Rel: 02/15/2013

ALABAMA COURT OF CRIMINAL APPEALS

OCTOBER TERM, 2012-2013

CR-10-1464

Emmett Grady Wallace

v.

State of Alabama

Appeal from Montgomery Circuit Court
(CC-10-1706)

On Application for Rehearing

PER CURIAM.

The opinion issued on June 29, 2012, is hereby withdrawn, and the following opinion is substituted therefor.

The appellant, Emmett Grady Wallace, was convicted of the chemical endangerment of a child, a violation of § 26-15-3.2(A), Ala. Code 1975, and the unlawful manufacture of a controlled substance, i.e., methamphetamine, a violation of § 13A-12-218, Ala. Code 1975. He was sentenced to 10 years' imprisonment on each conviction, the sentences to be served concurrently. This appeal followed.

I.

Wallace first argues that the State failed to present sufficient evidence to convict him of manufacturing methamphetamine because, he says, it failed to prove that the substance was in fact methamphetamine or that he possessed any precursor chemical as that term is defined in § 20-2-181, Ala. Code 1975. Specifically, he argues that the evidence was insufficient because the State failed to present the testimony of a forensic or scientific expert that the substance was methamphetamine or that he possessed a precursor chemical.

At the close of the State's case, Wallace moved for a judgment of acquittal and argued: "In order to establish that you made meth, you have to have a scientific determination that meth was present at that place or on these substances.

That requires the Department of Forensic Sciences to do some test or some other scientific agency to determine [the] presence of meth." (R. 292.) The circuit court denied the motion. (R. 299.)

Section 13A-12-218, Ala. Code 1975, provides, in relevant part:

> "(a) A person commits the crime of unlawful manufacture of a controlled substance in the first degree if he or she violates Section 13A-12-217 and two or more of the following conditions occurred in conjunction with that violation:
>
> "....
>
> "(4) A clandestine laboratory operation was to take place or did take place within 500 feet of a residence, place of business, church, or school.
>
> "....
>
> "(6) A clandestine laboratory operation was for the production of controlled substances listed in Schedule I or Schedule II.
>
> "(7) A person under the age of 17 was present during the manufacturing process."

Section 13A-12-217, Ala. Code 1975, provides, in pertinent part:

> "(a) A person commits the crime of unlawful manufacture of a controlled substance in the second degree if, except as otherwise authorized in state or federal law, he or she does any of the following:

"(1) Manufactures a controlled substance enumerated in Schedule I to V, inclusive.

"(2) Possesses precursor substances as determined in Section 20-2-181, in any amount with the intent to unlawfully manufacture a controlled substance."

Section 20-2-181(d), Ala. Code 1975, addresses precursor chemicals and states:

"Until the Board of Pharmacy adopts a rule designating listed precursor chemicals, as required by subsection (a), the following chemicals or substances are hereby deemed listed precursor chemicals:

"(1) Acetic anhydride;

"(2) Anthranilic acid and its salts;

"(3) Benzyl cyanide;

"(4) Ephedrine, its salts, optical isomers, and salts of optical isomers;

"(5) Ergonovine and its salts;

"(6) Ergotamine and its salts;

"(7) Hydriodic acid;

"(8) Isosafrol;

"(9) Methylamine;

"(10) N-Acetylanthranilic acid and its salts;

"(11) Norpseudoephedrine, its salts, optical isomers, and salts of optical isomers;

"(12) Phenylacetic acid and its salts;

"(13) Phenylpropanolamine, its salts, optical isomers, and salts of optical isomers;

"(14) Piperidine and its salts;

"(15) Pseudoephedrine, its salts, optical isomers, and salts of optical isomers;

"(16) Safrole; and

"(17) 3,4-Methylenedioxyphenyl-2-propanone."

The indictment charged Wallace as follows:

> "Emmett Grady Wallace ... whose name is otherwise unknown to the Grand Jury, did knowingly manufacture a controlled substance in Schedules I to V, to-wit: METHAMPHETAMINE, and/or possess precursor substances, in any amount, with the intent to unlawfully manufacture a controlled substance, as determined in Section 20-2-181 of the Code of Alabama 1975, and in conjunction therewith, did also establish a clandestine laboratory operation which was to take place or did take place within 500 feet of a residence, place of business, church, or school, to-wit: a residence; and/or established a clandestine laboratory operation for the production of controlled substances, to-wit: METHAMPHETAMINE; and/or a person under the age of 17, [E.T.] was present during the manufacturing process, in violation of section 13A-12-218 of the Code of Alabama, against the peace and dignity of the State of Alabama."

When reviewing whether the State has presented sufficient evidence to support a conviction, we keep in mind the following:

> "[T]he evidence must be reviewed in the light most favorable to the prosecution. Cumbo v. State, 368 So. 2d 871 (Ala. Cr. App. 1978), cert. denied, 368 So. 2d 877 (Ala. 1979). Conflicting evidence presents a jury question not subject to review on appeal, provided the state's evidence establishes a prima facie case. Gunn v. State, 387 So. 2d 280 (Ala. Cr. App.), cert. denied, 387 So. 2d 283 (Ala. 1980). The trial court's denial of a motion for a judgment of acquittal must be reviewed by determining whether there existed legal evidence before the jury, at the time the motion was made, from which the jury by fair inference could have found the appellant guilty. Thomas v. State, 363 So. 2d 1020 (Ala. Cr. App. 1978). In applying this standard, the appellate court will determine only if legal evidence was presented from which the jury could have found the defendant guilty beyond a reasonable doubt. Willis v. State, 447 So. 2d 199 (Ala. Cr. App. 1983); Thomas v. State. When the evidence raises questions of fact for the jury and such evidence, if believed, is sufficient to sustain a conviction, the denial of a motion for a judgment of acquittal by the trial court does not constitute error. Young v. State, 283 Ala. 676, 220 So. 2d 843 (1969); Willis v. State. A verdict of conviction will not be set aside on the ground of insufficiency of the evidence unless, allowing all reasonable presumptions for its correctness, the preponderance of the evidence against the verdict is so decided as to clearly convince this court that it was wrong and unjust. Duncan v. State, 436 So. 2d 883 (Ala. Cr. App. 1983), cert. denied, 464 U.S. 1047, 104 S.Ct. 720, 79 L.Ed.2d 182 (1984); Johnson v. State, 378 So. 2d 1164 (Ala. Cr. App.), cert. quashed, 378 So.2d 1173 (Ala. 1979)."

