[Cite as *State v. Cumberledge*, 2012-Ohio-3012.]

IN THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

LAKE COUNTY, OHIO

STATE OF OHIO,	:	**O P I N I O N**
Plaintiff-Appellee,	:	**CASE NO. 2010-L-142**
- vs -	:	
TODD B. CUMBERLEDGE,	:	
Defendant-Appellant.	:	

Criminal Appeal from the Lake County Court of Common Pleas, Case No. 10 CR 000241.

Judgment: Affirmed.

Charles E. Coulson, Lake County Prosecutor, and *Karen A. Sheppert*, Assistant Prosecutor, 105 Main Street, P.O. Box 490, Painesville, OH 44077 (For Plaintiff-Appellee).

R. Paul LaPlante, Lake County Public Defender, and *Vanessa R. Clapp*, Assistant Public Defender, 125 East Erie Street, Painesville, OH 44077 (For Defendant-Appellant).

THOMAS R. WRIGHT, J.

{¶1} The instant appeal is predicated upon a final judgment of the Lake County Court of Common Pleas. Following a jury trial in the underlying criminal case, appellant, Todd B. Cumberledge, was found guilty of two serious felony offenses pertaining to the production of methamphetamine. Before this court, he primarily contests the sufficiency and manifest weight of the evidence upon which his conviction was based.

{¶2} In December 2008, appellant and Angela Keene began to live together in the City of Ashtabula, Ohio. As part of their ensuing relationship, they would engage in the use of methamphetamine on the weekends when Keene's children were not home. As a direct result of the drug use, appellant and Keene became acquainted with Jaimee Patton and Jack Whitfield.

{¶3} Whitfield resided in a separate home in Ashtabula County, Ohio. During the entire year of 2009 and into the first three months of 2010, Whitfield would basically allow appellant and Keene to come over to his home and stay for sustained periods. At one point in February 2010, appellant and Keene actually lived in Whitfield's residence for a few weeks.

{¶4} As part of the "visits" to the Whitfield home, appellant and Whitfield would often engage in the general two-step process of producing methamphetamine. In order to facilitate this production, the two men would also take separate steps, by themselves or through other individuals, to procure the various substances needed to complete the entice process. The substances included pseudoephedrine pills, anhydrous ammonia, lithium batteries, Coleman fuel containers, drain cleaners, and Morton salt.

{¶5} In regard to the anhydrous ammonia, Whitfield had three metal containers in which the substance could be held. Two of these containers were old propane tanks which would commonly be used with an outdoor gas grill, while the third was somewhat larger and covered with a camouflage material. The opening valve of each of the three containers had been modified to enable someone to fill up the tank with the substance and then release it at the appropriate time. In order to obtain the anhydrous ammonia, Whitfield would travel to a secluded location in southern Ohio where the substance was

kept in large tanks on private property, and then surreptitiously transfer the gas into his three containers at night.

{¶6} In addition to appellant, Keene, and Patton, other individuals would go to the Whitfield residence to purchase, or barter for, methamphetamine. One such person was Michael Martin, who had been a friend of appellant while they were in school. As of February 2010, Martin was residing in a small apartment at the Plaza Motel in Wickliffe, Lake County, Ohio. At some point during that month, Whitfield telephoned Martin and asked if he could come by the apartment to "gas" a small quantity of pseudoephedrine. In essence, Whitfield wanted to use Martin's apartment to complete the second step of the process for producing methamphetamine. Martin willingly gave him permission, and was also able to provide him with two substances necessary to complete the "gas" step.

{¶7} Over the ensuing four to five weeks, Whitfield and appellant visited Martin together at the Wickliffe apartment on at least two occasions. Both times, a quantity of pseudoephedrine was "gassed" and the second step for producing methamphetamine was completed. The three men then split the resulting drug between them.

{¶8} In early April 2010, Whitfield decided that it was necessary to obtain new anhydrous ammonia from their source in southern Ohio. Despite the fact that appellant and Keene were no longer residing together, he called her to state that he and Whitfield wanted to use her minivan for the proposed trip. In response, Keene drove the minivan to Whitfield's home, where appellant loaded the three tanks into the back. After making a momentary stop at Martin's apartment in Lake County, Whitfield and appellant left for southern Ohio, accompanied by Keene and Patton.

