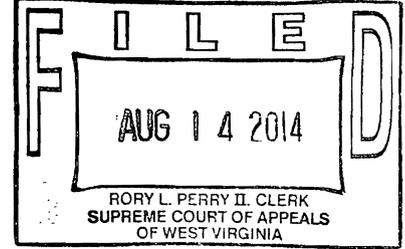


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

NO. 14-0200



STATE OF WEST VIRGINIA,

*Plaintiff Below,
Respondent,*

v.

RICK BROCK,

*Defendant Below,
Petitioner.*

RESPONDENT'S BRIEF

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STATEMENT OF THE CASE

On July 18, 2013, an indictment was returned in the Circuit Court of Wood County, West Virginia, charging Rick Brock (“Petitioner”) with one count of “Operating or Attempting to Operate a Clandestine Drug Laboratory” in violation of W. Va. Code § 60A-4-411 and one count of “Conspiracy to Commit Operating or Attempting to Operate a Clandestine Drug Laboratory” in violation of W. Va. Code §§ 60A-4-411 and 61-10-31. (App. at 1-2.)

The charges related to Petitioner and Terry Abbott being pulled over after being observed by law enforcement committing multiple minor traffic violations including driving left of center multiple times. (December 12, 2013, Trial Transcript (hereinafter “Trial Tr.”) at 7-12, 14-17.) Petitioner was driving the vehicle while Abbott was in the front passenger seat. (*Id.* at 17.) During the traffic stop, law enforcement requested a canine unit. (*Id.* at 21.) When the canine arrived it indicated on the front door on the passenger side of the vehicle and officers subsequently searched that portion of the vehicle. (*Id.* at 22.) When officers searched the passenger side of the vehicle, they found materials consistent with manufacturing meth located in the floorboard including but not limited to coffee filters, a plastic bottle, and ammonium nitrate. (*Id.* at 23-30.) The lab appeared to still be in the “reaction phase” when found. (*Id.* at 99-100.)

On December 12, 2013, after a two day jury trial, Petitioner was convicted of both counts as contained within the Indictment. (*Id.* at 166.) On February 13, 2014, Petitioner was sentenced to two to ten years on the first count, and one to five years on the second. (App. at 10-11.) The circuit court thereafter suspended Petitioner’s sentence and placed Petitioner on probation for a period of three years. (*Id.* at 11.) Petitioner now takes the instant appeal.

SUMMARY OF THE ARGUMENT

On appeal, Petitioner asserts five assignments of error including the following: the circuit court erred by denying his motion to dismiss the indictment; the circuit court erred by failing to give the entirety of Petitioner's Proposed Instruction No. 1; the circuit court erred by denying his motion to suppress the evidence obtained during the traffic stop; there was insufficient evidence to support a conviction; and the circuit court erred in allowing Officer Sturm to testify regarding the dangers of meth labs. As explained below, each of Petitioner's claims must be rejected and his conviction affirmed.

First, Petitioner complains that the indictment charged him with two offenses in one count. Specifically, Petitioner argues that the crime of "Operating or Attempting to Operate a Clandestine Drug Lab" contains two offenses, the substantive crime and the attempt. However, Petitioner's duplicitous count argument must be rejected because even if it can be said that the above crime contains two offenses, the offense of attempt is a lesser included offense of the substantive crime. Therefore, each count of the indictment only includes one offense, the substantive offense and the lesser included offense of attempt.

Second, the circuit court did not err by refusing to give the entirety of Petitioner's Proposed Instruction No. 1 because the portions in which were not included were substantially covered in the charge actually given to the jury. Third, the circuit court properly denied Petitioner's Motion to Suppress as officers had reasonable suspicion to initially stop Petitioner, did not prolong the traffic stop so as to render it unreasonable, and the subsequent canine indication on the passenger door gave officers probable cause to search the vehicle.

Fourth, Petitioner cannot meet his heavy burden in regard to his insufficiency claim. The jury heard evidence regarding the initial traffic stop, that materials consistent with manufacturing

methamphetamine were found in the vehicle, and that the process of manufacturing the meth had already begun at the time the materials were found. Finally, Officer Sturm's testimony was relevant in regard to the specific process used to manufacture methamphetamine in this case. Furthermore, assuming *arguendo* that the circuit court erred in this regard, any such error was harmless. Accordingly, the judgment of the Circuit Court of Wood County must be affirmed.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Oral argument is not necessary in this case as the dispositive issues have been decided. The briefs and records on appeal adequately present the facts and legal arguments. Oral argument would not significantly aid the decisional process, and a memorandum decision would be appropriate.

