No. SC88787

In the
Supreme Court of Missouri

STATE OF MISSOURI,

Respondent,

v.

JESSICA D. REED,

Appellant.

Appeal from St. Charles County Circuit Court
Eleventh Judicial Circuit
The Honorable Lucy D. Rauch, Judge

RESPONDENT'S BRIEF

CHRIS KOSTER
Attorney General

DANIEL N. McPHERSON
Assistant Attorney General
Missouri Bar No. 47182

P.O. Box 899
Jefferson City, MO 65102
Phone: (573) 751-3321
Fax: (573) 751-5391
Dan.McPherson@ago.mo.gov

ATTORNEYS FOR RESPONDENT
STATE OF MISSOURI

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JURISDICTIONAL STATEMENT

This appeal is from a conviction obtained in the Circuit Court of St. Charles County for attempted manufacture of a controlled substance (methamphetamine), section 195.211, RSMo Supp. 2003, for which Appellant was sentenced as a prior drug offender to six years imprisonment. This appeal involves the validity of section 491.074, RSMo 2000, which is being challenged by Appellant as violating his right to confront witnesses under the principles established in *Crawford v. Washington*, 541 U.S. 36 (2004); *Davis v. Washington*, 547 U.S. 813 (2006); *State v. Justus*, 205 S.W.3d 872 (Mo. banc 2006); and *State v. March*, 216 S.W.3d 663 (Mo. banc 2007). Therefore, the Supreme Court of Missouri has exclusive appellate jurisdiction. Mo. Const. art. V, § 3.

STATEMENT OF FACTS

Appellant was charged as a prior drug offender in a second amended information with attempted manufacture of a controlled substance (methamphetamine), section 195.211, RSMo Supp. 2003. (L.F. 4, 54-55). Appellant was tried by a jury on July 17 and 19, 2007,[1] before Judge Lucy D. Rauch. (L.F. 88). Appellant contests the sufficiency of the evidence to support her conviction. Viewed in the light most favorable to the verdict, the evidence at trial showed:

In the early afternoon of September 11, 2006, Appellant's sister, Elizabeth, and her boyfriend, Adam McCauley, were visiting Appellant at her father's home in a rural section of Foristell. (Tr. 227, 242-44). Behind the house was a horse trailer that was equipped with a bed, a small bathroom with a shower, and a kitchen area with a sink and cabinets. (Tr. 244-45, 412). Electrical cords running from the house were plugged into the trailer. (Tr. 274-75, 412).

When he arrived at the house, McCauley had seen a white Mustang parked in the driveway. (Tr. 244). He also saw Appellant in the trailer with someone else. (Tr. 270). McCauley smelled a strong odor of ammonia coming from the trailer. (Tr. 246-47). He went down the street and called Appellant's father to tell him that a strange car was parked in the driveway, and that he smelled ammonia. (Tr. 247). Appellant's father arrived five or six minutes later. (Tr. 247).

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[1] A one day continuance was necessitated by a water main break that forced the closing of the courthouse on July 18, 2007. (L.F. 88).

McCauley, along with Appellant's father and sister, went back to the house and saw two men coming out of the horse trailer. (Tr. 247). One man was carrying a black bag, while the other was carrying a pitcher. (Tr. 247-48). McCauley could see the silhouette of some kind of substance in the bottom of the pitcher. (Tr. 248). The substance did not look like water, and it was not moving in the pitcher. (Tr. 248). The man carrying the pitcher got into the Mustang and drove away to the east, through a neighbor's yard. (Tr. 232, 248-49). The man with the backpack left on foot in the same direction. (Tr. 249). McCauley called the police. (Tr. 248).

As McCauley was waiting for the police to arrive, he saw Appellant running into the woods south of the house, carrying a black trash bag. (Tr. 228, 251). Appellant returned a short time later, empty-handed. (Tr. 251-52). Foristell Police Officer Brandon Anderson arrived at the house, and McCauley pointed out the area where Appellant had taken the trash bag. (Tr. 227-28, 253).

McCauley and Officer Anderson went to look for the trash bag. (Tr. 228-29). They walked through the barn, and Anderson noticed an extreme odor of ammonia. (Tr. 229). He and McCauley returned to the house, and saw Appellant. (Tr. 229). McCauley remarked to Officer Anderson that Appellant had changed her clothes.[2] (Tr. 229). Officer Anderson placed Appellant under arrest and contacted the drug task force. (Tr. 230).

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[2] A drug task force detective testified that anhydrous ammonia will leave a residual smell on the clothing of persons who are around it. (Tr. 339).

When the drug task force officers arrived, two of the detectives went to the area where Appellant had gone with the trash bag. (Tr. 264). They found the bag in a pond about 150 to 200 yards behind the house. (Tr. 264). They retrieved the bag from the pond, and found that the top was twisted shut. (Tr. 265). The bag was emitting an ammonia smell. (Tr. 265). The detectives took the bag back to the house and opened it. (Tr. 266). Inside, they found numerous items used in the "Nazi-Birch" method of methamphetamine manufacture. (Tr. 266). Those items included aluminum foil containing trace amounts of methamphetamine; a muriatic acid bottle; a vodka bottle converted into a gas generator; coffee filters and paper towels that had been soaked in an unknown liquid; drain cleaner; plastic tubing; a glass fishbowl; a block of dry ice; used latex gloves; a small handheld whisk; and a small propane canister. (Tr. 276-78, 291, 351-53, 374-76).

