No. SC95818

In the
Supreme Court of Missouri

STATE OF MISSOURI,

Respondent,

v.

RANDY E. TWITTY,

Appellant.

Appeal from St. Charles County Circuit Court
Eleventh Judicial Circuit
The Honorable Richard K. Zerr, Judge

RESPONDENT'S SUBSTITUTE BRIEF

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ISSUE PRESENTED

Although Defendant, who was convicted of possessing pseudoephedrine with intent to create methamphetamine, possessed no pseudoephedrine when police searched his apartment, he admitted that several hours before this search, he had bought cold-medicine containing pseudoephedrine, removed the pills from their blister packs, and traded these pills for methamphetamine and cash. Moreover, police found in Defendant's apartment physical evidence, i.e., empty cold-medicine boxes and blister packs, receipts, and a pharmacy bag, corroborating Defendant's confession. Was the evidence sufficient to prove that Defendant possessed pseudoephedrine?

STATEMENT OF FACTS

This is an appeal from a St. Charles County Circuit Court judgment convicting Appellant (Defendant) of one count of possession of pseudoephedrine with intent to create methamphetamine, for which he was sentenced to five years' imprisonment.

Defendant was charged as a persistent felony offender with one count of possessing a chemical (pseudoephedrine) on August 29, 2013, with the intent to create a controlled substance (methamphetamine). (L.F. 18). The trial court found that Defendant was a persistent offender. (Tr. 4). Defendant was tried by the court on January 20, 2015, with Judge Richard K. Zerr presiding. (L.F. 6–8, 22–23). The court found Defendant guilty as charged, and it later sentenced him to five years' imprisonment. (Tr. 7–8, 22–26).

Viewed in the light most favorable to the court's finding of guilt, the evidence presented at trial showed the following:

On August 29, 2013, a detective assigned to the St. Charles County Drug Task Force was checking the National Precursor Log Exchange (NPLEX) for suspicious pseudoephedrine purchases. (Tr. 6–7). Businesses must report pseudoephedrine sales to this exchange, which records the sales. (Tr. 7). Pseudoephedrine is a necessary ingredient for making methamphetamine, and people have purchased pseudoephedrine to sell or trade to meth cookers.

(Tr. 8). The legitimacy of the purchases is gauged by the amount and frequency of an individual's purchases as shown on the exchange. (Tr. 8–9).

The detective researching entries on the exchange noticed that Debra Galebach had purchased an unusually large amount of pseudoephedrine (four purchases within the previous 38 days), which included a purchase earlier that day. (Tr. 10–11, 31, 59–60). Three task force detectives went to Galebach's apartment complex around 6 p.m. that day to ask her about these purchases and to determine if she still had the pills in her possession. (Tr. 11, 29–30, 41, 58–60).

Two detectives went to Galebach's front door, while a third detective went to the backside of the apartment and looked inside through a sliding glass door. (Tr. 11–13, 42–43, 61). Defendant answered the front door and falsely told the detectives that his name was "Bobby."[1] (Tr. 13, 61–62). After the detectives told Defendant they were there to discuss pseudoephedrine purchases made earlier that day, Defendant told them to wait outside while

[1] He later admitted that this was a lie and gave detectives his real name. (Tr. 70, 13). He explained that he lied about his name because he was on probation or parole for a meth offense. (Tr. 70).

he put up the dog.[2] (Tr. 14, 61–62). Defendant closed the door and went back inside. (Tr. 14).

The detective watching through the sliding glass door then saw Defendant go into the kitchen and tear up cold-medicine boxes and blister packs. (Tr. 43–45). Defendant lifted up trash already in the trashcan and put the pieces he had just torn under the other trash. (Tr. 43). Defendant then returned to the front door and let the two detectives waiting at the door inside the apartment. (Tr. 43).