{¶9} On two successive nights, Keene dropped off Whitfield and appellant at a

secluded location near the site where the anhydrous ammonia was stored. On the first night, Whitfield and appellant were accompanied by another man who knew the precise site of the substance. On the second, they were accompanied by a fifteen-year-old juvenile who was related to the third man. In each instance, Keene drove around for two hours until appellant telephoned her and indicated that they were ready to be picked up.

{¶10} Although Whitfield and appellant were not successful the first night, they were able to fill all three of their tanks the following evening. After Keene had returned to their rendezvous location, the two men loaded the tanks into the vehicle, and they left immediately to drive back to Lake County. The juvenile who helped in the procurement of the anhydrous ammonia also went with them for the return trip; thus, there were five persons in Keene's vehicle.

{¶11} Before the group could proceed very far, a leak developed in the valve of one of the tanks. Even though Keene stopped the minivan and appellant attempted to plug the leak, he was not entirely successful. As a result, the ammonia gas in the tank continued to leak into the vehicle throughout the remainder of the trip. This ultimately led to a terribly foul order inside the minivan, and caused the juvenile to lose consciousness.

{¶12} The group of five persons was finally able to arrive in the City of Wickliffe at about 2:30 a.m. the following morning, with Whitfield driving Keene's minivan. As the vehicle was travelling on Euclid Avenue near the Plaza Motel, it was spotted by Officer Dan Moreland, a patrolman with the city police department. Even after the minivan had passed his patrol car travelling in the opposite direction, Officer Moreland continued to

observe the vehicle because it was moving at a slow speed and had a large crack in its front windshield. In light of these two peculiarities, the officer quickly "ran" the vehicle's license plate number on the mobile data terminal in his patrol car. In response, the data terminal showed that the vehicle belonged to Keene, and that there was a warrant for her arrest from another municipality. Accordingly, the officer turned his vehicle around and began to follow the minivan.

{¶13} Within a short distance after passing the patrol car, Whitfield drove into the driveway of the Plaza Motel and proceeded to the area of the parking lot that was near Martin's apartment. Upon parking the minivan, Whitfield exited the vehicle and, along with appellant, began to walk toward the back door of the building. At approximately the same time, Officer Moreland pulled into that same area of the parking lot and parked his patrol car slightly cattycornered to the minivan, so that his headlights were shining at its right side. As he exited his vehicle, the officer tried to waive to Whitfield and appellant to come back to the minivan, but the two men went inside the door.

{¶14} As Officer Moreland walked toward Keene's minivan, she got out through the right sliding door and stood beside the passenger side of the vehicle. Following a short conversation, he placed her under arrest and put her in the back seat of his patrol car. Officer Moreland was then able to coax Patton and the fifteen-year-old juvenile to exit the minivan. In regard to the juvenile, the officer had to shout at him a few times in order to rouse him.

{¶15} While assisting Patton and the juvenile from the minivan, Officer Moreland noticed the strong order of ammonia in the interior. The officer also observed a number of items lying on the floor of the vehicle. For example, he saw valve stems, wrenches,

and tubing in an open duffel bag near the juvenile. He also observed an apparatus in Keene's open purse, i.e., a modified lightbulb, that is used to smoke methamphetamine. Based upon these observations, Officer Moreland concluded that the minivan was either a "mobile meth lab" or being used to transport materials employed in the production of methamphetamine. Therefore, when a second officer arrived at the scene, a full search of the minivan's interior was conducted.

{¶16} Upon opening the rear door of the vehicle and moving a tarp, the officers saw the three tanks and could hear the "hiss" of the gas which was leaking from one of the tanks. They further noted that the valves on each tank had been altered. Agreeing that the gas/substance in the three tanks could be hazardous, the officers closed all of the minivan's doors and contacted the local fire department. In light of the other items found throughout the vehicle, the Lake County Narcotics Agency was also called to the scene. The minivan was then towed to a safe location, where the search of its interior was completed after a warrant had been obtained.

{¶17} While the two officers were conducting the aborted search, Whitfield and appellant came back to the parking lot of the motel. Although appellant was questioned momentarily about the items in the minivan, he was not detained by the officers at that time. Similarly, Whitfield and Patton were not arrested during this particular encounter. However, since the minivan was towed away, none of them had any means of leaving the area, and they remained in the motel over the next few hours.