A search of the horse trailer disclosed a propane tank that had been converted to hold anhydrous ammonia. (Tr. 280). The tank was inside a shower stall and was emitting an odor of anhydrous ammonia. (Tr. 281, 337-38). Officers also observed "bluing" on a flange of the tank, indicating that the tank had held anhydrous ammonia, and they found some anhydrous in the tank. (Tr. 281-82). Also found inside the trailer was a syringe that tested positive for methamphetamine, a plastic baggy containing a powder that tested positive for ephedrine stereoisomer, lithium batteries, foil that tested positive for methamphetamine, and two propane canisters similar to the canister found in the black bag. (Tr. 282-83, 285, 290, 298-99, 374-76). The detectives also found a driver's license belonging to a Justin Caldwell. (Tr. 279). McCauley, the boyfriend of

Appellant's sister, told the detectives that he had seen the person pictured on that license with Appellant in the horse trailer. (Tr. 270-71).

Numerous other items used in the manufacture of methamphetamine were found in the barn or elsewhere on the property. (Tr. 339-49). Those items included additional coffee filters; gas generators equipped with tubing and fuel filters, one of which had some acid in the bottom; a muriatic acid bottle; empty bottles of Heet; an empty bag of ammonia sulfate; a bottle that had been converted into a funnel; casings from lithium batteries; and two propane tanks that contained chemicals used to make anhydrous ammonia. (Tr. 285-87, 293, 300-01).

When searching the barn, the detectives encountered an ammonia odor so strong that it forced them to leave the barn and put on air purifying respirator masks before resuming the search. (Tr. 337). The odor was particularly strong near a boat that was found to contain the two propane tanks that had been converted to manufacture anhydrous ammonia. (Tr. 336-37).

At some point as the search was underway, Appellant managed to get out of the police car in which she had been placed. (Tr. 233). Officer Anderson testified that in order to get out of the car, Appellant would have had to put her handcuffs in front of her body, slide open the window dividing the front and rear compartments of the car, jump through the window into the front seat, and then open the unlocked front door of the car. (Tr. 233). She was found inside the house, using the restroom. (Tr. 311).

Appellant did not testify at trial. (Tr. 323-24). Her father, Donald Reed,[3] testified that Appellant had been living with him for four or five weeks prior to her arrest, and that she slept on a futon in the basement. (Tr. 400, 403). Donald testified that Appellant never slept overnight in the horse trailer, but he did testify that she had a stereo in the trailer, and would often sit inside the trailer and listen to music. (Tr. 404-05). He testified that he was outside on his property the day before Appellant was arrested, and did not see anything unusual in the horse trailer. (Tr. 402). Donald Reed said that he received a call from his other daughter the next day about a strange car at the house, went home to investigate and found a chemical odor coming from the trailer, and a man he did not know inside it. (Tr. 405-07). The man ran, and Donald said that he started throwing stuff out of the trailer, including a bottle that was smoking. (Tr. 407). Donald said that Appellant began picking-up the items and putting them in a trash bag. (Tr. 408). She then took the trash bag into the woods, towards the pond. (Tr. 408-09).

Elizabeth Reed testified that Appellant invited her over to their father's house on the morning of September 11, 2006. (Tr. 427). Elizabeth said that when she arrived, Appellant was in the basement, and that they visited for thirty minutes. (Tr. 428-29). Elizabeth said that she walked out of the back door and smelled ammonia. (Tr. 429). Elizabeth said that she called her father and told him that something was not right. (Tr. 430). After her father arrived and went to investigate, Elizabeth heard him shout and

[3] To avoid confusion, Donald and Elizabeth Reed will be referred to by their first names. No disrespect is intended.

then saw one man get into a Mustang and another man coming out of the horse trailer. (Tr. 431-32). Elizabeth said that she saw Appellant standing in the house, looking out a window. (Tr. 433-34).

Detective Deric Dull testified as a rebuttal witness that Donald Reed had told him that Appellant was staying in the horse trailer. (Tr. 461). Dull testified that Donald had told him that Appellant was supposed to keep the trailer clean, in lieu of paying rent to stay there. (Tr. 461).

The jury found Appellant guilty of attempt to manufacture a controlled substance. (L.F. 88-89). The court had previously found beyond a reasonable doubt that Appellant was a prior drug offender. (L.F. 88). The court sentenced Appellant on August 27, 2007, to a term of six years imprisonment in the Department of Corrections. (L.F. 5, 125). This appeal follows. (L.F. 129-30).

ARGUMENT

I.

Section 491.074, RSMo, which permits the use of prior inconsistent statements as substantive evidence, does not violate the Confrontation Clause.

Appellant contends that the trial erred in allowing into evidence statements by Adam McCauley and Donald Reed that Appellant was living in or was seen in the horse trailer where methamphetamine manufacturing was taking place. Appellant alleges that section 491.074, RSMo, which permits prior inconsistent statements to be received as substantive evidence, unconstitutionally deprives her of her right to confront witnesses as set forth in *Crawford v. Washington*, 541 U.S. 36 (2004) and its progeny. However, the statute is constitutional, both facially and as applied, since it pertains to prior statements of witnesses who testify at trial, and since Adam McCauley and Donald Reed did testify at Appellant's trial and were subject to questioning about their prior statements.

A. Underlying Facts.

The record indicates that the State disclosed to the defense Adam McCauley's statement to the police and later noticed up the depositions of McCauley and Donald Reed. (L.F. 28, 44). The record does not reflect that Appellant filed any pre-trial motions in limine. (L.F. 1-4). The prosecutor told the jury in her opening statement, without objection, that Appellant was living in the horse trailer parked behind her father's house, and that she expected McCauley to testify to those facts. (Tr. 210, 213). In his opening statement, defense counsel told the jury that Appellant did not live in the horse trailer. (Tr. 219-20).