Defendant told the detectives that he lived in the apartment with his girlfriend, Galebach, who was at work. (Tr. 63). Defendant gave oral and written consent for the detectives to search his car and apartment. (Tr. 14–15, 44, 67). Inside the trashcan, detectives found torn pieces of two cold-medicine boxes and empty blister packs. (Tr. 16–18, 32, 45, 55, 70; State's Exhibits 11F, 11G, 11N). Writing on the front of the boxes said "Wal-Phed D" and "Pseudoephedrine Hydrochloride." (Tr. 17, 11F, 11G). The empty blister packs, which had contained 40 pills (20 in each box), also had the words

[2] The detectives found no evidence that there was a dog in the apartment. (Tr. 53).

"Pseudoephedrine Hydrochloride" written on them.[3] (State's Ex. 45–46, 60; State's Ex. 11N). A Walgreen's bag used for packaging pharmacy purchases was also found. (Tr. 45, 47; State's Exhibits 11H, 11L). Finally, police found two Walgreen's cash-register receipts showing Wal-Phed D purchases at 9:23 a.m. and 9:57 a.m. earlier that morning (August 29, 2013). (Tr. 19–20, 29–30, 45–47, 60; State's Exhibits 10A, 10B, 11I, 11L, 11M). No pseudoephedrine was found in Defendant's apartment. (Tr. 32, 72).

Although he was not under arrest, Defendant was given the *Miranda* warnings, and he signed a warning-waiver form. (Tr. 28, 64–67). During an interview in his apartment, Defendant told the detectives that he and Galebach had each purchased one box of Wal-Phed D earlier that day.[4] (Tr. 28–30, 63–64, 71–72). After Galebach left for work, Defendant said that he opened the Wal-Phed boxes and removed the pills from their blister packs. (Tr. 63–64, 71–72). He then drove to a commuter lot where he traded the

[3] The lot numbers on the blister packs matched the lot numbers shown on the NPLEX log, indicating that the boxes and blister packs found in Defendant's trashcan were the ones purchased earlier that day. (Tr. 20, 72–73).

[4] Because of limitations placed on the purchase of pseudoephedrine, one person would not have been allowed to make two purchases that close together on the same day. (Tr. 83–84).

pseudoephedrine pills for a quarter gram of methamphetamine and $50. (Tr. 39, 63–64, 71–72). After making the trade, Defendant promptly drove to a park and smoked all the methamphetamine. (Tr. 73–74, 86).

Defendant said he had purchased and then traded pseudoephedrine for methamphetamine three times that month. (Tr. 71–72, 81, 86). Defendant refused to identify the person to whom he had traded the pills. (Tr. 72). Defendant also admitted that he had put the boxes and blister packs in the trashcan. (Tr. 81–82).

ARGUMENT

The evidence was sufficient to prove that Defendant possessed pseudoephedrine because the record shows that Defendant confessed to police that a few hours before police came to his apartment to investigate suspicious pseudoephedrine purchases, he had gone to a drug store and purchased cold pills containing pseudoephedrine, removed the pills from the blister packs, and sold the pills to an unnamed third party for $50 and a quarter gram of methamphetamine.

Defendant's admissions were corroborated by the following evidence: (a) a detective testified that he watched Defendant stand in his kitchen and tear up cold-medicine boxes and throw them in the trash, and empty and torn cold-medicine boxes and blister packs were found in Defendant's trashcan; (b) the labeling on those torn boxes and blister packs stated that the packages contained pseudoephedrine hydrochloride; (c) store receipts were found in Defendant's apartment showing that Defendant and his girlfriend had purchased two boxes of cold medicine containing pseudoephedrine a few hours before police came to Defendant's apartment; and (d) information contained in a national database of

pseudoephedrine purchases confirmed the purchases shown on receipts.

Defendant contends that the evidence was insufficient to support his conviction for possession of pseudoephedrine with intent to create methamphetamine because he did not possess any pseudoephedrine when police searched his apartment. He claims that proof of possession of a drug or substance under Missouri law requires that the State "produce" the substance at trial. This argument is without merit since the plain language of the statute does not require such a showing, and Missouri courts have held that possession may be proved by circumstantial evidence.

