Not designated for publication.

ARKANSAS COURT OF APPEALS

DIVISION I

No. CACR07-1014

	Opinion Delivered JUNE 4, 2008
ANDY DWAYNE LAWSON APPELLANT	APPEAL FROM THE BOONE COUNTY CIRCUIT COURT, [NO. CACR-2005-196-4]
V.	HONORABLE GORDON WEBB, JUDGE
STATE OF ARKANSAS APPELLEES	AFFIRMED

ROBERT J. GLADWIN, Judge

Appellant Andy Lawson appeals his convictions from a Boone County jury on charges of manufacturing methamphetamine, with an enhancement for manufacturing methamphetamine in the presence of minors; possession of a firearm by certain persons; and simultaneous possession of drugs and firearms, for which he was sentenced to terms of fifteen years,[1] five years, and ten years, respectively, in the Arkansas Department of Correction. The sentences are to be served concurrently. On appeal appellant challenges the sufficiency of the evidence supporting each of his convictions. We affirm.

[1]Although the judgment and commitment order lists manufacturing in the presence of minors as offense number four, it also indicates "no time to serve on this offense" in the "Sentence imposed" section.

Facts

Law enforcement officers from the Boone County Sheriff's Department and 14th Judicial District Drug Task Force began investigating appellant, previously convicted of felony manslaughter in Oklahoma, in late October 2002, after receiving information from a local business that appellant had been purchasing certain precursors used to manufacture methamphetamine. Officers performed surveillance activities in and around appellant's mobile home residence and other businesses in an attempt to catch him buying additional precursors.

On March 17, 2004, officers were informed that appellant had purchased additional quantities of matches and Coleman fuel. A confidential informant working at a local Wal-Mart store observed appellant buying Coleman fuel and other solvents. In July 2005, a pet supply business in Alabama informed officers that appellant purchased significant quantities of pint bottles of seven-percent iodine. Investigator Greg Harris, coordinator for the 14th Judicial Drug Task Force, watched appellant's house after that call was received, and he reported back when the latest shipment of iodine was delivered. Appellant picked up the box and took it into the mobile home, after which officers obtained a search warrant.

Officers, including Investigator Bob King, executed the search warrant the same day, and while inventorying samples and collecting evidence for the Arkansas State Crime Lab, a Richardson's twenty-gauge single shot shotgun, a Ruger model 1022 semi-automatic rifle with a scope, and a Ruger P series nine-millimeter pistol, with two loaded clips, were discovered. The pistol was in the master bedroom dresser area, and the other two firearms

were in a locked gun safe next to the back door. Detective Paul Woodruff also discovered on the top of the dresser drawer a glass pipe with a residue inside and some tin foil with residue, normally used for smoking methamphetamine.[2]

The search lasted several hours and included the search of a blue shed in the backyard. Detective Woodruff testified that there was a disabled and what he would consider a working methamphetamine lab there. Although no usable methamphetamine was recovered, officers inventoried and sampled numerous precursors, including: a total of 10.2 grams of pseudoephedrine from various pills, which exceeds the legal limit; bi-layer solution, with both layers containing methamphetamine according to lab results; a police scanner programmed to listen to the local police department; a baby monitor through which the living room of the mobile home could be monitored from the shed; a small torch (commonly used to smoke methamphetamine); two boxes of latex gloves, two small boxes of new digital scales; rock salt (commonly used after the bi-layer stage); a one-gallon can of paint thinner; a fan and air conditioner (used to circulate the air because of fumes given off in the manufacturing process); sixteen pints of seven-percent iodine (the strongest available for purchase by a citizen and too caustic to place on the skin of a human or animal); two empty Coleman fuel cans; a jar of strong acid; several small coin zip-lock type bags (typically used in the sale or delivery); an air purifying respirator and filters; two pyrex brand glass pie plates with residue; a hot plate (upon which the pie plates were sitting); a razor blade; bottles of rubbing alcohol; Naptha (solvent);

[2]Appellant admitted to officers that he used speed, a term sometimes used to describe methamphetamine, but did not admit to making it.

acetone; a plastic graduated cup with markings; an Aquafina bottle containing bi-layer solution; laboratory type glassware equipment; a piece of paper with purple color indicating iodine crystals that have to be manufactured; thirteen receipts from Wal-Mart indicating purchases of various precursors; a partial bottle of Red Devil Lye; a partial bottle of muriatic acid (and an empty quart bottle). Officers did not find filter paper, which, although commonly are coffee filters, can be paper towels, toilet paper, or any kind of paper. There was testimony that usually filter paper is burned after it is used, and there was evidence of areas around appellant's residence where things had been burned.