The State's first witness was Foristell Police Officer Branden Anderson. (Tr. 225). The prosecutor asked Officer Anderson what information he received from Adam McCauley about the horse trailer. (Tr. 231). Defense counsel made a hearsay objection that was overruled on the grounds that the testimony could be admitted for the limited purpose of explaining subsequent police conduct:

> Q. (by [THE PROSECUTOR]) What information did you get from Donald [Reed] and also from Adam regarding the horse trailer?
>
> A. That she was living in the horse trailer at the time.
>
> [DEFENSE COUNSEL]: Objection, hearsay, and ask it be stricken.
>
> THE COURT: That request will be granted. That objection is sustained.

(Tr. 231-32). On cross-examination, defense counsel marked a copy of McCauley's written statement to the police as Defendant's Exhibit A. (Tr. 239). Defense counsel asked Officer Anderson if McCauley said anything in the statement about Appellant living in the trailer. (Tr. 240). Anderson acknowledged that the statement said nothing about the trailer. (Tr. 240).

Adam McCauley testified as the second witness for the State. (Tr. 242). McCauley testified that he and his girlfriend had stayed in the trailer one night. (Tr. 245). After described the furnishings inside the trailer, McCauley was asked:

> Q. And did you believe that Jessica was staying there for privacy?

[DEFENSE COUNSEL]: Objection. It calls for speculation. She says the word believe.

THE COURT: I'll sustain the objection.

Q. (by [THE PROSECUTOR]) Did you know that Jessica was staying there so she had privacy from Donald's one-bedroom apartment?

[DEFENSE COUNSEL]: Objection, unless he can talk about facts he observed.

THE COURT: I'll sustain the objection.

Q. (by [THE PROSECUTOR]) Was that – to your knowledge was she staying there?

A. No.

[DEFENSE COUNSEL]: Objection, again, same thing.

THE COURT: Well, the question was – this question was was she staying there without a reason so.

Q. ([THE PROSECUTOR]) Do you know?

A. No, I don't know if she was or not.

(Tr. 245-46). McCauley's testimony implied that Appellant was inside the house when he and Elizabeth Reed arrived on the property. (Tr. 243, 246). Later in the examination, McCauley denied telling Officer Anderson that Appellant had changed her clothes. (Tr. 253). The prosecutor showed McCauley his written statement to the police, where he had said that Appellant had changed her clothes. (Tr. 253). McCauley said that the officer

told him to write that in the statement. (Tr. 254). Defense counsel did not object to that line of questioning or to the prosecutor using the written statement. (Tr. 253-54).

The State's next witness was Deric Dull, a detective with the St. Charles County Regional Drug Task Force. (Tr. 261). Dull was asked what McCauley had told him about what he had observed. (Tr. 269). Defense counsel made a hearsay objection, and the prosecutor responded that she was intending to introduce McCauley's prior inconsistent statements as substantive evidence under section 491.074, RSMo. (Tr. 269-70). The court overruled the objection:

> Q. (by [THE PROSECUTOR]) What did Mr. McCauley tell you?
>
> A. Mr. McCauley advised me that when he came home – or came to, I'm sorry, excuse me, came to the Reed's address, he observed Jessica Reed in the trailer and observed her with another subject. And I asked him what he was – what he observed and which he stated that he believed –
>
> [DEFENSE COUNSEL]: -- Your Honor, may my objection be continuing to all of this?
>
> THE COURT: Yes.
>
> [DEFENSE COUNSEL]: Because we have just had Adam McCauley testify.
>
> THE COURT: Yes, it may be a continuing objection.

Q. (by [THE PROSECUTOR]) You can go ahead and complete what Mr. McCauley told you.

A. He believed that Jessica Reed was making methampetamine inside the trailer.

(Tr. 270-71). Dull went on to testify that he retrieved a driver's license from the trailer and showed it to McCauley. (Tr. 271). Dull testified that McCauley, "stated that the picture in the license, Justin Cardwell, is what the license came back to, that that was one of the subjects he observed in the trailer with her." (Tr. 271). Prior to cross-examination, defense counsel moved for a mistrial based on Dull's testimony that McCauley had said that he believed Appellant was making methamphetamine. (Tr. 312). That motion was denied. (Tr. 312). Defense counsel asked Dull on cross-examination if he could account for the fact that McCauley's written statement to the police said nothing about seeing Appellant in the horse trailer. (Tr. 316). Dull answered that he could not. (Tr. 316).

After two more witnesses testified, the State announced its intention to offer three witnesses to testify pursuant to section 491.074, RSMo, about prior inconsistent statements of Adam McCauley. (Tr. 380). Defense counsel objected and renewed his motion for mistrial, originally on the basis that McCauley's testimony was consistent with his written statement to the police, so that the State was therefore not surprised by his testimony. (Tr. 380-81). Defense counsel argued that the State could not impeach its own witness, and could not "use a prior inconsistent statement as a way of getting into evidence before the jury something they want to use as substantive evidence." (Tr. 381). Defense counsel continued:

> But I believe the Supreme Court has very recently addressed the use of hearsay as substantive evidence in the Crawford decision and I think and it's very clear that you can't use hearsay as a substantive evidence except under very limited circumstances, and this is not one of them.

(Tr. 381). The court overruled the objection and denied the renewed motion for mistrial. (Tr. 382).