A. Standard of review.

When considering sufficiency-of-evidence claims, this Court's review is limited to determining whether the evidence is sufficient for a reasonable juror to find each element of the crime beyond a reasonable doubt. *State v. Nash*, 339 S.W.3d 500, 508–09 (Mo. banc 2011); *State v. Freeman*, 269 S.W.3d 422, 425 (Mo. banc 2008). "This is not an assessment of whether the [appellate court] believes that the evidence at trial established guilt beyond a reasonable doubt but [is] rather a question of whether, in light of the evidence most favorable to the State, any rational fact-finder 'could have found the essential elements of the crime beyond a reasonable doubt.'" *Nash*, 339 S.W.3d at 509 (quoting *State v. Bateman*, 318 S.W.3d 681, 687 (Mo. banc

2010)). "In reviewing the sufficiency of the evidence, all evidence favorable to the State is accepted as true, including all favorable inferences drawn from the evidence." *Nash*, 339 S.W.3d at 509. "All evidence and inferences to the contrary are disregarded." *Id. See also State v. O'Brien*, 857 S.W.2d 212, 215–16 (Mo. banc 1993) (quoting *Jackson v. Virginia*, 443 U.S. 307, 319 (1979) (To ensure that the reviewing court does not engage in futile attempts to weigh the evidence or judge the witnesses' credibility, courts employ "a legal conclusion that upon judicial review all of the evidence is to be considered in the light most favorable to the prosecution.")).

"An appellate court 'faced with a record of historical facts that supports conflicting inferences must presume—even if it does not affirmatively appear in the record—that the trier of fact resolved any such conflicts in favor of the prosecution, and must defer to that resolution.'" *State v. Chaney*, 967 S.W.2d 47, 54 (Mo. banc 1998) (quoting *Jackson v. Virginia*, 443 U.S. at 326); *see also Freeman*, 269 S.W.3d at 425 (holding that an appellate court should "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'") (quoting *State v. Crawford*, 68 S.W.3d 406, 408 (Mo. banc 2002)); *see also Nash*, 339 S.W.3d at 509.

Appellate courts do not act as a "super juror with veto powers"; instead they give great deference to the trier of fact. *State v. Grim*, 854 S.W.2d 403,

405 (Mo. banc 1993); *State v. Chaney*, 967 S.W.2d at 52; *Nash*, 339 S.W.3d at 509; *Freeman*, 269 S.W.3d at 425. Appellate courts may neither determine the credibility of witnesses, nor weigh the evidence. *State v. Villa-Perez*, 835 S.W.2d 897, 900 (Mo. banc 1992). It is within the trier of fact's province to believe all, some, or none of the witnesses' testimony in arriving at the verdict. *State v. Dulany*, 781 S.W.2d 52, 55 (Mo. banc 1989). Circumstantial evidence is given the same weight as direct evidence in considering the sufficiency of the evidence. *Grim*, 854 S.W.2d at 405–06.

"In reviewing the sufficiency of the evidence in a court-tried criminal case, the same standard is applied as in a jury tried case." *State v. Niederstadt*, 66 S.W.3d 12, 13 (Mo. banc 2002). "The appellate court's role is limited to a determination of whether the state presented sufficient evidence from which a trier of fact could have reasonably found the defendant guilty." *Id.* at 13–14. "The Court examines the evidence and inferences in the light most favorable to the verdict, ignoring all contrary evidence and inferences." *Id.* at 14.

B. The record contains sufficient evidence to prove that Defendant possessed pseudoephedrine.

Defendant was charged with possessing pseudoephedrine with intent to create methamphetamine in violation of section 195.420, RSMo 2000, which provides in pertinent part:

> It is unlawful for any person to possess chemicals listed in subsection 2 of section 195.400…with the intent to manufacture, compound, convert, produce, process, prepare, test, or otherwise alter that chemical to create a controlled substance…in violation of sections 195.005 to 195.425.