{¶18} After transporting Keene to the local police department, Officer Moreland began to question her about the contents of the three tanks. Eventually, she admitted that the tanks contained anhydrous ammonia. The officer immediately relayed this fact

to Sergeant Brad Kemp of the narcotics agency, who was responsible for determining if the minivan was safe to search. Because the presence of anhydrous ammonia was an obvious indication of the production of methamphetamine, Sergeant Kemp told Officer Moreland that he should attempt to locate and question the three individuals who had been in the minivan with Keene. As a result, Officer Moreland and three other officers returned to the Plaza Motel at approximately 6:00 a.m.

{¶19} Initially, the motel clerk informed Officer Moreland that, of the four units in the wing of the building which Whitfield and appellant had entered, only the apartment of Michael Martin was occupied. As he approached Martin's unit through the hallway, Officer Moreland again noted a strong chemical odor. Upon knocking on the unit's door and announcing that he was a police officer, Officer Moreland could hear considerable noise emanating from the apartment. After a few minutes, Martin's girlfriend opened the door and allowed Officer Moreland to enter. During the interim period, Martin had tried to escape by leaping out a window, but the other officers easily apprehended him.

{¶20} Once he was inside the apartment, Officer Moreland again concluded that the chemical smell was so strong that a hazard might exist. Thus, he ordered everyone to leave the unit. Besides Martin's girlfriend, he found Whitfield and Patton in the unit's bedroom. In questioning these individuals in the hallway, Officer Moreland learned that appellant could be found in Apartment #24 of the motel. In making his way to that unit, Officer Moreland encountered appellant in the hallway and immediately arrested him.

{¶21} Within one day of the foregoing events, search warrants were obtained for Martin's unit and Apartment #24. Significant amount of drug paraphernalia associated with the production of methamphetamine was found in Martin's place. However, only a

valve for a propane tank was found in the second unit.

{¶22} As the investigation ensued and the seized evidence was fully analyzed, criminal charges were brought against all five individuals who had been present in either the minivan or Martin's apartment in the motel. Whitfield died while his charges against were still pending. Regarding Keene, Patton, and Martin, no trials were ever conducted on their respective charges; instead, each of them negotiated a plea agreement with the state. As consideration for the reduction of the respective charges, each person agreed to testify against appellant.

{¶23} In his separate indictment, appellant was charged with one count of illegal manufacturing of drugs, a first-degree felony pursuant to R.C. 2925.04, and one count of illegal assembly of chemicals for the manufacturing of drugs, a second-degree felony pursuant to R.C. 2925.041. Under the first count, it was alleged that he had knowingly engaged in a part of the production of methamphetamine. Under the second count, it was stated that he had obtained possession of chemicals to be employed in producing methamphetamine.

{¶24} Before his case could come to trial, appellant moved for the suppression of the evidence which had been seized during the search of the two apartments and the minivan. In relation to the apartments, he maintained that Officer Moreland's initial entry into the units had been illegal because none of the occupants had given their consent to the intrusion. After holding an evidentiary hearing on the matter, the trial court issued a written judgment overruling the motion to suppress. As the primary basis for its ruling, the trial court concluded that appellant lacked the proper standing to contest the search of the vehicle or the two apartments.

{¶25} Appellant's four-day jury trial began on September 28, 2010. As part of its evidentiary submission, the state was allowed to present testimony pertaining to certain prior acts which appellant had committed at the Whitfield residence before April 2010. The evidence in question was primarily set forth in the testimony of Angela Keene, who indicated, inter alia, that she had seen appellant "cook" methamphetamine on numerous occasions.

{¶26} At the close of the trial, the jury returned a verdict of guilty on each of the two counts. After conducting a separate sentencing hearing, the trial court determined that the second count should be merged into the first count for purposes of sentencing. The trial court then ordered that, as to the first count for illegal manufacturing of drugs, appellant should serve a term of eight years in a state prison.

{¶27} In now appealing the foregoing conviction, appellant has asserted a total of six assignments of error for review. Three of these assignments were set forth by his appointed counsel in his primary brief, while the other three assignments were raised by appellant himself in his supplemental brief:

{¶28} "[1.] The trial court erred to the prejudice of the defendant-appellant by failing to exclude testimony regarding the defendant-appellant's prior bad acts, in violation of the defendant-appellant's due process rights and rights to a fair trial as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and Sections 5 and 10, Article I of the Ohio Constitution.

{¶29} "[2.] The trial court erred to the prejudice of the defendant-appellant when it denied his motion for acquittal made pursuant to Crim.R. 29(A).

{¶30} "[3.] The trial court erred to the prejudice of the defendant-appellant when

it returned a verdict of guilty against the manifest weight of the evidence.