An intern with the prosecutor's office testified about a meeting he attended where McCauley said that he remembered Appellant changing her clothes after disposing of the garbage bag. (Tr. 385-87). Officer Brandon Anderson testified about the circumstances under which Appellant gave the written statement in which he said that Appellant had changed her clothes and where he said that he smelled ammonia in the barn. (Tr. 388-91). Defense counsel had earlier indicated that he did not object to testimony about McCauley's prior statements on those subjects. (Tr. 385). Although the prosecutor did not ask Anderson about any statements McCauley made about Appellant being in the trailer, defense counsel asked on cross-examination if McCauley's statement contained any assertion that she had been in the trailer. (Tr. 393). McCauley confirmed that it did not. (Tr. 393).

The prosecutor did ask the next witness, Detective Deric Dull, if he had received information about Appellant staying in the horse trailer. (Tr. 395). When defense counsel objected, the prosecutor conceded that he was trying to elicit a prior inconsistent statement of Donald Reed, which would be premature at that point in the trial. (Tr. 395). The court sustained the objection. (Tr. 395).

Donald Reed then testified during the defense case-in-chief that Appellant slept in the house, and that she did so on the night before the events that led to the charges against her. (Tr. 403-04). He also testified that while Appellant did not ever spend the night in the trailer, she would use the trailer to listen to music. (Tr. 404-05). Detective Dull testified, without objection, as a rebuttal witness that Donald Reed had told him that Appellant had been staying in the horse trailer, and that she was to keep the trailer clean in lieu of paying rent. (Tr. 461).

B. Standard of Review.

To preserve a constitutional claim for appellate review, that claim must be made at the earliest opportunity, with citations to specific constitutional sections. *State v. Chambers*, 891 S.W.2d 93, 103-04 (Mo. banc 1994); *State v. Baxter*, 204 S.W.3d 650, 652 (Mo. banc 2006). A hearsay objection does not preserve constitutional claims relating to the same testimony. *Chambers*, 891 S.W.2d at 104. Defense counsel only made hearsay objections the first time that the prosecutor relied on section 491.074, RSMo, to admit as substantive evidence McCauley's prior inconsistent statement that he had seen Appellant in the trailer with another man on the day of the charged crime. (Tr. 269-70). Because Appellant did not raise his constitutional claim at the earliest opportunity, that claim is not preserved for review.[4]

[4] Appellant also did not specify the constitutional provision that he claimed was being violated. Even if the reference to *Crawford* is understood as raising a Confrontation Clause objection, that still does not cure the untimeliness of that objection.

Where a claim is not properly raised, this Court has discretion to review for plain error where it finds that a manifest injustice or miscarriage of justice has resulted. *Baxter*, 204 S.W.3d at 652. Plain error can serve as the basis for granting a new trial on direct appeal only if the error was outcome determinative. *Id.* Manifest injustice is determined by the facts and circumstances of the case, and the defendant bears the burden of establishing manifest injustice. *Id.*

To the extent that Appellant's claim is properly preserved, this Court's review is *de novo*. *Doe v. Phillips*, 194 S.W.3d 833, 841 (Mo. banc 2006). Statutes are presumed to be valid and will not be found unconstitutional unless they clearly contravene a constitutional provision. *Id.*

C. Analysis.

1. Section 491.074, RSMo, does not violate Confrontation Clause.

Furthermore, Appellant's objection based on *Crawford* appears to be limited only to prior statements concerning Appellant's occupancy of the horse trailer. Counsel stated that he did not object to the admission of prior inconsistent statements regarding whether Appellant changed clothes or whether there was an ammonia smell in the barn. (Tr. 385). A constitutional claim must not only be raised at the earliest opportunity, but it must be preserved at each step of the judicial process. *Strong v. State*, 263 S.W.3d 636, 646 (Mo. banc 2008). Appellant's selective objections are hard to square with his claim that the statute is unconstitutional.

In *Crawford v. Washington*, the United States Supreme Court held that the Confrontation Clause prohibited the admission of testimonial hearsay unless the declarant was unavailable and the defense had a prior opportunity for cross-examination. *Crawford*, 541 U.S. at 68. The Court did not define testimonial hearsay, but said that it included, at a minimum, prior testimony at a preliminary hearing, before a grand jury, or at a former trial; and to police interrogation. *Id.* The Court later clarified that statements made in the course of a police interrogation are nontestimonial when the circumstances objectively indicate that the primary purpose of the interrogation is designed to enable police assistance to meet an ongoing emergency. *Davis v. Washington*, 547 U.S. 813, 822 (2006).

Missouri's constitutional right to confrontation is coextensive with the Sixth Amendment of the United States Constitution. *State v. Justus*, 205 S.W.3d 872, 878 (Mo. banc 2006). This Court has applied the "primary purpose" test in determining whether certain kinds of out-of-court statements are testimonial. *Id.* at 880-81; *State v. March*, 216 S.W.3d 663, 666 (Mo. banc 2007).

The record is not clear whether the out-of-court statements regarding Appellant's occupancy of the horse trailer were volunteered or were made in response to police interrogation. *See Justus*, 205 S.W.3d at 880-81 (applying "primary purpose" test to statements made in response to interrogation). Appellant has thus not established that the statements were, in fact, testimonial. *Crawford*, 541 U.S. at 68 (states are free to adopt an approach that exempts nontestimonial hearsay from Confrontation Clause scrutiny), *see also, In re N.D.C.*, 229 S.W.3d 602, 603 (Mo. banc 2007) (*Crawford* does not apply

to non-testimonial statements). Whether the statements are testimonial or not is an issue that this Court need not even reach.

a. Statute not unconstitutional as applied to Appellant.