Section 195.420, RSMo 2000. Pseudoephedrine is one of the chemicals listed in section 195.200.2. *See* section 195.400.2(20), RSMo Cum. Supp. 2010. Methamphetamine is a controlled substance. *See* section 195.017.4(3)(c), RSMo Cum. Supp. 2011. The statutory definition of the word *possessed* as used in Chapter 195 is:

> "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. Possession 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;

Section 195.010(34), RSMo Cum. Supp. 2010.

"To prove possession of a controlled substance, the state must show conscious and intentional possession of the substance, either actual or constructive, and awareness of the presence and nature of the substance. *State v. Stover*, 388 S.W.3d 138, 146–47 (Mo. banc 2012). "Proof of a defendant's knowledge often is supplied by circumstantial evidence of the acts and conduct of the defendant that permit an inference that he or she knew of the existence of the contraband." *Id.* at 147. *See also State v. McCleod*, 186 S.W.3d 439, 444 (Mo. App. W.D. 2006) (holding that "a defendant's knowledge of the presence and character of a substance is normally supplied by circumstantial evidence of the acts and conduct of the accused from which it can be fairly inferred he or she knew of the existence of the contraband").

To prove a violation of section 195.420, the State was required to prove that (1) Defendant possessed pseudoephedrine (2) with the intent to create methamphetamine. *State v. Beggs*, 186 S.W.3d 306, 313 (Mo. App. W.D. 2005).

The only element of the offense Defendant challenges is possession. The evidence presented at trial, however, proves either actual or constructive possession of pseudoephedrine. Defendant admitted that he and his girlfriend had purchased two boxes of Wal-Phed cold medicine containing pseudoephedrine a few hours before the detectives arrived at his apartment.

(Tr. 29–30, 63). He said that he opened the boxes, removed the pills from their blister packs, and drove to a commuter lot where he traded the pills to a person, whom he refused to name, for methamphetamine and $50. (Tr. 63–64, 71–72). He said that he had engaged in similar transactions three times that month. (Tr. 71–72, 81).

Defendant's confession was corroborated by the presence of torn Wal-Phed boxes and blister packs found in his trashcan. (Tr. 16–17, 43–45, 70). The packaging showed that the contents of the packages contained pseudoephedrine hydrochloride. (State's Exhibits 11G, 11N). Receipts showing purchases of two boxes of Wal-Phed cold medicine, one at 9:23 a.m. and the other at 9:57 a.m., were also found in Defendant's apartment. (Tr. 19–20, 29–30, 45–47; State's Exhibits 10A, 10B, 11M). A Walgreen's bag typically used to package pharmacy purchases was also found in the apartment. (Tr. 47; State's Ex. 11L). Finally, the national exchange that recorded pseudoephedrine purchases showed two purchases consistent with what was shown on the receipts. (Tr. 20, 72–73).

Defendant's act of initially giving police a false name and telling them he had to put up a dog that was not there showed consciousness of guilt. *See State v. Smith*, 770 S.W.2d 469, 474 (Mo. App. W.D. 1989). Defendant's act of tearing up the boxes and blister packs and hiding the torn pieces in a

trashcan was also evidence of his consciousness of guilt. *See State v. Leisure*, 810 S.W.2d 560, 572 (Mo. App. E.D. 1991).

Defendant contends that the evidence was insufficient to prove either actual or constructive possession of pseudoephedrine because the pills were not in his possession when police searched his apartment. He further contends that possession of pseudoephedrine, or any other precursor ingredient or controlled substance, is legally impossible to prove unless the police recover the substance and the State admits it into evidence at trial. This argument is at odds with the statutory definition of *possessed* in that it requires both proof of possession at the time of seizure or arrest and admission of the substance into evidence at trial. These elements are not contained within the plain language of the statute.