ARGUMENT

I. The Trial Court Properly Denied Petitioner's Motion to Dismiss Because the Indictment Does Not Violate Rule 8 of the West Virginia Rules of Criminal Procedure.

"This Court's standard of review concerning a motion to dismiss an indictment is, generally, *de novo*." Syl. Pt. 1, in part, *State v. Grimes*, 226 W. Va. 411, 701 S.E.2d 449 (2009).

Rule 8 of the West Virginia Rules of Criminal Procedure provides as follows:

"(a) Joinder of Offenses.

(1) *Permissive Joinder*. Two or more offenses may be charged in the same indictment or information in a separate count for each offense if the offenses charged, whether felonies or misdemeanors or both, are of the same or similar character.

(2) *Mandatory Joinder*. If two or more offenses are known or should have been known by the exercise of due diligence to the attorney for the state at the time of the commencement of the prosecution and were committed within the same county having jurisdiction and venue of the offenses, all such offenses upon which the attorney for the state elects to proceed shall be prosecuted by separate counts in a single prosecution if they are based on the same act or transaction or on two or more acts or transactions connected together or constituting parts of a common scheme or plan, whether felonies or misdemeanors or both. Any offense required by this rule to be prosecuted by a separate count in a single prosecution cannot be subsequently prosecuted unless waived by the defendant.

(b) Joinder of Defendants. Two or more defendants may be charged in the same indictment or information if they are alleged to have participated in the same act or transaction or in the same series of acts or transactions constituting an offense or offenses. Such defendants may be charged in one or more counts together or separately, and all of the defendants need not be charged in each count."

W. Va. R. Crim. P. 8.

The pertinent language of Rule 8 upon which Petitioner relied in his Motion to Dismiss comes from the portion of the rule concerning mandatory joinder. Specifically, Petitioner relies on the following language: "all such offenses upon which the attorney for the state elects to proceed shall be prosecuted by separate counts in a single prosecution" (App. at 4; Pet'r's Br. at 13.) Petitioner, utilizing the above language, argued that the Indictment in this case

violated Rule 8 because it improperly charged two offenses within the same count; the two offenses being (1) operating a clandestine drug laboratory and (2) attempting to operate a clandestine drug laboratory. (App. at 3-5.) The trial court properly denied Petitioner's motion, and Petitioner's claim that the circuit court erred in this regard must be rejected.

Petitioner's argument is that of a duplicitous count, or a count in a charging document alleging more than one offense.

"A duplicitous indictment is one that charges separate offenses in a single count. The overall vice of duplicity is that the jury cannot in a general verdict render its finding on each offense, making it difficult to determine whether a conviction rests on only one of the offenses or both. Adverse effects on a defendant may include ... the danger that a conviction will result from a less than unanimous verdict as to each separate offense."

United States v. Duncan, 850 F.2d 1104, 1108 n. 4 (6th Cir.1988). While to Respondent's knowledge this Court has not dealt with the specific argument Petitioner sets forth in the instant assignment of error, this Court has dealt with the issue of a duplicitous count. *See generally State v. Jerome*, 233 W. Va. 372, 758 S.E.2d 576 (2014)("whether a count in a charging document alleging that the defendant stole the property of several persons at the same time charges more than one offense and is therefore duplicitous."); *State v. Wyatt*, 198 W. Va. 530, 537, 482 S.E.2d 147, 154 (1996) (Appellant asserted on appeal that a count "was duplicitous in that it charged [a] violation of W. Va. Code § 61-8D-2(a) in one paragraph and subsection (b) of the statute in a second paragraph."); *State v. Perry*, 101 W. Va. 123, 132 S.E. 368 (1926)("[I]t is improper to join the two . . . offenses unconnected, in the same count of the indictment, even though the offenses thus charged are of the same general nature. To do so renders the count duplicitous. However, duplicity is a fault of form only, and the count is not subject to demurrer or motion to quash on that ground.")