Breckenridge v. State, 628 So. 2d 1012, 1018-19 (Ala. Crim. App. 1993).

> "'Circumstantial evidence is not inferior evidence, and it will be given the same weight as direct evidence, if it, along with the other evidence, is susceptible of a reasonable inference pointing unequivocally to the defendant's guilt. Ward v. State, 557 So. 2d 848 (Ala. Cr. App. 1990). In reviewing a conviction based in whole or in part on circumstantial evidence, the test to be applied is whether the jury might reasonably find that the evidence excluded every reasonable hypothesis except that of guilt; not whether such evidence excludes every reasonable hypothesis but guilt, but whether a jury might reasonably so conclude. Cumbo v. State, 368 So. 2d 871 (Ala. Cr. App. 1978), cert. denied, 368 So. 2d 877 (Ala. 1979).'"

Lockhart v. State, 715 So. 2d 895, 899 (Ala. Crim. App. 1997), quoting Ward v. State, 610 So. 2d 1190, 1191-92 (Ala. Crim. App. 1992).

The State's evidence tended to show that on June 30, 2010, Officer Christopher Owenby of the Eclectic Police Department was investigating a theft when he learned that property from the theft had been pawned at a pawnshop in Montgomery. Officer Owenby obtained the assistance of Sgt. C.J. Coughlin and Sgt. J.L. Walker, detectives with the Montgomery Police Department, to investigate the name and

address on the pawn ticket. The pawn ticket had been signed by M.T. and listed a Plum Street address in Montgomery.[1]

Officer Owenby testified that when the officers arrived at the Plum Street address, he went to the back of the house and approached an open window. Wallace was standing at the open window and Officer Owenby asked him to answer the door. The house was occupied by Wallace, M.T., and M.T.'s six-year old daughter, E.T. M.T. told police that the stolen property was no longer in the house, and she gave oral and written consent for the officers to search the residence.

Sgt. Coughlin testified that he found a box in a closet in a bedroom that M.T. said was occupied by her and Wallace. The box, he said, had smoke emanating from it. Inside the box was a duffel bag, and inside the duffel bag was a plastic drink bottle with fluid and metal strips in it. The substance, he said, was bubbling, and he believed that it was hazardous. At that time, Sgt. Coughlin testified, he followed protocol, cleared the house, and called the narcotics division. Sgt. Coughlin further testified that there was a

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[1]To protect the anonymity of the child victim in this case, we are using initials for the child's mother and child. See Rule 52, Ala. R. App. P.

thick white smoke throughout the house that had a chemical smell and that the child, E.T., was walking around the house.

Detective W.T. Grant of the Montgomery Police Department testified that Wallace made a statement to him in regard to what had happened at Plum Street. Wallace told him that he had lived at that residence for five years; Detective Grant said that Wallace first referred to M.T. as his wife and that Wallace later called M.T. his girlfriend. Wallace told Detective Grant that he, M.T., and E.T., lived in the house.

Detective Benjamin Schlemmer, a narcotics officer with the Montgomery Police Department, testified that he was called to the house on Plum Street because officers on site suspected that they had discovered a portable meth lab. Detective Schlemmer testified to the extent of his training in identifying "both the finished product of methamphetamines once it had actually been manufactured and then also how to identify the manufacturing process of methamphetamine." (R. 232.) He had over 150 hours of training that focused on the manufacture of narcotics, specifically methamphetamine. He said that coffee filters, tubing, a funnel, butane, a mason jar with a clear liquid at the bottom of it, salt, and rags at

the residence were all materials necessary for a one-pot meth lab. Detective Schlemmer testified:

> "Prosecutor: And say in the instance of cocaine, would you actually collect that evidence?
>
> "[Detective Schlemmer]: Yes, ma'am. I would collect it myself.
>
> "Prosecutor: What would you do with that evidence once you collected it?
>
> "[Detective Schlemmer]: I would submit it to the Department of Forensic Sciences for analysis.
>
> "Prosecutor: Okay. In the instance of a meth lab, do you collect evidence in the same way you would with, say, cocaine?
>
> "[Detective Schlemmer]: No, ma'am, we do not.
>
> "Prosecutor: Why not?
>
> "[Detective Schlemmer]: When you show up on the scene of a meth lab, like I said, you have many volatile chemicals. You have camping fuel which is flammable. A lot of times you'll have lithium strips, battery strips, which create sparks and heat which can cause the camp fuel to ignite. You can also have multiple other explosive devices that are generally kept under pressure. So once those have been combined, there's no way to send it over to the lab without endangering the people that would be testing it."