{¶31} "[4.] The trial court committed reversible error in permitting the state to amend the indictment to change the date and time of the alleged crime as the amendment changed the identity of the crime that was never presented to the grand jury.

{¶32} "[5.] The trial court erred in denying appellant's motion to suppress evidence that is a product of the poisonous tree, and where no reasonable/articulable suspicion existed that appellant engaged in any criminal activities sufficient to warrant investigative searches and seizure in violation of the Fourth Amendment of the United States Constitution.

{¶33} "[6.] The appellant was denied effective assistance of trial counsel when counsel failed to properly address the legal question concerning Crim.R. 7(D)."

{¶34} Under the first assignment of this appeal, appellant contests the decision of the trial court to permit the state to introduce evidence about certain prior bad acts he supposedly committed before April 2010. While acknowledging that the evidence may have been relevant to establishing a pattern of activity on his part, he contends that the disputed evidence should have been excluded because its prejudicial effect outweighed its probative value. In support of this argument, appellant emphasizes that the nature of his bad acts was very similar to the offense of illegal manufacturing of drugs.

{¶35} As both parties correctly note, the admission of evidence of prior bad acts is governed by Evid.R. 404(B), which provides:

{¶36} "Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show he acted in conformity therewith. It may,

however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident."

{¶37} In applying the foregoing rule, this court has indicated that it delineates a non-exhaustive list of acceptable reasons for admitting testimony of prior bad acts into evidence. *State v. Melton*, 11th Dist. No. 2009-L-078, 2010-Ohio-1278, at ¶78, quoting *State v. Davis*, 11th Dist. No. 97-L-246, 1998 Ohio App. LEXIS 6389, at *8, (Dec. 31. 1998). As the basic wording of the rule suggests, the key issue in determining admissibility is whether the evidence is merely meant to show that the defendant had acted consistent with his prior behavior, or whether its submission is meant to prove a fact that is consequential to the case. Id. "Nevertheless, even if the evidence meets the prerequisites of Evid.R. 404(B), it may still be excluded under Evid.R. 403(A) if its probative value is substantially outweighed by the danger of unfair prejudice, confusing the issues, or misleading the jury." *State v. Ford*, 12th Dist. No. CA2009-01-039, 2009-Ohio-6046, ¶37.

{¶38} As a basic proposition, the admissibility of evidence under Evid.R. 404(B) lies within the sound discretion of the trial court. *Melton*, 2010-Ohio-1278, at ¶79. As a result, the trial court's ruling will not be reversed unless it is found to be unreasonable, arbitrary or unconscionable. *Id*.

{¶39} In the instant action, the disputed evidence was primarily contained in the testimony of Angela Keene. In describing the acts which appellant committed when he was at Whitfield's home during the twelve months prior to April 2010, Keene essentially stated that appellant and Whitfield had operated a "meth lab" in the residence. Keene expressly testified that she had seen appellant "cook" methamphetamine on at least 100

occasions during that time span.

{¶40} As previously discussed, the indictment against appellant contained one count of illegal manufacturing of drugs and one count of illegal assembly of chemicals for the manufacturing of drugs. In challenging the admission of Keene's testimony into evidence, appellant focuses his discussion solely upon the "illegal manufacturing" count and whether his prior bad acts at the Whitfield residence were relevant to any element of that offense. That is, appellant never addresses the relevancy of Keene's testimony to the "illegal assembly" charge. After reviewing the elements of the latter offense, this court concludes that the trial court did not abuse its discretion in admitting the evidence regarding appellant's behavior prior to April 2010, pursuant to Evid.R. 404(B).

{¶41} The "illegal assembly" count was brought under R.C. 2925.041(A), which prohibits a person from knowingly assembling or possessing "one or more chemicals that may be used to manufacture a controlled substance in schedule I or II with the intent to manufacture a controlled substance in schedule I or II ***." Pursuant to R.C. 3719.41, methamphetamine is designated a controlled substance under schedule II.

{¶42} Under the clear requirements of R.C. 2925.041(A), the mere assembly or possession of chemicals which could be used to produce a controlled substance is not sufficient to prove the performance of the criminal act. In addition to procuring or having such a chemical, the state must further demonstrate a present intent on the part of the defendant to actually use the chemical in the future to produce the illegal drug. In most instances, proof of this intent will likely be based upon the defendant's completion of a subsequent act, such as an initial step in the manufacturing process. However, in some situations, the "intent" element can be satisfied through proof of the defendant's prior

production of the controlled substance.