Appellant argues that section 491.074, RSMo, is unconstitutional as applied to his case because it violates his confrontation rights as set out in *Crawford*. That claim fails, however, because the declarants of those prior inconsistent statements testified at trial and could be examined by defense counsel about those statements.

The Supreme Court noted in *Crawford* that, "when the declarant appears for cross-examination at trial, the Confrontation Clause places no constraints at all on the use of his prior testimonial statements." *Crawford*, 541 U.S. at 59 n.9. This Court recently cited that language in rejecting a *Crawford* challenge to the constitutionality of section 491.075, RSMo 2000, which permits out-of-court statements made by children under the age of twelve to be used as substantive evidence. *State v. Perry*, No. SC89240, slip op. at 8 (Mo. banc, Jan. 27, 2009). The Court found that the statute was not unconstitutional as applied to the defendant because his accuser testified at trial. *Id.* The Court concluded, "[t]he Confrontation Clause simply is not implicated in such circumstances." *Id.* at 19.

Consistent with *Perry*, the Missouri Court of Appeals Southern District has previously found in several cases that no *Crawford* violation occurred where the declarant testified at trial. *State v. Atkeson*, 255 S.W.3d 8, 11 n.5 (Mo. App. S.D. 2008); *Guese v. State*, 248 S.W.3d 69, 72 (Mo. App. S.D. 2008); *State v. Lucio*, 247 S.W.3d 131, 134 (Mo. App. S.D. 2008); *State v. Howell*, 226 S.W.3d 892, 897 (Mo. App. S.D. 2007). Likewise, courts in other jurisdictions have applied the above-quoted language from

Crawford to find that the introduction of prior inconsistent statements made by testifying witnesses does not violate the Confrontation Clause. *See, e.g., United States v. Mayberry*, 540 F.3d 506, 516 (6th Cir. 2008); *People v. Richardson*, 183 P.3d 1146, 1177-78 (Cal. 2008); *State v. Holliday*, 745 N.W.2d 556, 568 (Minn. 2008); *State v. Holness*, 958 A.2d 754, 761-62 (Conn. 2008); *United States v. Butterworth*, 511 F.3d 71, 75-76 (1st Cir. 2007); *State v. Nelis*, 733 N.W.2d 619, 628 (Wis. 2007).

Adam McCauley and Donald Reed both testified at trial, and defense counsel had the opportunity to question them about the statements they made to the police. The Confrontation Clause was therefore not implicated, and the introduction of the prior inconsistent statements through section 491.074, RSMo, did not violate *Crawford*.

b. Statute is not facially unconstitutional.

Appellant does not explicitly argue that the statute is facially unconstitutional. If his argument is read as encompassing such a claim, then that claim must also fail. This Court has noted that a facial challenge to a legislative act requires a showing that no set of circumstances exist under which the act would be valid. *Perry*, No. SC89240, slip op. at 7 (quoting *United States v. Salerno*, 481 U.S. 739, 745 (1987)). This Court found in *Perry* that section 491.075, RSMo, was not facially invalid because the language of the statute permitted the introduction of child witness statements when the child appears for cross-examination at trial. *Perry*, No. SC89240, slip op. at 8.

Likewise, section 491.074, RSMo, allows the introduction of prior inconsistent statements of declarants who appear at trial:

> Notwithstanding any other provisions of law to the contrary, a prior inconsistent statement *of any witness testifying in the trial of a criminal offense* shall be received as substantive evidence, and the party offering the prior inconsistent statement may argue the truth of such statement.

§ 491.074, RSMo 2000 (emphasis added). Since there are circumstances in which the statute can be applied constitutionally, it is not facially invalid. *Perry*, No. SC89240, slip op. at 8.

Appellant also rehashes arguments about the reliability of prior inconsistent statements that have been expressly rejected by this Court. *State v. Bowman*, 741 S.W.2d 10, 13 (Mo. banc 1987). Those reliability arguments are inapposite to Appellant's constitutional claim, since that claim is based on *Crawford*, in which the Supreme Court stated that the only measure of reliability in determining the admissiblity of testimonial hearsay is the opportunity to confront the declarant. *Crawford*, 541 U.S. at 68-69. If the prior statements of Adam McCauley and Donald Reed are indeed testimonial hearsay, they bore "the only indicium of reliability sufficient to satisfy constitutional demands . . . confrontation." *Id.* at 69.

If the statements were not testimonial hearsay, then the State has the flexibility to develop its hearsay law concerning the admission of those statements, even if that means exempting such statements from Confrontation Clause scrutiny altogether. *Id.* at 68; *Perry*, No. SC89240, slip op. at 9. In upholding the constitutionality of section 491.074, RSMo, this Court noted that the admissibility of prior inconsistent statements as substantive evidence was a matter of legislative choice that the Court would not set aside.

Bowman, 741 S.W.2d at 13. There is nothing in *Crawford* or any other subsequent case cited by Appellant that upsets that conclusion.

2. Trial court did not err in admitting the statements.

Appellant also makes an argument that the prosecutor elicited testimony about the prior inconsistent statements of McCauley and Reed before either man took the stand. That seems to be more a claim of an erroneous evidentiary ruling than a constitutional claim. In any event, the record refutes Appellant's argument. Officer Anderson testified, prior to McCauley's testimony, that McCauley had said that Appellant lived in the horse trailer. (Tr. 231-32). The trial court sustained defense counsel's objection and granted his request that the testimony be stricken. (Tr. 232). Despite receiving the relief he had requested, defense counsel raised the subject of Appellant's occupancy of the trailer when he cross-examined Officer Anderson about whether McCauley's written statement to the police contained any allegation that Appellant lived there. (Tr. 239-40). Appellant cannot be heard to complain about self-invited error or matters that he brings into the case. *State v. Mayes*, 63 S.W.3d 615, 632 n.6 (Mo. banc 2001).