(R. 238-39.) Detective Schlemmer said that he observed a white smoke coming from the container, that the smoke had an acidic ammonia smell, and that, in his experience, which he

had detailed, the box discovered in the closet was a "one-pot methamphetamine lab." (R. 245.) Detective Schlemmer further testified that at a certain stage in the manufacture of methamphetamine, the plastic bottle will contain three layers of liquid: a bottom and top layer of byproduct and a middle layer of methamphetamine oil. He further explained that what should be a clear liquid in the plastic bottle is often tinted blue or red depending on the component containing the ephedrine or pseudoephedrine. He said that either ephedrine or pseudoephedrine is a necessary ingredient in making methamphetamine and that neither may be purchased but must be extracted from various cold or allergy pills such as Sudafed. These pills are assigned specific colors -- Sudafed is red. During the chemical processing inside the plastic bottle, Detective Schlemmer said, the color attached to the agent used separates and releases the coloring "thus causing the tinting in the liquid." (R. 270.) Following this stage in the manufacture, filters would be used to extract the methamphetamine oil and then the butane and hoses would be used to apply pressure to the oil, which results in the formation of crystal methamphetamine. Here, the substance at

the top of the liquid was red, indicating that pseudoephedrine had been used in the process.

Detective Schlemmer contacted the Drug Enforcement Administration, who, in turn, summoned a company -- One-Stop Environmental -- to dispose of the lab and its contents. He watched an employee of One-Stop test the finished product and then place it in a container for transporting hazardous material, Detective Schlemmer said.

E.T. testified at Wallace's trial and a videotape of her interview by law-enforcement officers also was admitted and played to the jury. At trial, E.T. testified that she was then in the first grade, that she lived with her mother and her stepfather, Wallace, and that her mother and Wallace married after Wallace was arrested. On the videotape E.T. said that on three occasions she had seen Wallace put "medicine" into the plastic bottle and that she had seen Wallace "fire[] it up and then he smoked it." She also said that she told Wallace that police would find the "stuff" in the closet.

Alabama has never required direct proof that a substance is a controlled substance to sustain a drug conviction. As

this Court stated in J.M.A. v. State, 74 So. 3d 487 (Ala. Crim. App. 2011):

> "This Court has upheld convictions for possession of a controlled substance despite a lack of scientific testing where a witness who confiscated or took possession of the substance testified to having sufficient knowledge or expertise to identify the substance. See Hanks v. State, 562 So. 2d 536, 540 (Ala. Crim. App. 1989), rev'd on other grounds, 562 So. 2d 540 (Ala. 1989) (upholding admission of police officer's opinion testimony that substance was marijuana, despite lack of scientific testing, where 'the record contain[ed] ample evidence of the testifying police officer's experience and training in the area of drug enforcement and drug detection and identification'); Headley v. State, 720 So. 2d 996, 998 (Ala. Crim. App. 1998) ('The evidence does not have to consist of scientific testing, so long as the proper foundation for the arresting officer's own experience in identifying marijuana is laid.'); Powell v. State, 804 So. 2d 1167, 1170 (Ala. Crim. App. 2001) (affirming conviction where 'the witness who identified the substance as marijuana[] had experience in recognizing marijuana[] and was familiar with its odor and appearance')."

74 So. 3d at 493-94.

Overwhelmingly, the vast majority of jurisdictions that have considered this issue agree that chemical tests are not necessary to obtain a drug-related conviction.

> "'The law is quite clear that the introduction of a chemical analysis of the substance is not essential to conviction. ... The narcotic nature of the substance need not be proved by direct evidence if

> the circumstantial evidence presented established ... that beyond a reasonable doubt the substance was [cocaine]. [Citations omitted.]'
>
> "United States v. Zielie, 734 F.2d 1447, 1456 (11th Cir. 1984), cert. denied, 469 U.S. 1189, 105 S.Ct. 957, 83 L.Ed.2d 964 (1985); see United States v. Leavitt, 878 F.2d 1329, 1336 (11th Cir.), cert. denied, 493 U.S. 968, 110 S.Ct. 415, 107 L.Ed.2d 380 (1989); United States v. Harrell, 737 F.2d 971, 978 (11th Cir. 1984), cert. denied, 469 U.S. 1164, 105 S.Ct. 923, 83 L.Ed.2d 935 (1985); United States v. Crisp, 563 F.2d 1242, 1244 (5th Cir. 1977); United States v. Quesada, 512 F.2d 1043, 1045 (5th Cir.), cert. denied, 423 U.S. 946, 96 S.Ct. 356, 46 L.Ed.2d 277 (1975). The law of this circuit takes the expansive view that the identification of a controlled substance can be established by such circumstantial evidence as 'lay experience based on familiarity through prior use, trading, or law enforcement; a high sales price; on-the-scene remarks by a conspirator identifying the substance as a drug; and behavior characteristic of sales and use, such as testing, weighing, cutting and peculiar ingestion.' Harrell, 737 F.2d at 978. Additionally, this court has recognized that 'the uncorroborated testimony of a person who observed a defendant in possession of a controlled substance is sufficient if the person is familiar with the substance at issue.' Zielie, 734 F.2d at 1456; see United States v. Rodriguez-Arevalo, 734 F.2d 612, 616 (11th Cir. 1984); United States v. Sanchez, 722 F.2d 1501, 1506 (11th Cir.), cert. denied, 467 U.S. 1208, 104 S.Ct. 2396, 81 L.Ed.2d 353 (1984)."

United States v. Baggett, 954 F.2d 674, 677 (11th Cir. 1992).