The first element of possession requires proving the defendant's knowledge of the presence and nature of the substance. This was established by Defendant's admission to police that he and Galebach went to the drug store and purchased two boxes of cold medicine containing pseudoephedrine. This admission was corroborated by the empty cold-medicine boxes, which clearly stated that the pills inside contained pseudoephedrine, the empty blister packs, the cash register receipts, and the NPLEX logs confirming the purchases. Defendant then removed the pills from their blister packs and traded them for methamphetamine and $50. This evidence shows that

Defendant intentionally possessed the pseudoephedrine knowing its nature. To prove actual possession the State had to show that Defendant had the pseudoephedrine within his "easy reach and convenient control." The evidence readily satisfied that requirement since Defendant admitted purchasing the pseudoephedrine, popping the pills out of the blister packs, and delivering them to a third party.

Defendant argues that the use of the word "has" in the statute defining actual possession necessarily implies that the defendant have the substance when he is seized by police or is arrested. But the plain language of the statute places no such temporal requirement on the act of possession. As long as the State proves actual possession of the substance within the time period charged, the element of possession is satisfied whether or not the defendant has actual possession when arrested. The State's evidence readily showed that Defendant possessed pseudoephedrine on the date charged, August 29, 2013.

Missouri courts have repeatedly held that convictions for possessing or selling drugs or other contraband can be supported solely by the testimony of a witness, and that the substance does not have to be recovered by police, analyzed by a laboratory, or admitted into evidence at trial.

In *State v. Krutz*, 826 S.W.2d 7 (Mo. App. W.D. 1991), the court found that the evidence was sufficient to support the defendant's conviction for cocaine

possession even though no cocaine was ever recovered or analyzed. The only evidence in the case was the testimony of a known cocaine dealer who sold the cocaine to the defendant and the testimony of the person who purchased and used the cocaine with the defendant. *Id.* at 9. The cocaine dealer testified that he sold cocaine to the defendant and another man named Hickey for $200, and that the defendant and Hickey snorted some of the cocaine at the drug dealer's house. *Id.* at 8-9. Hickey testified that after he and the defendant bought the cocaine, they went to the defendant's grandparents' house where they drank beer and did "another line." *Id.* at 8. Hickey further testified that the substance they snorted produced the same effect that he had previously experienced when snorting cocaine. *Id.* at 9.

The Court of Appeals rejected the defendant's sufficiency challenge to the evidence, holding that the "law in this area is well-settled" and that the State may prove "the nature of an illegal substance" with "circumstantial evidence." *Id.* at 8. This type of circumstantial evidence includes testimony "that a high price was paid in cash for the substance,…and that transaction[s] involving the substance was carried on with secrecy or deviousness."[5] *Id.* at 8.

[5] When the defendant in *Krutz* committed his crime in December 1989, the statutory definition of the word *possessed* was the same as it was when

The confession and circumstantial evidence presented in Defendant's case was sufficient to prove possession. Moreover, Defendant received a quarter gram of cocaine and $50 for 40 pills of pseudoephedrine that cost him a total of only $17.24. (State's Ex. 10A, 10B, 11M). Defendant also admitted that the transaction in which he traded the pseudoephedrine pills for methamphetamine and cash occurred at a commuter lot and that he had engaged in similar transactions three times during the month. Defendant also refused to identify the person who purchased the pseudoephedrine pills, and he attempted to conceal evidence of his actions by tearing up the boxes and blister packs and hiding them in his trashcan.