“In reviewing an indictment for duplicity, our task is . . . to assess whether the indictment itself can be read to charge only one violation in each count. *United States v. Mastelotto*, 717 F.2d 1238, 1244 (9th Cir. 1983) *overruled on other grounds by United States v. Miller*, 471 U.S. 130, 105 S.Ct. 1811, 85 L.Ed.2d 99 (1985). “Ordinarily, it has been thought that attempt is a lesser-included offense of the completed crime and need not be charged at all.” *United States v. D’Amico*, 496 F.3d 95, 99 (1st Cir. 2007) *vacated on other grounds*, 552 U.S. 1173, 128 S. Ct. 1239, 170 L. Ed. 2d 52 (2008).

Given the foregoing, Petitioner’s claim must be rejected first and foremost because the offense of “Operating or Attempting to Operate a Clandestine Drug Laboratory” is one offense as defined by the Legislature. However, even assuming arguendo that the offense does contain two offenses, Petitioner’s argument still must be rejected because the offense of “Attempting to Operate a Clandestine Drug Laboratory” is a lesser included offense of the offense “Operating a Clandestine Drug Laboratory.” “In order to constitute the crime of attempt, two requirements must be met: (1) a specific intent to commit the underlying substantive crime; and (2) an overt act toward the commission of that crime, which falls short of completing the underlying crime.” Syl. Pt. 1, *State v. Burd*, 187 W. Va. 415, 419 S.E.2d 676 (1991) (citation omitted). The offense of “Operating or Attempting to Operate a Clandestine Drug Laboratory” obviously requires the act of “assembling chemicals and equipment.” W. Va. Code § 60A-4-411(b). This provision also has the specific intent element “for the purpose of manufacturing methamphetamine.” *Id.* See *People v. Cervi*, 717 N.W.2d 356, 365 (Mich. App. 2006) (“for the purpose of” language in statute incorporates specific intent requirement); *People v. Atkins*, 18 P.3d 660, 666 (Cal. 2001) (phrases such as “with the intent” to achieve or “for the purpose of” achieving some further act require specific intent). See also ALI Model Penal Code § 2.02(2)(a)(I) (defendant acts

purposely if “it is his conscious object” to engage in specific behavior or to bring about a specific result”).

Thus, counts one and two of the indictment in this case may be read to include only one offense as to each count, operating a drug laboratory and the lesser included offense of attempting to operate a drug laboratory as to count one, and conspiracy as to count two. *See Id.*; 42 C.J.S. Indictments § 201 (2014) (“a count is not duplicitous because the offense charged contains a lesser included offense.”); *Braverman v. United States*, 317 U.S. 49, 54 (1942) (“allegation in a single count of conspiracy to commit several crimes is not duplicitous, for the conspiracy is the crime, and that is one, however diverse its objects.”); *United States v. Quinn*, 364 F. Supp. 432, 437 (N.D. Ga. 1973) (“there is nothing duplicitous in the government charging an attempt along with the substantive crime. In so doing the government is merely making explicit its right to a verdict, should the evidence warrant, finding defendant guilty of an attempt to commit the offense charged, whether an attempt is charged in the indictment or not.”) Therefore, Petitioner’s claim that the Indictment charges two offenses creating a duplicitous count must be rejected.

II. The Circuit Court Did Not Abuse Its Discretion in Refusing to Give the Entirety of Petitioner’s Proposed Instruction No. 1.

The circuit court’s instructions as to possession were as follows:

“In West Virginia mere physical presence on premises in which a controlled substance is found does not give rise to a presumption of possession of a controlled substance, but is evidence to be considered along with other evidence demonstrating conscious dominion over the controlled substance.

A conviction should not be obtained by piling inference upon inference. An inference is reasonable only if the conclusion flows from logical and probabilistic reasoning. The evidence supporting the conviction must be substantial and do more than raise a suspicion of guilt. To prove constructive possession when there is joint occupancy of a vehicle, the State must present some evidence supporting at least a plausible inference that the defendant had knowledge of an access to the contraband.

In order to sustain a conviction for Operating or Attempting to Operate a Clandestine Drug Laboratory by assembling any chemicals or equipment for the purpose of manufacturing methamphetamine, the State must prove beyond a reasonable doubt that the defendant had actual or constructive possession over the chemicals and/or equipment. In order to establish constructive possession where the defendant is present in a vehicle wherein such materials are found, the State must prove beyond a reasonable doubt that the defendant had knowledge of the presence of the chemicals and/or equipment to be used for the purposes of manufacturing methamphetamine and that such items were subject to the defendant's dominion and control."