> "Illegal drugs will often be unavailable for scientific analysis because their nature is to be consumed. As a practical matter, therefore, the evidentiary rule urged by [the appellant] would

> insulate from prosecution a large class of unlawful acts involving illicit drugs when the government happens upon the scene too late to seize a sample of the substance. To our knowledge, no court has held that scientific identification of a substance is an absolute prerequisite to conviction for a drug-related offense, and we too are unwilling to announce such a rule. In view of the limitations that such a burden would place on prosecutors, and in accordance with general evidentiary principles, courts have held that the government may establish the identity of a drug through cumulative circumstantial evidence. See, e.g., United States v. Osgood, 794 F.2d 1087, 1095 (5th Cir.), cert. denied, 479 U.S. 994, 107 S.Ct. 596, 93 L.Ed.2d 596 (1986); [United States v.] Harrell, 737 F.2d [971] 978-79 [(11th Cir. 1984)]. So long as the government produces sufficient evidence, direct or circumstantial, from which the jury is able to identify the substance beyond a reasonable doubt, the lack of scientific evidence is not objectionable. Cf. Osgood, 794 F.2d at 1095; Harrell, 737 F.2d at 978."

United States v. Schrock, 855 F.2d 327, 334 (6th Cir. 1988). See also United States v. Walters, 904 F.2d 765, 770 (1st Cir. 1990) ("Proof based on scientific analysis or expert testimony is not required to prove the illicit nature of a substance, and identification of a substance as a drug may be based on the opinion of a knowledgeable lay person."); United States v. Scott, 725 F.2d 43, 45 (4th Cir. 1984) ("[L]ay testimony and circumstantial evidence may be sufficient, without the introduction of an expert chemical analysis, to establish the

identity of the substance involved in an alleged narcotics transaction."); State v. Hernandez, 85 Wash. App. 672, 676, 935 P.2d 623, 625 (1997)("Circumstantial evidence and lay testimony may be sufficient to establish the identity of a drug in a criminal case."); United States v. Murray, 753 F.2d 612, 615 (7th Cir. 1985) ("The identity of a drug may be established by circumstantial evidence."); Sterling v. State, 791 S.W.2d 274, 277 (Tex. App. 1990) ("An expert may identify a controlled substance without chemical analysis."); United States v. Aqueci, 310 F.2d 817, 828 (2d Cir. 1962) ("Just as with any other component of the crime, the existence of and dealing with narcotics may be proved by circumstantial evidence; there need be no sample placed before the jury, nor need there be testimony by qualified chemists as long as the evidence furnished found for inferring that the material in question was narcotics.").

The United States Court of Appeals for the Fourth Circuit stated the following concerning the types of circumstantial evidence that will support a drug conviction where no scientific evidence as to the identity of the drug has been introduced:

> "Such circumstantial proof may include evidence of the physical appearance of the substance involved in the transaction, evidence that the substance produced the expected effects when sampled by someone familiar with the illicit drug, evidence that the substance was used in the same manner as the illicit drug, testimony that a high price was paid in cash for the substance, evidence that transactions involving the substance were carried on with secrecy or deviousness, and evidence that the substance was called by the name of the illegal narcotic by the defendant or others in his presence ...."

United States v. Dolan, 544 F.2d 1219, 1221 (4th Cir. 1976)).

Here, Detective Schlemmer testified that the plastic bottle and its components were consistent with the materials needed to build a meth lab and that the chemical smell emanating from the bottle was consistent with the presence of methamphetamine. The liquid on the top in the bottle was the color of one of the ingredients used in the process, Detective Schlemmer said, and the substance in this case was red, indicating the presence of pseudoephedrine.[2] E.T. said on

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[2]The dissenting opinion asserts:

> "[T]he State presented no evidence to prove that the substance in the seized plastic bottle was, in fact, methamphetamine or that completed methamphetamine had been produced by Wallace. Rather, Det. Schlemmer explained part of the manufacturing process, testified that the layered liquid in the plastic bottle indicated that an intermediate step

videotape that she had seen Wallace put "medicine" in the bottle and that she had seen him "fire[] it up and then he smoked it." The State's evidence established beyond a reasonable doubt that Wallace was guilty of the unlawful manufacture of a controlled substance.

II.

> in the process had not been completed and that two additional steps were required -- filtration to extract methamphetamine oil and application of gas to the oil to crystalize it, but that 'it hadn't made it to that process yet.'"

___ So. 3d at ___ (emphasis added). As the emphasized language indicates, Detective Schlemmer's testimony was sufficient for the jury to conclude that the one-bottle meth lab in this case contained methamphetamine.

Detective Schlemmer specifically testified that the middle layer of liquid in a one-bottle meth lab, like the one in Wallace's case, is methamphetamine oil. For purposes of proving that Wallace possessed methamphetamine in violation of § 13A-12-217, this testimony was sufficient. Wallace does not argue that the State was required to prove that he possessed methamphetamine; rather, he argues that the State was required to use scientific or forensic analysis to prove that he possessed methamphetamine. See Wallace's brief, p. 15 ("The core of Mr. Wallace's argument is that the State cannot prove [its] case without scientific evidence indicating that a chemical compound listed in Schedule I through V was manufactured by Mr. Wallace .... Mr. Wallace's contention is that in order to convict the State would be required to present expert scientific testimony at the trial of his case." (Emphasis added)). For the reasons, discussed, Wallace's position is inconsistent with Alabama law.

Wallace next argues that the State failed to prove that he violated § 26-15-3.2, Ala. Code 1975, because, he says, it failed to prove that he was a "responsible person" as that term is defined in § 26-15-2, Ala. Code 1975.

Section 26-15-3.2(a), Ala. Code 1975, defines the crime of chemical endangerment:

> "(a) A responsible person commits the crime of chemical endangerment of exposing a child to an environment in which he or she does any of the following:
>
> > "(1) Knowingly, recklessly, or intentionally causes or permits a child to be exposed to, to ingest or inhale, or to have contact with a controlled substance, chemical substance, or drug paraphernalia as defined in Section 13A-12-260."