Officers also discovered a small kiddie pool located some ten to fifteen feet from the blue shed and inflatable toys close by the pool. Officers found children's shoes and toys that had been shed or discarded between the shed and the pool. It is undisputed that appellant, his wife, and their two children, ages three and eight, live in the residence. Appellant's mother continued to live there part-time, sometimes up to three days per week, even after she married in September 2003, in order to help take care of the children. Appellant's wife testified that the kids use the pool almost every day.

The State filed a felony information on August 2, 2005, and an amended felony information on September 8, 2006. A jury trial was held on March 28, 2007. Appellant moved for a directed verdict on each count at the close of the State's case in chief, and the motion was denied. He renewed the motions at the close of all the evidence, and the renewed motions were also denied. The jury convicted appellant on all counts, and he was

sentenced as previously set forth. A judgment and commitment order was filed on March 28, 2007, and appellant filed a timely notice of appeal on April 17, 2007. This appeal followed.

I. Sufficiency of the Evidence Supporting the Convictions

A. Preservation of Issues

We first consider whether this issue is preserved for appeal. Arkansas Rule of Criminal Procedure 33.1(a) provides that in a jury trial a motion for a directed verdict must be made at the close of the evidence offered by the prosecution and again at the close of all evidence. The rule further provides that the failure of a defendant to challenge the sufficiency of the evidence at the times and in the manner required will constitute a waiver of any question pertaining to the sufficiency of the evidence to support the verdict. Ark. R. Crim. P. 33.1(c). Appellant moved for a directed verdict as to all charges at the close of the State's case in chief, and that motion was denied. He renewed the motion at the close of all the evidence, and the renewed motion was also denied. Therefore, as related solely to the timing requirements of Rule 33.1, his challenge to the sufficiency of the evidence is preserved for our review.

B. Standard of Review

We treat a motion for a directed verdict as a challenge to the sufficiency of the evidence. *Coggin v. State*, 356 Ark. 424, 156 S.W.3d 712 (2004). The test for determining the sufficiency of the evidence is whether the verdict is supported by substantial evidence, direct or circumstantial. *Id.* Evidence is substantial if it is of sufficient force and character to compel reasonable minds to reach a conclusion and pass beyond suspicion and conjecture.

Id. On appeal, we view the evidence in the light most favorable to the State, considering only that evidence that supports the verdict. *Id.* We do not weigh witness credibility. *See Baughman v. State*, 353 Ark. 1, 110 S.W.3d 740 (2003). The jury is free to believe all or part of any witness's testimony and may resolve questions of conflicting testimony and inconsistent evidence. *Phillips v. State*, 344 Ark. 453, 40 S.W.3d 778 (2001). Likewise, the reliability of an eyewitness is a question for the jury. *Id.* After a jury gives credence to a witness's testimony, it will not be disregarded unless it is so inherently improbable, or clearly unbelievable that reasonable minds could not differ. *Williams v. State*, 351 Ark. 215, 91 S.W.3d 54 (2002). Additionally, a witness will not be discredited because his or her testimony is uncorroborated or because it has been impeached. *Id.*

C. Manufacturing Methamphetamine

Arkansas Code Annotated section 5-64-401(a)(1) provides that it is unlawful for any person to manufacture, deliver, or possess with intent to manufacture or deliver a controlled substance, including the manufacturing of a controlled substance, methamphetamine. Appellant moved for a directed verdict on this charge, arguing that many of the ingredients and equipment necessary for manufacturing methamphetamine were not discovered during the search. He pointed out that no tubing, proper cooking dishes, coffee filters, phosphorus, hydrogen peroxide, HEET, pill soak, or HCL generator were found pursuant to the search. Likewise, officers found no customer list, price list, stash of cash, evidence of comings and goings, or anything else appellant contends that common sense tells us is usually associated with a methamphetamine manufacturing operation.

Appellant claims that the State's case rested for the most part on the existence of regular household goods found in the blue shed behind the mobile home. He explains that officers involved testified as to certain items necessary for manufacturing that were not discovered on the scene during the search. Investigator King testified that there were no remnants of lithium batteries, no hydrogen peroxide, no phosphorus, no anhydrous ammonia, and no usable methamphetamine on the premises. He further explained that the pyrex pie plates, when rinsed with methanol, showed positive for methamphetamine, but he acknowledged that he had no idea of when they may have been used. Investigator King also testified that E9A was a representative sample of E9, a twenty-four ounce Aquafina bottle containing two layers of liquid, which was something besides water that had a solvent odor to it.