(App. at 29.) Petitioner asserts that the circuit court erred by not giving the entirety of his Proposed Jury Instruction No. 1. (Pet'r's Br. at 19-20.) The jury instructions given by the circuit court, as Petitioner admits, cover the first two paragraphs of his proposed instruction. (App. at 32; Pet'r's Br. at 18.) Petitioner argues that it was error for the circuit court not to include the last two paragraphs of his proposed instruction which consist of instructing the jury that if they have a reasonable doubt as to whether the defendant had knowledge or exercised dominion and control over the chemicals and/or equipment, then they should find the defendant not guilty. (App. at 32; Pet'r's Br. at 19-20.)

"As a general rule, a refusal to give a requested instruction is reviewed for an abuse of discretion." Syl. Pt. 1, in part, *State v. Hinkle*, 200 W. Va. 280, 489 S.E.2d 257 (1996). "When assessing whether the trial court properly exercised that discretion, a reviewing court must examine the instructions as a whole to determine if they sufficiently cover the issues in the case and focus on the facts presented by the evidence." *Id.*

"Thus, an instruction offered by the defense should be given if the proposed instruction: (1) is substantively correct, (2) is not covered substantially in the charge actually delivered to the jury, and (3) involves an important issue in the trial so the trial court's failure to give the instruction seriously impairs the defendant's ability to effectively present a defense."

Id., Syl. Pt. 2, in part, (citing *State v. Derr*, 192 W.Va. 165, 180, 451 S.E.2d 731, 746 (1994)). As explained below, the circuit properly exercised its discretion in refusing to give the last two paragraphs of Petitioner’s Proposed Instruction No. 1.

First, the trial court’s instruction fully covered the State’s burden to prove constructive possession. This Court held in *State v. Cummings*, 220 W. Va. 433, 440, 647 S.E.2d 869, 876 (2007), that “in order to sustain a conviction for violation of W. Va. Code § 60A-4-411 . . . the State must prove beyond a reasonable doubt that the defendant had actual or constructive possession over the chemicals and/or equipment.” *Cummings* additionally addressed what the State must prove to establish constructive possession.

“In order to establish constructive possession where the defendant is present in a vehicle wherein such materials are found, the State must prove beyond a reasonable doubt that the defendant had knowledge of the presence of the chemicals and/or equipment to be used for the purposes of manufacturing methamphetamine and that such items were subject to the defendant's dominion and control.”

Id. at 440, 647 S.E.2d at 876.

Given the foregoing, the last two paragraphs of Petitioner’s proposed instructions are substantively correct. If the State has the burden to prove constructive possession beyond a reasonable doubt, then it is obviously correct that if there is a reasonable doubt as to constructive possession Petitioner should be found not guilty. However, these instructions are substantially covered in the circuit court’s instructions actually given to the jury.

The instructions given properly instructed the jury as to the State’s burden to prove Petitioner guilty beyond a reasonable doubt in both the standard instructions and the instructions concerning constructive possession. (App. at 23-24, 29.) The standard jury instructions given also properly explained that the law presumed defendants innocent and that the State’s burden never shifts to a defendant. The circuit court also explained what the beyond a reasonable doubt

standard is, and furthermore that if there exists a reasonable doubt as to the guilt of the accused, the accused must be acquitted. (*Id.* at 23-24.) Therefore, when the jury instructions concerning constructive possession explained to the jury that the State must prove constructive possession beyond a reasonable doubt, the jury had already been instructed as to the beyond a reasonable doubt standard and their duty to acquit Petitioner if that standard is not met. Therefore, the last two paragraphs of Petitioner's Proposed Jury Instruction No. 1 are substantially covered in the instruction actually given to the jury, and the circuit court did not abuse its discretion in this regard.

III. The Circuit Court Properly Found Probable Cause to Search the Vehicle in the Possession and Control of Petitioner.

Before trial, Petitioner filed a Motion to Suppress seeking to suppress all of the items seized as a result of the search of the vehicle in which Petitioner was driving. (App. at 7.) After a suppression hearing the circuit court denied Petitioner's motion. (December 11, 2013 Suppression Hearing Transcript (hereinafter "Supp. Hrg. Tr.") at 65-66.) The standard of review on a motion to dismiss is as follows:

"By employing a two-tier standard, we first review a circuit court's findings of fact when ruling on a motion to suppress evidence under the clearly erroneous standard. Second, we review *de novo* questions of law and the circuit court's ultimate conclusion as to the constitutionality of the law enforcement action. Under the clearly erroneous standard, a circuit court's decision ordinarily will be affirmed unless it is unsupported by substantial evidence; based on an erroneous interpretation of applicable law; or, in light of the entire record, this Court is left with a firm and definite conviction that a mistake has been made."