A "responsible person" is defined in § 26-15-2(4), Ala. Code 1975, as follows:

> "A child's natural parent, stepparent, adoptive parent, legal guardian, custodian, or any other person who has the permanent or temporary care or custody or responsibility for the supervision of a child."

Here, E.T. testified that Wallace was her stepfather. (R. 218.) She said that her mother and Wallace married after Wallace was arrested. Wallace told law enforcement that he had lived at the Plum Street residence for five years. M.T.

told police that the bedroom where the drugs were found was occupied by her and Wallace.

The jury could have inferred that E.T. was under the supervision of her mother and Wallace. The State presented sufficient evidence that Wallace was a "responsible person" as that term is defined in § 26-15-2, Ala. Code 1975.

III.

Last, Wallace argues that the circuit court committed reversible error by refusing to give an instruction on the statutory definition of precursor chemicals that are contained in § 20-2-181, Ala. Code 1975.

At trial, Wallace requested that the court read § 20-2-181(d), Ala. Code 1975, the list of the 17 enumerated precursor chemicals recognized in that statute, to the jury. The circuit court indicated that no pattern jury instruction existed for the offense, that the list of precursor chemicals was not exclusive, and that the list was confusing. The circuit court declined to read the list of the precursor chemicals to the jury. (R. 320.)

> "'It has long been the law in Alabama that a [circuit] court has broad discretion in formulating jury instructions, provided those instructions are accurate reflections of the law and facts of the

> case.' Culpepper v. State, 827 So. 2d 883, 885 (Ala. Crim. App. 2001) (citing Knotts v. State, 686 So. 2d 431, 456 (Ala. Crim. App. 1995))."

Barrett v. State, 33 So. 3d 1287, 1288 (Ala. Crim. App. 2009).

> "The trial judge may refuse to give a requested jury charge when the charge is either fairly and substantially covered by the trial judge's oral charge or is confusing, misleading, ungrammatical, not predicated on a consideration of the evidence, argumentative, abstract, or a misstatement of the law."

Harris v. State, 794 So. 2d 1214, 1220 (Ala. Crim. App. 2000).

As stated in Part I, to be convicted of violating § 13A-12-218, Ala. Code 1975, the State must prove that the appellant is guilty of violating § 13A-12-217, Ala. Code 1975. This section provides:

> "(a) A person commits the crime of unlawful manufacture of a controlled substance in the second degree if ... he does any of the following:
>
> > "(1) Manufactures a controlled substance enumerated in Schedules I to V, inclusive.
> >
> > "(2) Possesses precursor substances as determined in Section 20-2-181, in any amount with the intent to unlawfully manufacture a controlled substance."

(Emphasis added.)

Here, the indictment charged alternative means of committing the offense of the unlawful manufacture of a controlled substance in the second degree:

> "Emmett Grady Wallace ... whose name is otherwise unknown to the Grand Jury, did knowingly manufacture a controlled substance in Schedules I to V, to-wit: METHAMPHETAMINE, and/or possess precursor substances, in any amount, with the intent to unlawfully manufacture a controlled substance...."

(Emphasis added.)

The circuit court instructed the jury on the manufacture of methamphetamine, and the jury returned a verdict finding Wallace guilty of the unlawful manufacture of a controlled substance. "We have recognized that an error in instructions pertaining to a particular charge is rendered harmless where the jury returns a verdict of guilty to a different or alternative charge." State v. Bowman, 588 A.2d 728, 732 (Me. 1991). See Deutcsh v. State, 610 So. 2d 1212, 1221 (Ala. Crim. App. 1992). Thus, any error in the circuit court's failure to list all the precursor chemicals necessary to constitute a violation of § 13A-12-217(a)(b), Ala. Code 1975, an alternative method of committing the crime of the unlawful manufacture of a controlled substance in the second degree, was harmless beyond a reasonable doubt.

For the foregoing reasons, we affirm Wallace's convictions for the chemical endangerment of a child and the unlawful manufacture of a controlled substance.

APPLICATION FOR REHEARING GRANTED; OPINION OF JUNE 29, 2012, WITHDRAWN; OPINION SUBSTITUTED; AFFIRMED.

Windom, P.J., and Kellum, Burke and Joiner, JJ., concur; Welch, J., concurs in part and dissents in part, with opinion.

WELCH, Judge, concurring in part and dissenting in part.

The majority affirms Emmett Grady Wallace's convictions for chemical endangerment of a child, § 26-15-3.2(A), Ala. Code 1975, and first-degree unlawful manufacture of a controlled substance, § 13A-12-218, Ala. Code 1975. I concur with the majority's affirmance of the chemical-endangerment conviction. I disagree with the majority's resolution of Wallace's challenge to the unlawful-manufacture conviction and respectfully dissent as to the portions of the opinion discussing the two issues related to that conviction.

Wallace argues that the trial court erred when it denied the motion for a judgment of acquittal as to the unlawful-manufacture charge that he made at the conclusion of the

State's case because, he says, the State did not present scientific evidence to establish either that the substance he manufactured was methamphetamine or that he possessed any chemical precursors as defined in § 20-2-181, Ala. Code 1975.

It appears that the majority holds that the State proved beyond a reasonable doubt that Wallace was guilty of the unlawful manufacture of a controlled substance, and appears to hold that the State established a prima facie case as to both alternatives of the charge -- that Wallace actually manufactured methamphetamine and that he possessed a precursor chemical. The evidence presented by the State supports neither alternative.