McCauley was the next witness to testify, and said that he did not know whether or not Appellant was living in the trailer. (Tr. 245-46). Detective Deric Dull testified next, and said that McCauley had told him that he had seen Appellant in the trailer with another man. (Tr. 270-71).

Dull was later recalled to the stand by the State. (Tr. 394). The court sustained defense counsel's objection when the prosecutor attempted to ask Dull about whether Donald Reed had said anything about Appellant living in the trailer. (Tr. 395). Donald

Reed subsequently testified for the defense and denied that Appellant lived in the trailer. (Tr. 404-05). Dull was then called as a rebuttal witness by the State, and testified that Donald Reed had told him that Appellant did live in the trailer. (Tr. 461).

A prior inconsistent statement is admissible as substantive evidence under section 491.074, RSMo as soon as the inconsistency appears from the witness' testimony. *State v. Blankenship*, 830 S.W.2d 1, 9 (Mo. banc 1992). The prior statements of McCauley and Donald Reed were admitted only after they gave testimony that was inconsistent with the statements that they made to police at the scene. The trial court thus did not err in admitting those statements.

Furthermore, if there had been error, Appellant would have the burden of showing that it was prejudicial. *State v. Forrest*, 183 S.W.3d 218, 223-24 (Mo. banc 2006). Trial court error is not prejudicial unless there is a reasonable probability that it affected the outcome of the trial. *Id.* at 224. As the argument under Appellant's Point II below demonstrates, the State did not have to prove that Appellant actually lived in the trailer in order to establish her possession of the meth manufacturing items found inside it. The State could make a submissible case by showing that Appellant had routine access to the area where those items were found in plain view. *State v. Wurtzberger*, 265 S.W.3d 329, 337 (Mo. App. E.D. 2008). The defense's own evidence, through the testimony of Appellant's father, established that she had routine access to the trailer. (Tr. 404-05). Even without the prior inconsistent statements, the jury had sufficient evidence of Appellant's guilt, as is outlined more fully in Point II below. There is thus not a

reasonable probability that the admission of those statements changed the outcome of the trial.

Appellant has failed to demonstrate either a constitutional violation or an erroneous evidentiary ruling. His point should be denied.

II.

Sufficient evidence supported the jury's verdict.

Appellant claims there was insufficient evidence to establish that she took a substantial step towards the manufacture of methamphetamine by possessing items used in the manufacture of methamphetamine. There was sufficient evidence, however, that Appellant actually possessed the items contained in the trash bag that she carried into the woods and dumped into a pond, and that she constructively possessed the items found in plain view in the horse trailer to which she had routine access.

A. Standard of Review.

"In reviewing the sufficiency of evidence, this Court limits its determination to whether a reasonable juror could have found guilt beyond a reasonable doubt. In so doing, the evidence and all reasonable inferences therefrom are viewed in the light most favorable to the verdict, disregarding any evidence and inferences contrary to the verdict. As such, this Court will not weigh the evidence anew since the fact-finder may believe all, some, or none of the testimony of a witness when considered with the facts, circumstances and other testimony in the case." *State v. Freeman*, 269 S.W.3d 422, 425 (Mo. banc 2008) (internal citations and quotation marks omitted).

B. Analysis.

Appellant was charged, and the case was submitted to the jury, under an accomplice liability theory. (L.F. 54, 75-76). To make a submissible case of accomplice liability, the State has to show that the defendant associated herself with the venture or participated in the crime in some manner. *State v. Beggs*, 186 S.W.3d 306, 313 (Mo. App. W.D. 2005). Any evidence that shows affirmative participation in aiding the principal to commit the crime is sufficient to support a conviction. *Id.* The jury was instructed that it had to find that: (1) Appellant possessed crushed tablets containing ephedrine steroisomer together with lithium and other chemicals and items used in the manufacturing process of methamphetamine; (2) that such conduct was a substantial step toward the commission of the offense of manufacturing methamphetamine; and (3) that Appellant engaged in such conduct for the purpose of manufacturing a controlled substance. (L.F. 75).

Appellant claims that there is insufficient evidence that she possessed the meth-related items, so that the State failed to prove that she took a substantial step towards the manufacture of methamphetamine. In determining whether there was sufficient evidence in cases involving similar claims, Missouri courts have applied the same standard of possession that is used in cases charging a possession offense. *State v. Withrow*, 8 S.W.3d 75, 80 (Mo. banc 1999); *State v. Mickle*, 164 S.W.3d 33, 42 (Mo. App. W.D. 2005); *Wurtzberger*, 265 S.W.3d at 336. The statutory definition of possession provides:

> **"Possessed"** or **"possessing a controlled substance"**, a person, with the knowledge of the presence and nature of a substance, has actual or

constructive possession of the substance. A person has actual possession if he has the substance on his person or within easy reach and convenient control. A person who, although not in actual possession, has the power and the intention at a given time to exercise dominion or control over the substance either directly or through another person or persons is in constructive possession of it. Possesssion may also be sole or joint. If one person alone has possession of a substance possession is sole. If two or more persons share possession of a substance, possession is joint[.]

§ 195.010(34), RSMo Supp. 2001 (emphasis in original).