Detective Woodruff likewise acknowledged that no usable methamphetamine was recovered, although there was methamphetamine in solution, and on pyrex dishes. He corroborated Investigator King's statements, repeating that there was no phosphorus, coffee filters, tubing or straw, HEET, pill soak, or camp fuel; likewise no history of strange comings and going or reports of bad smells. He acknowledged that neither large sums of cash, customer lists, price lists, or guns were found in the blue shed, and further acknowledged that no chemical analysis was performed on the hot plate to see what had been cooked on it. Appellant focuses on Detective Woodruff's testimony that someone would not be very prepared to manufacture methamphetamine if he had no hydrogen peroxide to make hydriotic acid, matchbox striker plates, HEET, coffee filters, Morton's table salt, sulphuric

acid, or tubing to bubble the gas. Finally, Investigator Harris explained that officers found residue of iodine crystals, but acknowledged that they proceeded on the approximate color and did not follow up with a chemical analysis for confirmation.

Appellant argues that the proof is simply insufficient to support the conviction on the manufacturing charge. No fingerprints were taken. No lab work was completed on tin foil found in the residence. No lab work was performed on the filter to the air purifying respirator to test what had been breathed through it. Likewise, no lab work was performed on the pair of "weird-shaped flasks," the hotplate or the residue in its trough. In fact, the hot plate was not even tested to see whether it was even operable.

He reiterates that the definition of manufacturing in AMCI 2d 6405 requires that he purposely produced, prepared, or processed methamphetamine by extraction from substances of natural origin or by means of chemical synthesis and claims that there is no testimony in the record that anything in this case amounted to a "synthesis." He alleges that "synthesis" is beyond jury comprehension in the absence of testimony as to what is and what is not a synthesis. That being the case, he claims that "there was no testimony whatever of a manufacturing of methamphetamine."

Although the State argues that this issue is not preserved because appellant asserts there was no testimony that anything in this case amounted to a "synthesis" and, thus, there was insufficient evidence supporting the manufacturing charge, we disagree. Regarding his motion for directed verdict on the manufacturing charge, appellant argued that the evidence was insufficient because there was "not a complete lab operation and that the ingredients and

equipment for the operation of a lab are not present." The State is correct that no mention of the term "synthesis" was made below, and accordingly the State maintains that this court should not reach the merits of the argument. *See Stewart v. State*, 320 Ark. 75, 894 S.W.2d 930 (1995). While we acknowledge that the phrasing of the argument differs on appeal, we hold that the underlying argument that served as the basis of appellant's motion for directed verdict is substantively the same as the argument asserted on appeal.

Alternatively, the State argues that there is sufficient evidence to support the conviction on the manufacturing charge. Testimony from Investigator King, Detective Woodruff, Investigator Braden, Investigator Harris, and forensic chemist Benjamin Peacock indicate that appellant possessed nearly every component necessary for the manufacture of methamphetamine. *See Stone v. State*, 348 Ark. 661, 74 S.W.3d 591 (2002) (finding that although the accused was not caught in the act of manufacturing, there was sufficient evidence of manufacturing by way of required ingredients and apparatus). The State asserts that, while there was no usable methamphetamine found at the residence, all of the items located in the shed perform a function in the various phases in the manufacture thereof. *See Lee v. State*, 297 Ark. 421, 762 S.W.2d 790 (1989). The State also cites *Aydelotte v. State*, 85 Ark. App. 67, 146 S.W.3d 392 (2004), where this court held that, although no active manufacturing was taking place when officers arrived, manufacturing had clearly taken place based on methamphetamine residue on several items found.

Although appellant focuses on the fact that there was no lab actively manufacturing methamphetamine at the time officers arrived, the above-cited cases demonstrate that

evidence of an "active" methamphetamine laboratory is not required to establish sufficient evidence of manufacturing methamphetamine. Investigator Harris specifically testified that essentially every item required for the manufacture of methamphetamine, with the possible exception of some filter paper, was present and that:

> . . . there was an ongoing methamphetamine manufacturing process, at the time. There was evidence of one to come . . . . there was evidence of one that had just finished, there was items in that process. I mean, there was an ongoing operation, current at the time and on going.