Of course, the majority has correctly stated that, in reviewing a trial court's denial of a motion for a judgment of acquittal, this Court must consider the evidence in the light most favorable to the State and must determine whether, at the time the motion was made, there was sufficient evidence before the jury from which the jury could by fair inference have found the defendant guilty. I agree with the majority's statement that "Alabama has never required direct proof that a substance is a controlled substance to sustain a drug

conviction." ___ So. 3d at ___. I do not disagree with the majority's implicit holding that the prosecution is not required in all cases to present evidence based on scientific testing and analysis to identify a controlled substance. However, all those propositions, combined with the principle that circumstantial evidence is entitled to the same weight as direct evidence so long as it points unequivocally to the defendant's guilt, are not enough to uphold the trial court's denial of Wallace's motion for a judgment of acquittal in this case.

Wallace was charged with knowingly manufacturing a controlled substance -- methamphetamine -- and/or possessing a precursor substance as defined in § 20-2-181, Ala. Code 1975, with the intent to unlawfully manufacture a controlled substance.

Section 13A-12-218 provides, in relevant part:

> "(a) A person commits the crime of unlawful manufacture of a controlled substance in the first degree if he or she violates Section 13A-12-217 and two or more of the following conditions occurred in conjunction with that violation:
>
> "...
>
> "(4) A clandestine laboratory operation was to take place or did take

> place within 500 feet of a residence, place of business, church, or school.
>
> "...
>
> "(6) A clandestine laboratory operation was for the production of controlled substances listed in Schedule I or Schedule II.
>
> "(7) A person under the age of 17 was present during the manufacturing process."

Section 13A-12-217, Ala. Code 1975, provides, in relevant part:

> "(a) A person commits the crime of unlawful manufacture of a controlled substance in the second degree if, except as otherwise authorized in state or federal law, he or she does any of the following:
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> "(1) Manufactures a controlled substance enumerated in Schedules I to V, inclusive.
>
> "(2) Possesses precursor substances as determined in Section 20-2-181, in any amount with the intent to unlawfully manufacture a controlled substance."

A. Manufacture of Methamphetamine

The majority states: "Detective Schlemmer testified that the plastic bottle and its components were consistent with the materials needed to build a meth lab and that the chemical smell emanating from the bottle was consistent with the presence of meth." ___ So. 3d at ___. I agree with the

majority. The State established that Wallace had the components for a one-pot methamphetamine lab. The State further established that the liquid at the top of the plastic bottle had a red tint, indicating the possible presence of pseudoephedrine, which the State acknowledged was a necessary ingredient of methamphetamine. Finally, the State established that E.T. had on prior occasions seen Wallace put pills in the bottle and that he had smoked what he made in the bottle. However, the State presented no evidence to prove that the substance in the seized plastic bottle was, in fact, methamphetamine or that completed methamphetamine had been produced by Wallace. Rather, Det. Schlemmer explained part of the manufacturing process, testified that the layered liquid in the plastic bottle indicated that an intermediate step in the process had not been completed and that two additional steps were required -- filtration to extract methamphetamine oil and application of gas to the oil to crystalize it, but that "it hadn't made it to that process yet." (R. 283.) The substance in the Mason jar was tested by the clean-up crew, but there was no testimony about the result of that test and

certainly no testimony that the test revealed the presence of methamphetamine.

At most, the State proved that Wallace was attempting to make methamphetamine, but the State's own witness established that Wallace had not completed the process. Rather, the State hoped that the jury would fill in the gaps in the evidence, that it would overlook the State's failure to provide even circumstantial evidence that Wallace had actually manufactured methamphetamine, and that it would find Wallace guilty of manufacturing a drug without any evidence that the drug was ever actually produced. A reasonable jury could not have concluded beyond a reasonable doubt that Wallace was guilty of completed crime of the unlawful manufacture of methamphetamine, and I dissent from the majority's holding to the contrary.

However, Alabama specifically criminalizes the attempt to commit a controlled-substance crime.

> "Section 13A-12-203(a), Ala. Code 1975, provides that '[a] person is guilty of an attempt to commit a controlled substance crime if he engages in the conduct defined in § 13A-4-2(a), and the crime attempted is a controlled substance crime.' See also Rhodes v. State, 686 So.2d 1288, 1289 (Ala.Cr.App. 1996); Norris v. State, 601 So.2d 1105 (Ala.Cr.App. 1991). Section 13A-4-2(a), Ala. Code

> 1975, provides that '[a] person is guilty of an attempt to commit a crime if, with the intent to commit a specific offense, he does any overt act towards the commission of such offense.'"

Davis v. State, 747 So. 2d 921, 922 (Ala. Crim. App. 1999).

Here, the State established that Wallace was in an intermediate phase in the process of manufacturing methamphetamine. When the police arrived, a chemical reaction consistent with manufacturing methamphetamine was taking place in a container commonly used to manufacture methamphetamine. But for proof of the presence of ephedrine or pseudoephedrine, Wallace had the necessary components to complete the manufacture of methamphetamine. These facts are sufficient to constitute overt acts toward the commission of manufacturing methamphetamine.

Because the jury was charged on the offense of the attempted manufacture of a controlled substance, this case should be remanded to the trial court with instructions for that court to enter a judgment of guilty of the lesser-included offense of attempted manufacture of a controlled substance and to impose a sentence for that offense. See Brand v. State, 960 So. 2d 748 (Ala. Crim. App. 2006) (holding that appellate courts have the authority to

reverse a conviction and order an entry of judgment on a lesser-included offense).

Based on the foregoing, the trial court erred when it denied Wallace's motion for a judgment of acquittal as to the first alternative of the unlawful-manufacture count.