1. Appellant actually possessed items in trash bag.

The undisputed evidence at trial, including the evidence developed during Appellant's case, was that Appellant ran into the woods with a black trash bag which she threw into a pond. (Tr. 228, 251-52, 264-65, 408-09). The bag emitted an ammonia smell when recovered by the police, and contained numerous items used in the "Nazi-Birch" method of methamphetamine production. (Tr. 266, 276-78, 291, 351-53, 374-76). Evidence that Appellant was seen carrying the bag containing those items a short time before the bag was recovered is sufficient to show that Appellant had the bag within easy reach and convenient control.

In *State v. Camerer*, the defendant was a passenger in a truck that was being followed by a police officer. *State v. Camerer*, 29 S.W.3d 422, 423-24 (Mo. App. S.D. 2000). The officer saw an object being thrown out the passenger side window. *Id.* at 423. That object turned out to be a backpack containing a jar with pseudoephedrine

inside it. *Id.* at 424. The Southern District found that the defendant had actual control, concluding that: "if the evidence was sufficient to support a finding that Appellant was the person who tossed the backpack from the pickup, the evidence was sufficient to support a finding that she had the backpack within easy reach and convenient control." *Id.* at 425.

The Western District followed *Camerer* in *State v. Belton*, where a police officer saw the defendant throw several plastic bags from a car window. *State v. Belton*, 108 S.W.3d 171, 172-73 (Mo. App. W.D. 2003). The bags contained 820 grams of marijuana. *Id.* at 173. The defendant was convicted of littering for throwing the bags out of the car. *Id.* The Western District found that the defendant was in actual possession of the marijuana, noting that he did not challenge his conviction for littering with the bags: "[b]ecause the evidence was sufficient to convict Belton of littering with the bags containing the marijuana, it was sufficient to support a finding that he had the bags within easy reach and control. He could not have discarded them otherwise." *Id.* at 176. *Belton* and *Camerer* were cited in yet another case where the defendant was observed throwing something out of a window that contained a controlled substance – this time a change purse that held methamphetamine. *State v. McLane*, 136 S.W.3d 170, 172, 173 (Mo. App. S.D. 2004).

As was the case in *Belton*, Appellant does not challenge the evidence that she carried the trash bag into the woods, that the bag she carried contained items used in the manufacture of methamphetamine, or that she was aware of the presence and nature of those substances. In fact, Appellant's father testified for the defense that he saw

Appellant carry the bag away. *See State v. Meuir*, 138 S.W.3d 137, 143 (Mo. App. S.D. 2004) (incriminating evidence developed during the defendant's case may be considered in determining the sufficiency of the evidence); *State v. Kimberley*, 103 S.W.3d 850, 857 (Mo. App. W.D. 2003) (testimony of defense witnesses that can support an inference of guilt is considered for sufficiency purposes). While Appellant's father tried to provide an innocent explanation for why Appellant carried-off the bag, the jury was entitled to disbelieve that explanation and conclude instead that Appellant was trying to dispose of evidence to cover-up the illegal activity of her and her friends. *Freeman*, 269 S.W.3d at 425.

2. Appellant constructively possessed items in trailer.

Constructive possession of drugs or drug components and apparatus will be sufficient to support a conviction if other facts exist which buttress the inference of the defendant's requisite mental state. *Withrow*, 8 S.W.3d at 80. Constructive possession requires, at a minimum, evidence that the defendant had access to and control over the premises where the materials were found. *Id.* Exclusive possession of the premises where the materials were found raises an inference of possession and control. *Id.* When the accused shares control over the premises, further evidence is needed to connect her to the manufacturing process. *Id.* Because there was evidence that other persons were involved in manufacturing methamphetamine inside the horse trailer, the items seized from the trailer are subject to a joint possession analysis.

Various types of incriminating evidence have been held to permit an inference of the requisite knowledge and control in cases involving joint possession of premises.

Wurtzberger, 265 S.W.3d at 336-37. That evidence includes consciousness of guilt; routine access to the place where the controlled substance is found; the smell of chemicals used to manufacture the drug; a great quantity of the illegal substance at the scene; and the substance being in public view and accessible by the defendant. *Id.* at 337. The totality of the circumstances is considered in determining whether there are sufficient additional incriminating circumstances to prove possession. *Id.*

All of the additional circumstances mentioned above are present in this case. Appellant's action of trying to dispose of meth-manufacturing items, which the jury could infer had been removed from the trailer, demonstrates consciousness of guilt. (Tr. 228, 251-52). The jury could also infer consciousness of guilt from the evidence that Appellant changed her clothes after disposing of the bag, presumably because the clothes that she had been wearing smelled of anhydrous ammonia. (Tr. 229, 339). There was evidence that Appellant lived in the trailer and that she was seen inside the trailer with one of the other suspects who had fled the scene. (Tr. 270-71, 461). The jury was entitled to believe that evidence. *State v. Potter*, 72 S.W.3d 307, 312 (Mo. App. S.D. 2002) (trier of fact was free to believe that defendant lived in garage-home where items used to manufacture methamphetamine were found). Appellant's own evidence demonstrated that she lived on the property and had routine access to the trailer. (Tr. 400, 403-05).

An odor of ammonia emitted from the trailer that was strong enough to be detected by Adam McCauley as he walked by the outside of the trailer. (Tr. 246-47). Detectives also noticed the odor when they went inside the trailer. (Tr. 281, 337-38). While large

quantities of methamphetamine were not present at the scene, there was present a large quantity of the ingredients and apparatus used to make the illegal drug, and those items were in plain view in the horse trailer and throughout the rest of the property, including the barn. (Tr. 280-83, 285-87, 290, 293, 298-301, 339-49, 374-76).