There was express testimony at trial that this was more than the mere possession of precursors necessary for the manufacture of methamphetamine; Investigator Harris indicated that it was a working lab that was simply not in active production at the time of the search. The jury was at liberty to disregard appellant's testimony to the contrary, as well as his explanations that the items in question were not his and that the pseudoephedrine pills and iodine were used to treat his animals. *See Ewings v. State*, 85 Ark. App. 411, 155 S.W.3d 715 (2004) (holding that a jury may or may not consider and give weight to any false, improbable, and contradictory statements made by the defendant to explain suspicious circumstances). Moreover, the police found a bi-layer liquid containing methamphetamine, which the State's chemist indicated was the penultimate step in manufacturing methamphetamine, requiring onle an HCL gas generator. Based upon the evidence in the record and our standard of review, we hold that sufficient evidence supports the conviction for manufacturing methamphetamine. Accordingly, we affirm on this point.

D. Sentence Enhancement for Manufacturing in the Presence of Minors

Arkansas Code Annotated section 5-64-407 states that a person is subject to a sentence enhancement of an additional term of imprisonment of ten years for manufacturing in the presence of minors if, he is found guilty of manufacturing methamphetamine, § 5-64-401(a)(1), or possession of drug paraphernalia with the intent to manufacture methamphetamine, § 5-64-403(c)(5), and the offense is committed: (1) in the presence of a minor, elderly person, or incompetent person who may or may not be related to the person; (2) with a minor, elderly person, or incompetent person in the same home or building where the methamphetamine was being manufactured or where the drug paraphernalia to manufacture methamphetamine was in use or was in preparation to be used; or (3) with a minor, elderly person, or incompetent person present in the same immediate area or in the same vehicle at the time of the person's arrest for the offense. Appellant contends that none of the three provisions apply in the instant case.

Household goods alleged to be part of a methamphetamine lab were discovered in a blue shed behind appellant's mobile home. He maintains that there is no evidence of when any methamphetamine was allegedly manufactured. No evidence was introduced indicating that appellant's children, or any other children, were anywhere on the property at any time that methamphetamine was being manufactured. Appellant claims that the State relied solely upon the existence of a small kiddie pool located ten to fifteen feet from the blue shed. Although appellant's wife testified that their three-and eight-year-old children use the pool almost every day, appellant argues that there was no testimony as to when any

methamphetamine was manufactured near the pool, or for that matter, how the pool and the shed were related.

The State disagrees and claims that the testimony provides sufficient evidence of the children being on the property when methamphetamine was being manufactured. Investigator Braden testified that a children's pool was located approximately ten to fifteen feet from the blue shed and that the blue shed as located approximately fifteen feet back from the mobile home itself. It is undisputed that appellant's two minor children lived in the residence with appellant and their mother. Every officer and investigator involved testified that there were several items associated with the manufacture of methamphetamine located in the blue shed. Additionally, Investigator Harris, who was the coordinator of the drug task force, specifically testified that there "was an ongoing methamphetamine manufacturing process."

The State maintains that the evidence established that two minor children were "within the immediate area" of the manufacture of methamphetamine as set out in Ark. Code Ann. § 5-64-407(a)(3). Appellant admitted that he and his wife moved into the mobile home in 2000, and that the children, ages three and eight, live in the residence with them. Appellant's wife further testified that they played in the pool almost every day. The next-door neighbor testified that she watched the children playing in the back yard and in the pool from her window.

Appellant has failed to show any resulting prejudice from the jury's findings on this issue. Although the jury found him guilty of manufacturing methamphetamine in the

presence of minors, no additional sentence was imposed. Accordingly, we affirm on this point as well.

E. Felon in Possession of a Firearm

Arkansas Code Annotated section 5-73-103 provides, in relevant part, that no person shall possess or own any firearm who has been convicted of a felony. Appellant acknowledges that he has a previous felony conviction but argues that the State failed to prove that he ever possessed the firearms that were owned by his mother, even though they were located at the mobile home where he resided. Investigator King testified that no fingerprints were run on any of the guns and acknowledged that there was no direct proof that appellant had ever possessed any of the guns. He further testified that officers made no determination as to who owned the guns, or for that matter, who owned the mobile home in which they were found.

The rifle and shotgun were found in a locked metal gun safe located in the kitchen area. Officers had to pry it open after failing to locate a key to the safe anywhere on the premises. The pistol was found in the dresser area of the master bedroom, which is where appellant acknowledged that he slept. However, there was also testimony from appellant, his wife Jeannie Lawson, and his mother Agness Hillock, that his mother still considered the mobile home her home, still kept belongings there, and was there approximately three times a week. There was testimony that she slept in the master bedroom when she stayed there. There was evidence that the rifle and shotgun belonged to appellant's mother and that she had acquired them from her former husband when he died. Additionally, there was testimony that appellant's brother, Andy, had helped their mother purchase the pistol. Ms. Hillock

testified that the guns were never out of the safe while appellant was living there. She explained that she had the only key, and he had never asked her for it.