B. Possession of Precursor Chemicals

The majority holds that the State proved the second alternative of the unlawful-manufacture charge -- that Wallace was in possession of a precursor substance and that he had the intent to manufacture methamphetamine. I disagree.

1. Evidentiary Insufficiency

The State did not proffer any evidence indicating that Wallace was in possession of any precursor substances, as defined in § 20-2-181(d), Ala. Code 1975, which evidence was required to prove the alternative charge that Wallace possessed precursor substances with intent to unlawfully manufacture methamphetamine.

Section 20-2-181(d), Ala. Code 1975, addresses precursor chemicals and states:

> "Until the Board of Pharmacy adopts a rule designating listed precursor chemicals, as required by subsection (a), the following chemicals or

substances are hereby deemed listed precursor chemicals:

"(1) Acetic anhydride;

"(2) Anthranilic acid and its salts;

"(3) Benzyl cyanide;

"(4) Ephedrine, its salts, optical isomers, and salts of optical isomers;

"(5) Ergonovine and its salts;

"(6) Ergotamine and its salts;

"(7) Hydriodic acid;

"(8) Isosafrol;

"(9) Methylamine;

"(10) N-Acetylanthranilic acid and its salts;

"(11) Norpseudoephedrine, its salts, optical isomers, and salts of optical isomers;

"(12) Phenylacetic acid and its salts;

"(13) Phenylpropanolamine, its salts, optical isomers, and salts of optical isomers;

"(14) Piperidine and its salts;

"(15) Pseudoephedrine, its salts, optical isomers, and salts of optical isomers;

"(16) Safrole; and

"(17) 3,4-Methylenedioxyphenyl-2-propanone."

Although the State presented testimony that Wallace had in his possession various components that were used in the methamphetamine-manufacturing process, such as camp fuel, rubber hosing, coffee filters, rags, and a box of salt, none of those items are precursor chemicals as defined in the statute, and no witness testified otherwise. The only evidence that might have suggested that a precursor chemical was present was E.T.'s statement that she had previously seen Wallace put pills in the plastic bottle. However, reference to a handful of pills at some prior time was insufficient proof that at the time of his arrest Wallace possessed pseudoephedrine or any other precursor chemical listed in the statute. Det. Schlemmer testified that the red tint to the liquid in the bottle was consistent with Sudafed brand decongestant. No doubt there are numerous red pills and other substances that Wallace could have placed in the bottle and that could have resulted in the red-tinted liquid found in the bottle at the time of Wallace's arrest. The State presented no packaging, receipts of purchase, or any other evidence that would have allowed the jury to conclude that Wallace placed any necessary precursor, including pseudoephedrine or Sudafed,

into the bottle. As Wallace argued at trial, the fact that Sudafed was a red pill and that the water was tinted red did not constitute sufficient proof that the water in the bottle was red because he had placed Sudafed in it.

The State provided an incomplete chain of facts and resorted to speculation and conjecture in an attempt to prove that Wallace had, in fact, placed pseudoephedrine, which the State's expert witness testified was a necessary ingredient in the manufacturing process of methamphetamine, inside the plastic bottle. A jury is not permitted to conclude that a defendant is guilty beyond a reasonable doubt based on inferences that are unsupported by evidence. The State's incomplete chain of facts in this case required the jury to rely on such unsupported inferences and speculation. The State's evidence, when viewed in the light most favorable to the State, was not sufficient for a jury to reasonably find that the evidence excluded every reasonable hypothesis except that of guilt. See Lockhart v. State, 715 So. 2d 895, 899 (Ala. Crim. App. 1997), quoting Ward v. State, 610 So. 2d 1190, 1191 (Ala. Crim. App. 1992). The State failed to present any evidence that would allow the jury to find, beyond

a reasonable doubt, that Wallace possessed precursor chemicals with the intent to manufacture methamphetamine. Therefore, a verdict based on § 13A-12-217(a)(2) could not be upheld, and the trial court erred when it denied Wallace's motion for a judgment of acquittal as to this alternative of the unlawful-manufacture charge.

2. Jury Instruction

I would hold that the trial court erred when it denied Wallace's motion for a judgment of acquittal as to the alternative charge in the indictment of possession of precursor chemicals with the intent to manufacture methamphetamine, thus rendering moot Wallace's argument in Issue III of his brief -- that the trial court erred when it refused to instruct the jury, based on § 20-2-181(d), Ala. Code 1975, as to the substances that were defined by the statute as precursors. However, I address this issue here because the majority appears to hold in Part I of its opinion that the State established a prima facie case of the possession of precursor chemicals with the intent to manufacture and then holds in Part III of its opinion that the trial court did not err when it refused to give the statutory

definition of precursor chemicals contained in § 20-2-181, Ala. Code 1975.

I disagree with the majority's analysis and holding.

The indictment charged Wallace with possessing "precursor substances, in any amount, with the intent to unlawfully manufacture a controlled substance, as determined in Section 20-2-181 of the Code of Alabama 1975," but the indictment did not list any specific precursor chemical. In order to find him guilty under this count, the prosecution had to prove that he was in possession of a precursor listed in the statute. Testimony about the presence of various components that could be used in the methamphetamine-manufacturing process, such as camp fuel, rubber hosing, coffee filters, rags, and a box of salt, was not the same as proof of the presence of a precursor chemical. None of those items are precursor chemicals as defined in the statute, and no witness testified otherwise. Det. Schlemmer implied that Wallace had used Sudafed to make methamphetamine, but the detective was unable to testify to that fact, and there was no other testimony that would have permitted the jury to make that finding, nor was there any

testimony about any other chemical that would have been classified as a precursor under § 20-2-181.