State v. Lilly, 194 W. Va. 595, 600, 461 S.E.2d 101, 106 (1995). Furthermore, when reviewing a circuit court's denial of a motion to suppress, this Court considers the evidence in the light most favorable to the prosecution. *Id.*

It is well established that the "[t]emporary detention of individuals during the stop of an automobile by the police ... constitutes a 'seizure,' " no matter how brief the detention or how

limited its purpose. *United States v. Branch*, 537 F.3d 328, 335 (4th Cir. 2008) (citing *Whren v. United States*, 517 U.S. 806, 809, 116 S.Ct. 1769 (1996)). “Police officers may stop a vehicle to investigate if they have an articulable reasonable suspicion that the vehicle is subject to seizure or a person in the vehicle has committed, is committing, or is about to commit a crime.” Syl. Pt. 1, in part, *State v. Stuart*, 192 W. Va. 428, 452 S.E.2d 886 (1994). This Court described the reasonable suspicion standard as follows:

“a less demanding standard than probable cause not only in the sense that reasonable suspicion can be established with information that is different in quantity or content than that required to establish probable cause, but also in the sense that reasonable suspicion can arise from information that is less reliable than that required to show probable cause.”

Id. at 432, 452 S.E.2d at 890 (quoting *Alabama v. White*, 496 U.S. 325, 330, 110 S. Ct. 2412, 2416 (1990)). “When evaluating whether or not particular facts establish reasonable suspicion, one must examine the totality of the circumstances, which includes both the quantity and quality of the information known by the police.” *Id.*, Syl. Pt. 2.

In this case, Officer Woodyard was working undercover as a part of a drug enforcement team watching a home in which another task force had previously made buys for methamphetamine. (Supp. Hrg. Tr. at 16-17.) Officer Woodyard observed a white Monte Carlo stop by the residence twice for approximately fifteen to twenty minutes each time wherein an individual entered the residence and returned to the vehicle. (*Id.* at 17-20.) Officer Woodyard then followed the white Monte Carlo when it left the residence for the second time and observed erratic driving behavior including going left of center on multiple occasions, repeated application of brakes, and going right of the fog line. (*Id.* at 21-22.) Officer Woodyard testified that he then called for a marked cruiser to intercept the vehicle informing the marked cruiser of the traffic violations. (*Id.* at 35.) Officer Woodyard continued to follow the vehicle until Trooper Jackson,

both in uniform and in a marked cruiser, engaged his lights to pull over the white Monte Carlo. (*Id.* at 23, 34.) Trooper Jackson identified Petitioner as the driver of the vehicle and Terry Abbott as the passenger. (*Id.* at 39.)

The totality of the circumstances gave the officers in this case reasonable suspicion to stop the vehicle Petitioner was driving. Officer Woodyard witnessed the vehicle commit multiple traffic violations including driving left of center on multiple occasions. Petitioner, however, does not challenge the lawfulness of the initial stop, but argues on appeal that the actions of the subsequent dog sniff constituted a search for which there was no probable cause, and that law enforcement is not automatically entitled to delay a traffic stop for the purpose of bringing a dog to the traffic stop. (Pet'r's Br. at 20-21.) As explained below, Petitioner's arguments must be rejected and the circuit court affirmed.

“Observing a traffic violation provides sufficient justification for a police officer to detain the offending vehicle for as long as it takes to perform the traditional incidents of a routine traffic stop.” *United States v. Branch*, 537 F.3d 328, 335 (4th Cir. 2008) (citations omitted). “A canine sniff is also constitutionally acceptable if performed within ‘the time reasonably required’ to issue a traffic citation. This is because a dog sniff is not a search within the meaning of the Fourth Amendment, and it therefore requires no additional justification.” *Id.* at 335-36 (citing *Illinois v. Caballes*, 543 U.S. 405, 407-09, 125 S. Ct. 834, (2005)).

While conducting the tasks associated with a traffic stop, a police officer's “questions or actions ... need not be solely and exclusively focused on the purpose of that detention.” *United States v. Digiovanni*, 650 F.3d 498, 507 (4th Cir. 2011)(citation omitted). However, “[a] seizure that is justified solely by the interest in issuing a warning ticket to the driver can become unlawful if it is prolonged beyond the time reasonably required to complete that mission.”