Appellant cites *Williams v. State*, 94 Ark. App. 440, 236 S.W.3d 519 (2006), where this court held that the State failed to establish that the appellant exercised care, control, and management over the contraband, although the gun was found in the apartment he shared with his girlfriend. In *Williams*, the State did not present evidence of who actually rented the apartment. There was no evidence that the gun was found with any of the appellant's personal belongings. The State did not test the weapon or the ammunition to see if the appellant's fingerprints were on them. The only evidence the State presented was that the gun was found in an apartment jointly occupied by the appellant and that it was large and difficult to handle, and this court held that the evidence was not sufficient to link appellant to the gun. Appellant asks that this court apply the same reasoning in the instant case and reverse his conviction with respect to the possession of the firearms.

The State points out that appellant neither disputes that he is a convicted felon nor that the firearms were in the residence; instead, he merely argues that there was insufficient evidence that he exercised care, control, or management over "any gun." Neither exclusive not actual physical possession is necessary to sustain a conviction for possessing contraband, and constructive possession is sufficient. *See Williams*, *supra*. Constructive possession may be implied when the contraband is in the joint control of the accused and another. *Id.* In a joint occupancy situation, the State must establish that the accused exercised care, control, and

management over the contraband, and that he knew the matter was contraband. *See Abshure v. State*, 79 Ark. App. 317, 87 S.W.3d 822 (2002).

In his initial taped statement to police, which was not included in appellant's brief but was provided by the State, appellant admitted that he owned the guns. He stated that he needed to have the guns. True, his mother also testified that the guns were hers, and further testified that she was aware that her convicted-felon son should not have guns, which was the reason she kept them in the gun safe. She further testified that she considered the mobile home her home, although she had remarried in 2003. Interestingly, at trial, appellant changed his story, and testified that the guns did belong to his mother. He explained that he initially said they were his in an attempt to protect his mother. The State maintains, and we agree, that the jury had the right to accept appellant's initial statements about his ownership of the guns and disregard the contradictory testimony at trial. *See Ewings*, *supra*. Because appellant, an undisputed convicted felon, admitted that he purchased and owned the firearms, and was aware that the firearms were kept in the residence, we hold that sufficient evidence supported the conviction on this count. We affirm on this point.

F. Simultaneous Possession of Drugs and Firearms

Arkansas Code Annotated section 5-74-106 provides that a person commits simultaneous possession of drugs and firearms if he commits a felony violation of § 5-64-401 or unlawfully attempts, solicits, or conspires to commit a felony violation of § 5-64-401 while in possession of a firearm. Appellant asserts that this point is derivative from the prior two points. Specifically, if there was no proof, or insufficient proof, that he possessed any firearm

and insufficient proof that he manufactured methamphetamine, then it would naturally follow that he did not possess firearms at the same time as he was manufacturing methamphetamine. This is the entirety of appellant's argument on this point.

Arkansas Code Annotated § 5-74-106 does not require that methamphetamine actually be produced from the manufacturing process to sustain a conviction because a felony violation of the statute includes attempted manufacture of methamphetamine. *See Cherry v. State*, 80 Ark. App. 222, 95 S.W.3d 5 (2003). However, some link between the firearm and the drugs is required, and mere possession of a firearm is not enough. *See Manning v. State*, 330 Ark. 699, 956 S.W.2d 184 (1997). Appellant has not raised the defense of the firearm not being "readily accessible" and has failed to challenge the sufficiency of the evidence to prove the nexus between the methamphetamine and the firearms. *See Vergara-Soto v. State*, 77 Ark. App. 280, 74 S.W.3d 683 (2002).

The State contends that, on appeal, appellant merely disputes the conviction for simultaneous possession because he did not manufacture methamphetamine and because he did not possess a firearm. In his motion for directed verdict below, he argued that there was no evidence that "the guns were ever in the shed . . . or that any meth cooking operation was ever in the house." Because that particular argument was not raised on appeal, appellant has abandoned it. *See King v. State*, 323 Ark. 671, 916 S.W.2d 732 (1996). Because we hold that substantial evidence supports the convictions for manufacturing methamphetamine and for felon in possession of a firearm, we likewise hold there is sufficient evidence to support this conviction.

Affirmed.

HART and MARSHALL, JJ., agree.