During the jury-charge conference Wallace asked the trial court to instruct the jury on what constitutes precursor chemicals by reading the list of substances in § 20-2-181. When the State objected to Wallace's request, Wallace's attorney asked, "How are they supposed to decide? How are they supposed to decide if this man possessed precursor chemicals if we do not define what precursor chemicals are?" (R. 310.) He also stated, "I don't see how we can send a jury back there and ask them to determine whether or not this man possessed precursors if we don't give them what precursors are." (R. 311.)

As the majority states, a trial court has broad discretion in formulating its jury charge, so long as the charge accurately reflects the facts and the law of the case. ___ So. 3d at ___ If the trial court refuses to give a requested jury instruction, no error results if the substance of the charge is covered in the trial court's charge to the jury. E.g., Weeks v. State, 611 So. 2d 1156, 1158 (Ala. Crim. App. 1992).

The trial judge here did not adequately charge the jury on the law of the case, and it abused its discretion when it denied Wallace's request that it list the precursor substances in § 20-2-181, Ala. Code 1975.

The majority states that because the jury was presented with alternative ways of proving first-degree manufacturing a controlled substance -- i.e., by manufacturing methamphetamine and/or possessing precursor chemicals with intent to manufacture a controlled substance -- any error in not charging the jury with the definition of "precursor chemicals" was harmless. Citing State v. Bowman, 588 A.2d 728, 732 (Me. 1991), the majority states that "'an error in instructions pertaining to a particular charge is rendered harmless where the jury returns a verdict of guilty to a different or alternative charge.'" ___ So. 3d ___, quoting Bowman, 588 A.2d at 732. I do not believe that Bowman supports the majority's contention. Bowman addressed alternate charges; Wallace's case concerns alternate proof. Bowman was charged with murder. The issue was whether the jury was properly charged on manslaughter. Although it was determined that the manslaughter charge was erroneous, the Bowman court found that

because the trial court had instructed the jury to first decide whether Bowman was guilty of murder before deciding his culpability for manslaughter. The jury found Bowman guilty of murder; thus, that court held that the error regarding the manslaughter instruction was harmless because the jury did not consider the manslaughter charge. In Deutcsh v. State, 610 So. 2d 1212, (Ala. Crim. App. 1992), also cited by the majority, the jury was given an erroneous instructions on tampering with governmental records as charged in § 13A-10-12(a)(2), Ala. Code 1975. This Court held that the error was harmless because Deutcsh was convicted of tampering with governmental records as charged in § 13A-10-12(a)(1), Ala. Code 1975. Unlike Bowman and Deutcsh, Wallace was not convicted of an alternative offense to the charged offense. Wallace concerns alternative proof to substantiate the offense charged in the indictment. In Wallace, the jury was instructed that it could find guilt based on manufacturing methamphetamine (a controlled substance in Schedules I to V) or possession of a precursor chemical, or both. I do not believe it was proper to instruct the jury that it could

return a guilty verdict based on the possession of a precursor chemical without defining precursor chemical.

"When a term is included in a statute relevant to a case, and that term is not defined by statute, whether it is necessary for the trial court to define the term for the jury hinges on the facts of the case." Ivery v. State, 686 So. 2d 495, 501-02 (Ala. Crim. App.), aff'd on return to remand, 686 So. 2d 520 (Ala. Crim. App. 1996). The term, "precursor," is not defined in § 13A-12-217, but that statute refers to § 20-2-181. Section 20-2-181 does not define the term, but it includes a list of chemicals that are considered precursor chemicals.[3] When it denied Wallace's request for the jury instruction, the trial court noted that there is no pattern jury instruction defining "precursor," which is true. That, alone, does not resolve the issue, however. If the term was one that was understood by the average juror in his or her common usage, that would mitigate against the need for a

[3]Section 20-2-180(2), Ala. Code 1975, provides: "Listed Precursor Chemical. A chemical substance specifically designated as such by the Alabama State Board of Pharmacy, that, in addition to legitimate uses, is used in the unlawful manufacture of a controlled substance or controlled substances."

definition. E.g., Thornton v. State, 570 So. 2d 762, 772-73 (Ala. Crim. App. 1990). "Precursor" is not within the common usage of an average juror, and it is arguably not within the common usage of law-enforcement officers, as Wallace demonstrated in his cross-examination of one of the police officers, who was unable to name even one precursor necessary to the manufacture of methamphetamine. (R. 192, 195.) Without a definition being provided to the jury, it is possible, and perhaps likely, that the jury found that Wallace's possession of the items such as the tubing and the camp fuel constituted proof that he was in possession of a "precursor substance," because the State argued that all the components found in the search of the Plum Street residence were used in manufacturing methamphetamine. Certainly the jury was never instructed that, in order to find Wallace guilty under the second alternative for proving second-degree manufacturing of a controlled substance as charged in the indictment, it would have to find beyond a reasonable doubt that Wallace possessed the precursor chemical pseudoephedrine. Without an instruction as to what substances constituted precursors, the jury could not be expected to reach informed

decision about whether Wallace possessed one. The trial court abused its discretion when it refused Wallace's requested jury instruction. The error was exacerbated by the trial court's reference in its jury charge to § 20-2-181 and to the fact that the statute delineated precursor substances. (R. 353.) The trial court's error as to the denial of the jury charge, too, provides a basis for reversal of Wallace's conviction for the unlawful manufacture of a controlled substance.

Therefore, I concur only with the affirmance of Wallace's conviction for the chemical endangerment of a child, as discussed in Part II of the majority opinion. I disagree with the majority's analysis of the issues related to Wallace's unlawful-manufacture conviction, and I dissent from the affirmance of that conviction.