Caballes, 543 U.S. at 407. “In this case, the dog sniff was performed on the exterior of respondent’s car while he was lawfully seized for a traffic violation. Any intrusion on respondent’s privacy expectations does not rise to the level of a constitutionally cognizable infringement.” *Id.* at 409. Therefore the question in this case becomes whether the traffic stop was performed within a reasonable time.

In this case, Trooper Jackson first approached the driver’s side window of the vehicle and asked Petitioner for identification. (Supp. Hrg. Tr. at 40.) The video of the traffic stop provided in this case reveals Jackson approaching the window of the car at approximately one minute. When Petitioner could not produce any identification, Jackson asked him to step out of the car. (*Id.*; see *Pennsylvania v. Mimms*, 434 U.S. 106, 111, 98 S. Ct. 330, 333 n.6 (1977) (Holding “that once a motor vehicle has been lawfully detained for a traffic violation, the police officers may order the driver to get out of the vehicle without violating the Fourth Amendment’s proscription of unreasonable searches and seizures.”) At approximately two minutes and thirty seconds into the video, Petitioner steps out of the vehicle. Petitioner was able to produce a revoked Ohio driver’s license once he was out of the car. (*Id.* at 40.) At approximately three minutes and fifty seconds in the video Jackson inquires of Petitioner whether his license is valid. Trooper Jackson testified that in the course of speaking with Petitioner about obtaining identification he questioned Petitioner about whether there was anything illegal in the vehicle to which Petitioner responded that he didn’t believe so. (Supp. Hrg. Tr. at 40.) This occurs at approximately five minutes into the video. Jackson testified that Petitioner then denied him consent to search the vehicle at which time he requested the assistance of a canine unit. (*Id.* at 41.) At approximately six minutes into the video, Jackson makes the request for a canine. While the video does not show the actual dog because of the way the camera is positioned, at approximately twelve

minutes and forty-eight seconds an officer states that he thinks it may be an active lab. At the very least the canine arrived before this point in time in which the lab was found. Additionally, it appears probable that the canine unit arrived at approximately ten minutes and thirty seconds into the video since both Petitioner and Mr. Abbott were asked to move away from the vehicle. From the time Jackson approached Petitioner in the vehicle to the time it took a canine unit to arrive took less than twelve minutes. Given the above circumstances, the traffic stop in this case was not unreasonably prolonged, and Petitioner's Fourth Amendment Rights were not violated by calling a canine unit.

Trooper Jackson testified that the dog indicated on the front door of the vehicle on the passenger side. (*Id.* at 42.) At this point, as the circuit court pointed out in its ruling, Trooper Jackson had probable cause to search the vehicle. (Suppr. Hrg. Tr. at 66); *See United States v. Hawkins*, 2014 WL 2696645 (N.D.W. Va. June 13, 2014) ("The [canine] inspection established that there was contraband located inside the vehicle. In such instances, a warrantless search of the vehicle's interior, including the glove compartment and trunk, may be conducted.") (citing *United States v. Place*, 462 U.S. 696, 707 (1983); *Florida v. Royer*, 460 U.S. 491, 506 (1983)). Therefore, the circuit court did not err in denying Petitioner's Motion to Dismiss as probable cause existed to search Petitioner's vehicle.

IV. Sufficient Evidence Was Admitted at Trial to Convince a Reasonable Person of Petitioner's Guilt Beyond a Reasonable Doubt.

"The function of an appellate court 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, is sufficient to convince a reasonable person of the defendant's guilt beyond a reasonable doubt. Thus, the relevant inquiry is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime proved beyond a reasonable doubt."

Syl. Pt. 1, *State v. Guthrie*, 194 W. Va. 657, 461 S.E.2d 163 (1995).

“A criminal defendant challenging the sufficiency of the evidence to support a conviction takes on a heavy burden. An appellate court must review all the evidence, whether direct or circumstantial, in the light most favorable to the prosecution and must credit all inferences and credibility assessments that the jury might have drawn in favor of the prosecution. The evidence need not be inconsistent with every conclusion save that of guilt so long as the jury can find guilt beyond a reasonable doubt. Credibility determinations are for a jury and not an appellate court. Finally, a jury verdict should be set aside only when the record contains no evidence, regardless of how it is weighed, from which the jury could find guilt beyond a reasonable doubt. To the extent that our prior cases are inconsistent, they are expressly overruled.”

