamine.

Manifest Weight of the Evidence

{¶24} In determining whether a 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 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, 33 Ohio App.3d 339, 340 (1986). A weight of the evidence challenge indicates that a greater amount of credible evidence supports one side of the issue than supports the other. *Thompkins*, 78 Ohio St.3d at 387. Further, when reversing a conviction on the basis that the conviction was against the manifest weight of the evidence, the appellate court sits as the "thirteenth juror" and disagrees with the factfinder's resolution of the conflicting testimony. *Id.* Therefore, this Court's "discretionary power to grant a new trial should be exercised only in the exceptional case in which the evidence weighs heavily against the conviction." *State v. Martin*, 20 Ohio App.3d 172, 175 (1st Dist.1983).

{¶25} Mr. Kirkby argues that his conviction was against the manifest weight of the evidence. Specifically, Mr. Kirkby contends that because he was incarcerated for a large period of time preceding the officers arriving to search his home, and because the officers failed to investigate two known meth cooks who had access to his home, the State failed to prove beyond a reasonable doubt that he knowingly manufactured methamphetamine. However, the jury apparently accepted the testimony of Officer LeMonier and Lieutenant Simcox that evidence existed showing Mr. Kirkby manufactured meth in his home. Such testimony, if believed, would support the conclusion that Mr. Kirkby knowingly manufactured methamphetamine. Although Mr. Kirkby attempted to show through cross-examination of several witnesses that other

individuals who had access to his house were responsible for cooking the meth, the jury was free to disregard that theory. After reviewing the entire record, we cannot conclude that the jury lost its way and committed a manifest miscarriage of justice in convicting Mr. Kirkby of illegal manufacture of drugs.

{¶26} Accordingly, Mr. Kirkby's third assignment of error is overruled.

ASSIGNMENT OF ERROR IV

THE TRIAL COURT COMMITTED REVERSIBLE ERROR WHEN IT FAILED TO MERGE THE MANUFACTURING AND ASSEMBLY CONVICTIONS FOR SENTENCING PURPOSES.

{¶27} In his fourth assignment of error, Mr. Kirkby argues that the trial court erred in declining to merge the manufacturing and assembly convictions. Specifically, Mr. Kirkby argues that R.C. 2925.04(A), Illegal Manufacture of Drugs, and R.C. 2925.041(A), Illegal Assembly or Possession of Chemicals for the Manufacture of Drugs, are crimes of similar import and must merge for sentencing purposes. We disagree.

{¶28} We "apply a de novo standard of review in reviewing a trial court's R.C. 2941.25 merger determination." *State v. Williams*, 134 Ohio St.3d 482, 2012–Ohio–5699, ¶ 28. It is a defendant's burden to demonstrate that he or she is entitled to have two offenses merge. *State v. Washington*, 137 Ohio St.3d 427, 2013–Ohio–4982, ¶ 18.

{¶29} R.C. 2941.25 provides:

> (A) Where the same conduct by defendant can be construed to constitute two or more allied offenses of similar import, the indictment or information may contain counts for all such offenses, but the defendant may be convicted of only one.
>
> (B) Where the defendant's conduct constitutes two or more offenses of dissimilar import, or where his conduct results in two or more offenses of the same or similar kind committed separately or with a separate

> animus as to each, the indictment or information may contain counts for all such offenses, and the defendant may be convicted of all of them.

Thus, two or more offenses may result in multiple convictions if any of the following are true: "(1) the offenses are dissimilar in import or significance—in other words, each offense caused separate, identifiable harm, (2) the offenses were committed separately, and (3) the offenses were committed with separate animus or motivation." *State v. Ruff*, Slip Opinion No. 2015-Ohio-995, ¶ 25.[2] "The conduct, the animus, and the import must all be considered." *Id*. at ¶ 31. "At its heart, the allied-offense analysis is dependent upon the facts of a case because R.C. 2941.25 focuses on the defendant's conduct." *Id*. at ¶ 26.

{¶30} Here, the trial court addressed the issue of merger during the sentencing hearing and stated as follows on the record:

> The Court does not think that Counts One and Two, the manufacturing and the assembly, merge because the dates were different. And you remember at trial, the Prosecutor amended[3] the dates that you were buying the pseudoephedrine to July through September, I believe. * * * It's an extended period of time. Whereas the indictment charges on a specific date, I think September of 2013. So this is an expanded period of time. So those would not merge.

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[2] The Supreme Court of Ohio has reevaluated its allied offense jurisprudence since the date of Mr. Kirkby's sentencing hearing. The trial court and Mr. Kirkby's appellate counsel analyzed the merger issue under the test set forth in *State v. Johnson*, 128 Ohio St.3d 153, 2010-Ohio-6314, syllabus. Because *Ruff* supplements and clarifies the *Johnson* test, we have elected to apply *Ruff* in the first instance rather than remand the matter to the trial court for a determination as to whether Mr. Kirkby's illegal assembly or possession and illegal manufacture of drugs offenses are, in fact, allied offenses of similar import. *See Ruff* ¶ 29 (Supreme Court remanding the matter to the First District Court of Appeals to consider whether aggravated burglary and rape were crimes of similar or dissimilar import rather than remanding the matter back to the trial court).

[3] Count Two of the original indictment reads that "on or about the 2nd day of September, 2013 [Mr. Kirkby] did commit the crime of ILLEGAL ASSEMBLY OR POSSESSION OF CHEMICALS FOR THE MANUFACTURE OF DRUGS * * * ." On March 14, 2014, the prosecuting attorney made an oral Crim.R. 7(D) Motion to amend the date in the indictment on that count. The amended indictment charged Mr. Kirkby with illegally assembling or possessing chemicals for the manufacture of drugs between July 25, 2013 and September 2, 2013. Mr. Kirkby's trial counsel did not object and the trial judge granted the State's motion.

Sentencing Tr., p. 9-10.

{¶31} We agree with the trial judge's analysis and therefore conclude that because Mr. Kirkby had been routinely purchasing pseudoephedrine over a period of time, these crimes were not committed with the same conduct and with the same animus. *See State v. Chandler*, 4th Dist. Highland No. 14CA11, 2014-Ohio-5215, ¶ 26 (declining to merge illegal manufacture and illegal assembly or possession of drugs charges because Appellant apparently purchased pseudoephedrine, cold packs, and other material on different days than the actual manufacturing took place, as well as the fact that additional materials, over and above those needed to manufacture the meth made on the day of Appellant's arrest, were found in Appellant's home during the police search.) Mr. Kirkby's conduct in purchasing pseudoephedrine over a period of months was separate from his later conduct in manufacturing methamphetamine. Because Mr. Kirkby committed these offenses separately, separate convictions are permitted. *Ruff* at ¶ 31. As such, the illegal manufacturing and illegal assembly charges are not allied offenses of similar import in this case and the trial court did not err in refusing to merge them for purposes of sentencing.

{¶32} Accordingly, Mr. Kirkby's fourth assignment of error is overruled.

III.

{¶33} Mr. Kirkby's assignments of error are overruled, and 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(C). 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.

JULIE SCHAFER
FOR THE COURT

CARR, P. J.
WHITMORE, J.
CONCUR.

APPEARANCES:

GREGORY A. PRICE, Attorney at Law, for Appellant.

SHERRI BEVAN WALSH, Prosecuting Attorney, and HEAVEN DIMARTINO, Assistant Prosecuting Attorney, for Appellee.