Appellant argues that this case is similar to *Withrow*, where this Court found insufficient evidence of joint possession to sustain the jury's verdict. *Withrow*, 8 S.W.3d at 81. This case, however, more closely resembles *Wurtzberger*, in which the Eastern District distinguished *Withrow* and found sufficient evidence to sustain the conviction. *Wurtzberger*, 265 S.W.3d at 338. In *Withrow*, the defendant was seen exiting a bedroom where methamphetamine was being manufactured in a locked closet. *Withrow*, 8 S.W.3d at 80-81. This Court reversed the conviction due to the absence of evidence that the defendant lived in the house or had any connection to the contraband and materials found in the locked closet. *Id.* at 81.

In *Wurtzberger*, the Eastern District found additional incriminating evidence similar to the evidence present in this case. Evidence was presented that the defendant lived at the residence where methamphetamine, marijuana, and a digital scale were found in plain view in common areas to which the defendant had routine access. *Wurtzberger*, 265 S.W.3d at 337.[5] The defendant's father, similar to Appellant's father in this case,

[5] In the other case on which Appellant relies, the various items of illegal contraband were not in plain view, and some of them were seized from areas to which the defendant did not have routine access. *State v. West*, 21 S.W.3d 59, 66 (Mo. App. W.D. 2000).

testified that the defendant had routine access to a shed where numerous items used in the manufacture of methamphetamine were found. *Id*. at 337-38. Numerous other cases have found sufficient evidence of possession based on a defendant's routine access to an area where drugs or drug-related items were found. *See, e.g., State v. Glowczewski*, 168 S.W.3d 100, 105 (Mo. App. S.D. 2005); *Kimberley*, 103 S.W.3d at 860; *Potter*, 72 S.W.3d at 313; *State v. Smith*, 850 S.W.2d 934, 944 (Mo. App. S.D. 1993); *State v. Steward*, 844 S.W.2d 31, 34 (Mo. App. W.D. 1992); *State v. McIntire*, 819 S.W.2d 411, 412-13 (Mo. App. S.D. 1991); *State v. Kerfoot*, 675 S.W.2d 658, 662 (Mo. App. E.D. 1984); *State v. Jackson*, 576 S.W.2d 756, 757 (Mo. App. E.D. 1979). In *Glowczewski*, there was also evidence that the defendant was seen fleeing from the trailer, that officers immediately noticed an odor associated with meth labs, and that a meth lab was set up in plain view. *Glowczewski*, 168 S.W.3d at 105-06. Those factors are also present in this case.

Appellant argues that there was no evidence that she was actually in the trailer while the manufacturing process was taking place. That ignores the evidence that Adam McCauley had told officers about seeing Appellant in the trailer with the suspect who left his driver's license in the trailer. (Tr. 270-71). The jury was also entitled to disbelieve the testimony of McCauley and of Appellant's sister that Appellant was in the house during the entire time that they were on the property. *Freeman*, 269 S.W.3d at 425.

Even without any direct evidence of Appellant's presence in the trailer while meth manufacturing was taking place, possession can be established by circumstantial evidence. *State v. Purlee*, 839 S.W.2d 584, 587 (Mo. banc 1992). Given the large

amount of materials and equipment on the property that were related to meth manufacturing, it would be naïve for the jury to believe that two strangers suddenly appeared on the property that day and began making meth without Appellant's knowledge. *McIntire*, 819 S.W.2d at 412. A defendant's access to an area where drugs are found is an incriminating fact which is not destroyed by another individual also having access to the area. *State v. Metz*, 43 S.W.3d 374, 380 (Mo. App. W.D. 2001). The jury could also reasonably infer that Appellant went inside the trailer to fill the trash bag that she carried into the woods and threw into the pond. Because Appellant lived on the property and indisputedly had routine access to the trailer where large amounts of manufacturing items were found, the presence of manufacturing items in the barn was an additional circumstance that the jury could consider in finding that Appellant had possession. *State v. Bremenkamp*, 190 S.W.3d 487, 494 (Mo. App. S.D. 2006).

The evidence supports the jury's verdict. Appellant's point should be denied.

CONCLUSION

In view of the foregoing, Respondent submits that Appellant's conviction and sentence should be affirmed.

Respectfully submitted,

CHRIS KOSTER
Attorney General

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DANIEL N. McPHERSON
Assistant Attorney General
Missouri Bar No. 47182

P. O. Box 899
Jefferson City, MO 65102
Phone: (573) 751-332l
Fax: (573) 751-5391

ATTORNEYS FOR RESPONDENT
STATE OF MISSOURI

CERTIFICATE OF COMPLIANCE

I hereby certify:

1. That the attached brief complies with the limitations contained in Missouri Supreme Court Rule 84.06 and contains 8,147 words as calculated pursuant to the requirements of Missouri Supreme Court Rule 84.06, as determined by Microsoft Word 2003 software; and

2. That the floppy disk filed with this brief, containing a copy of this brief, has been scanned for viruses and is virus-free; and

3. That a true and correct copy of the attached brief, and a floppy disk containing a copy of this brief, were mailed this 28th day of January, 2009, to:

Lawrence J. Fleming
Herzog Crebs, LLP
100 N. Broadway, 14th Floor
St. Louis, MO 63102

_____

DANIEL N. McPHERSON
Assistant Attorney General
Missouri Bar No. 47182

P.O. Box 899
Jefferson City, Missouri 65102
Phone: (573) 751-3321
Fax (573) 751-5391

ATTORNEYS FOR RESPONDENT
STATE OF MISSOURI

APPENDIX

SECTION 195.010(34), RSMo SUPP. 2001..... A1

SECTION 491.074, RSMo 2000..... A2