Id., Syl. Pt. 3.

Petitioner was convicted of one count of “Operating or Attempting to Operate a Clandestine Drug Laboratory” and one count of “Conspiracy to Commit Operating or Attempting to Operate a Clandestine Drug Laboratory.” (December 12, 2013 Trial Transcript (hereinafter “Trial Tr.”) at 166.) In order to be convicted of “Operating or Attempting to Operate a Clandestine Drug Laboratory the jury had to find beyond a reasonable doubt that Petitioner did unlawfully, intentionally, and feloniously operate or attempt to operate a clandestine drug laboratory by assembling chemicals and/or equipment for the purpose of manufacturing methamphetamine a schedule II non-narcotic controlled substance. (App. at 25.) In order to find Petitioner guilty of the conspiracy charge the jury had to find that Petitioner did unlawfully and intentionally conspire with Terry Abbott to commit the offense of operating or attempting to operate a clandestine drug laboratory and that one or both of Petitioner and Terry Abbott committed some overt act in furtherance of the conspiracy. (*Id.* at 27.)

As explained below, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of each of the crimes above beyond a reasonable doubt.

The evidence adduced at trial established that Petitioner was driving a white Monte Carlo which was pulled over by law enforcement after observed traffic violations including going left of center and to the right of the fog line. (Trial Tr. at 7-12; 14-17.) During the traffic stop by Trooper Jackson, a canine unit indicated at the front door on the passenger's side of the vehicle. (*Id.* at 21-22.) Trooper Jackson then searched that portion of the vehicle. (*Id.* at 23.)

At this point, Trooper Jackson testified that he received a specialized course in methamphetamine from the DEA in Quantico, Virginia in which he became certified to handle, take down, and to package methamphetamine. (*Id.*) Trooper Jackson then testified to what he found in the passenger side floorboard of the vehicle, which he termed a "young pop clandestine laboratory or shake and bake." (*Id.* at 25-26.) Jackson found coffee filters, a bag of ammonium nitrate, and a green bottle inside of a blue insulated cooler bag. (*Id.* at 26-27.) Jackson also testified that when he got closer to the items he could detect a chemical odor that was indicative of a meth lab and that he observed a vapor or cloud emitting from the blue bag. (*Id.* at 28.)

The jury also heard the testimony of Alisha Neal, whom is employed at the West Virginia State Police Forensic Laboratory. (*Id.* at 70.) Neal testified that four items from Petitioner's case were received for testing. (*Id.* at 72.) Neal testified that the item identified as Item 1.1, which consisted of two plastic bags containing chunks of white and off-white powder and coffee filters, tested positive for methamphetamine. (*Id.* at 74-76.) Neal testified that Item 2.2, a powder residue, also contained methamphetamine. (*Id.* at 76.)

Finally, the jury heard the testimony of Officer Douglas Sturm of the Parkersburg Police Department and certified instructor through the State of West Virginia on methamphetamine awareness and recognition. (*Id.* at 83-84.) Sturm also received training from the DEA in regard to methamphetamine labs and attended numerous methamphetamine investigation schools

throughout West Virginia and Ohio. (*Id.*) Sturm's testimony described the shake and bake method of making methamphetamine. (*Id.* at 86.) Sturm testified that this method involves taking a plastic bottle and first adding to the bottle ammonium nitrate and crystal drain cleaner. (*Id.* at 87.) Subsequently crushed pseudoephedrine from decongestant pills is added, and thereafter, the solvent and lithium from lithium batteries is added to start a chemical reaction. (*Id.*)

Importantly, Sturm specifically testified as to the state of the lab in the vehicle Petitioner was driving at the time it was found. (*Id.* at 95.) Sturm testified from photographs of what was found during the traffic stop. (*Id.*) First, Sturm was shown the pop bottle which was found inside the vehicle which Sturm testified to be a common reaction vessel for the shake and bake method. (*Id.*) Sturm then testified as to the material within the bottle testifying that the sludge found at the bottom would be the ammonium nitrate and crystal granules and that the black item floating within the bottle was the lithium strips. (*Id.* at 95-96.) Sturm testified that when the reaction is completed the lithium strips curl up into tight balls. (*Id.* at 97.) However, Sturm identified the strips found in the bottle as being elongated, which suggested a fairly new reaction. (*Id.*) Sturm further testified that the chemical reaction had already taken place but was stopped for one reason or another. (*Id.* at 98.) Sturm testified that the process from start to finish could be as quick as an hour or take as long as two to three hours. (*Id.* at 99.)