In *State v. Neal*, 624 S.W.2d 182 (Mo. App. S.D. 1981), the only evidence proving that a sale of marijuana had occurred and that the substance sold was in fact marijuana was the testimony of the purchaser, an informant who used and dealt drugs. The court held that this witness's testimony stating that the substance sold was marijuana was sufficient to support the conviction. *Id.* at 183–84. *See also State v. Moore*, 279 S.W. 133, 133–34 (Mo. 1925) (holding that the evidence was sufficient to support the defendant's conviction for selling moonshine whiskey even though the only evidence

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Defendant committed his offense in August 2013. *See* section 195.010(34), RSMo Cum. Supp. 1989.

showing that the substance sold was whiskey was the testimony of the purchasers who consumed it); *State v. Roper*, 591 S.W.2d 58, 61 (Mo. App. E.D. 1979) (holding that "officers who have had considerable experience in investigating marijuana cases can testify that in their opinion a certain substance is marijuana," and that this testimony is sufficient to make a submissible case even "in the absence of a chemical analysis by an expert"). *But see State v. Eyman*, 828 S.W.2d 883 (Mo. App. W.D. 1992) (although noting that "[p]roof that a substance is a contraband drug does not always require expert testimony," the court held that under the circumstances of that case, the testimony of the State's sole witness was insufficient to prove that the substance was cocaine).

The sufficiency argument Defendant makes in this case is similar to one made in murder cases in which no dead body is ever recovered by police, and proof of the victim's death is supported only by circumstantial evidence. Missouri courts have rejected these arguments and have held that circumstantial evidence is sufficient to support a murder conviction even when no dead body is recovered. *See State v. Davis*, 814 S.W.2d 593, 594–98 (Mo. banc 1991) (holding that the evidence was sufficient to support the defendant's first-degree murder conviction even though the victim's body was never found); *State v. Byrd*, 389 S.W.3d 702, 710–11 (Mo. App. E.D. 2012) (holding that "[s]ufficient evidence may support a finding that the defendant

killed the victim in the manner charged even where the State does not produce evidence of the victim's dead body").

Although Defendant does not challenge the sufficiency of the evidence to prove that the pills he purchased and traded were pseudoephedrine, the record contains sufficient evidence proving that element as well. The manufacturer's printed labeling on both the cold-medicine boxes and blister packs showed that the pills packaged inside contained pseudoephedrine. *See Moore v. Director of Revenue*, 811 S.W.2d 848 (Mo. App. S.D. 1991) (holding that manufacturer's "labels placed on pharmaceutical and hazardous substances suffice to establish 'circumstantial probability of trustworthiness,' and are admissible as evidence to prove the contents of the substances in the containers to which the labels are attached"). *See also Reemer v. State*, 835 N.E.2d 1005 (Ind. 2005) (holding that the label on a cold-medicine box identifying the pills inside as "pseudoephedrine hydrochloride" was sufficient evidence to support the defendant's conviction for possession of pseudoephedrine as a methamphetamine precursor). Moreover, it can be reasonably inferred from Defendant's conduct that he purchased the cold medicine precisely because it contained pseudoephedrine, which he then used to trade for methamphetamine.

Defendant also does not challenge the sufficiency of the evidence to prove that he had the intent to create methamphetamine. The record contains

sufficient evidence to support that element as well. "The intent to manufacture methamphetamine may be proved by showing that either the defendant himself intended to manufacture methamphetamine or that he gave it to a third person to make." *Beggs*, 186 S.W.3d at 314. The record showed that Defendant had repeatedly purchased substantial quantities of pseudoephedrine and traded it to someone whom Defendant refused to identify for cash and methamphetamine. (Tr. 71–72, 81). In finding Defendant guilty, the trial court noted that it could reasonably infer that Defendant was trading the pseudoephedrine to someone whom Defendant knew was going to use it to make methamphetamine. (Tr. 92). This logical inference was supported by sufficient evidence presented at trial.

The record contains sufficient evidence to prove that Defendant possessed pseudoephedrine with the intent to create methamphetamine.

CONCLUSION

The trial court did not commit reversible error. Defendant's conviction and sentence should be affirmed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Undersigned counsel hereby certifies that the attached brief complies with the limitations contained in Missouri Supreme Court Rule 84.06 and contains 4,474 words, excluding the cover, signature block, and this certificate, as determined by Microsoft Word 2010 software; and that a copy of this brief was sent through the electronic filing system on November 21, 2016, to:

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