Based on the foregoing, there was sufficient evidence to convict Petitioner of both counts as charged within the indictment. Petitioner's argument on appeal focuses on the element of possession as discussed in *State v. Cummings*, supra. Petitioner specifically argues that, as in *Cummings*, there was no evidence in this case in which a jury could find constructive possession. However, the situation here was far from the situation found in *Cummings*. The jury could

believe from the evidence adduced in this case that an active cook was in progress at the time the bottle and other items were found in the passenger floorboard of the vehicle, and therefore, could infer knowledge, dominion and control. Trooper Jackson testified that he could detect an odor indicative of a meth lab when he was close to the bottle and moreover that he saw a vapor or cloud emit from the blue cooler bag. Sturm testified that the items found indicated that a reaction had been started but was not complete. Based on the above evidence, a jury could infer that Petitioner had knowledge, dominion and control over an active lab found in the passenger side floorboard. A jury could also find based on the above evidence that Petitioner conspired with Abbott to produce methamphetamine. Accordingly, Petitioner's claim in this regard must also be rejected.

V. The Circuit Court Did Not Err in Allowing Officer Sturm to Testify Regarding the Dangers of Meth Labs.

Rule 401 of the West Virginia Rules of Evidence defines relevant evidence as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Furthermore, Rule 403 of the West Virginia Rules of Evidence provides that relevant evidence "may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence."

Petitioner argues that Sturm's testimony regarding the dangers of meth labs was irrelevant and prejudicial to his case. Petitioner points to a small portion of Sturm's testimony in which he is describing the one-bottle, or shake and bake, method of manufacturing methamphetamine. (Pet'r's Br. at 32; Trial Tr. at 88.) Sturm gave testimony as to the danger of meth labs involving the specific shake and bake method, the method in which both Jackson and

Sturm testified as being the method used in this case. (Trial Tr. at 88.) Therefore, testimony regarding the processes used in the shake and bake method are extremely relevant in the context of this case. Sturm's testimony as to the dangers associated with the shake and bake method are less relevant than his description of the actual processes used, however, the testimony relating to the dangers of this method was not so prejudicial as to warrant excluding the testimony. Accordingly, the trial court did not commit error in allowing Sturm to testify as to the dangers of a meth lab.

Moreover, assuming *arguendo* that the circuit court can be considered to have erred in permitting Sturm to testify in this regard, any such error would be harmless.

“Where improper evidence of a nonconstitutional nature is introduced by the State in a criminal trial, the test to determine if the error is harmless is: (1) the inadmissible evidence must be removed from the State's case and a determination made as to whether the remaining evidence is sufficient to convince impartial minds of the defendant's guilt beyond a reasonable doubt; (2) if the remaining evidence is found to be insufficient, the error is not harmless; (3) if the remaining evidence is sufficient to support the conviction, an analysis must then be made to determine whether the error had any prejudicial effect on the jury.”

State v. Atkins, 163 W. Va. 502, 261 S.E.2d 55, 56-57 (1979).

Even without the testimony complained of, the remaining evidence is sufficient to support Petitioner's conviction. The importance of Sturm's testimony was not in the dangers associated with using the shake and bake method, but rather in describing the process of manufacturing methamphetamines in this fashion. Sturm's testimony was even more important with regard to whether the lab within the vehicle in this case was an active lab at the time it was found. Finally, the prejudicial effect Sturm's testimony regarding the dangers of meth labs may have had is minimal at best. The dangers of meth labs are well documented, and it would come to no surprise to the jury that manufacturing methamphetamine in a vehicle can prove to be dangerous.

CONCLUSION

For the reasons stated above, the judgment of the Circuit Court of Wood County must be affirmed.

Respectfully submitted,

STATE OF WEST VIRGINIA,
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CERTIFICATE OF SERVICE

I, Derek A. Knopp, Assistant Attorney General and counsel for the State of West Virginia, hereby verify that I have served a true copy of "Respondent's Brief" upon counsel for the Petitioner by depositing said copy in the United States mail, with first-class postage prepaid, on this 14th day of August, 2014, addressed as follows:

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