{¶43} Our review of the trial transcript indicates that the "illegal assembly" count against appellant was based upon his participation in the procurement of the anhydrous ammonia from the site in southern Ohio. The transcript also shows that the vehicle in which the "ammonia" containers were transported by Whitfield was searched by Officer Moreland before any step could be taken to actually use the ammonia. Accordingly, in the absence of any admission, the state would only be able to demonstrate the requisite intent to employ the ammonia for the purpose of making methamphetamine through the submission of circumstantial evidence from which an inference could be drawn.

{¶44} Angela Keene's testimony concerning appellant's prior acts in producing methamphetamine constituted the needed circumstantial evidence. That is, given that the state presented expert testimony indicating that anhydrous ammonia was generally used in the manufacturing of methamphetamine, Keene's statement that she had often seen appellant "cooking" the illegal drug would readily support the logical inference that Whitfield and appellant had obtained the ammonia in the three containers with the intent of producing new methamphetamine. To this extent, Keene's testimony was relevant to an element of the "illegal assembly" charge.

{¶45} Evid.R. 404(B) expressly states that evidence of a person's past criminal acts is admissible for purposes of establishing, inter alia, that person's intent or motive. Therefore, since Keene's disputed testimony was pertinent to the "intent" element of the "illegal assembly" charge under R.C. 2925.041(A), the trial court acted within its sound discretion in admitting it into evidence.

{¶46} Focusing solely upon the separate "illegal manufacturing" count, appellant

submits that, since his bad acts, i.e., "cooking" methamphetamine, was virtually identical to the charged offense, there was a greater possibility that the jury may have found him guilty of that offense simply because he had previously committed the same crime. In light of this, he further submits that, even if Keene's testimony was admissible in regard to the "illegal manufacturing" count for one of the permissible reasons in Evid.R. 404(B), it still should have been excluded from evidence under Evid.R. 403 because its limited probative value was substantially outweighed by the risk of unfair prejudice.

{¶47} Without expressly deciding whether Keene's testimony was admissible as to the "illegal manufacturing" count, this court would emphasize that, even if appellant's prior bad acts should not have been considered for purposes of that offense, they were still clearly admissible as to the "illegal assembly" charge. Under such circumstances, the jury should have been instructed to only consider the "bad acts" testimony in relation to the "illegal assembly" count.

{¶48} In moving to exclude the "bad acts" testimony prior to trial, appellant did not attempt to distinguish between the two pending counts; rather, he only asserted a blanket objection to all evidence of that type. Moreover, the trial transcript shows that, at the conclusion of the evidence, appellant did not request an instruction informing the jury that the "bad acts" testimony could be considered solely for purposes of the "illegal assembly" count. As a result, the trial court only gave the general instruction that such evidence could only be considered to the extent that it would tend to prove appellant's motive, knowledge, or absence of mistake, not for purposes of showing that he simply acted in conformity with his prior behavior.

{¶49} Given the manner in which appellant framed the "prior bad acts" issue at

the trial level, this court holds that he has failed to demonstrate any error on the part of the trial court. Again, Keene's testimony was clearly relevant to the issue of appellant's intent under the "illegal assembly" charge. Additionally, the probative value of the "bad acts" testimony was significant; hence, even if that testimony was not admissible under Evid.R. 404(B) as to the "illegal manufacturing" charge, its value in relation to the "illegal assembly" charge was not substantially outweighed by the possibility of unfair prejudice or confusion of the issues. This is especially true in light of the fact that the trial court expressly instructed the jury that it was not allowed to assume that, since appellant had committed criminal acts in the past, he was guilty of the two charges in this case.

{¶50} As there has been no showing that the trial court abused its discretion in permitting the state to introduce the "bad acts" evidence, appellant's first assignment is without merit.

{¶51} Under his second assignment, appellant challenges the legal sufficiency of the evidence upon which his conviction was based. In regard to both counts, appellant maintains that the state's evidence only established that, although he was present when certain crimes were committed, he was an innocent bystander whose sole role was to smoke methamphetamine.

{¶52} It is well-settled under Ohio case law that the determination of whether the evidence was sufficient to sustain the jury verdict raises a question of law. *Ford*, 2009-Ohio-6046, at ¶45. In essence, sufficiency tests the adequacy of the state's evidence, and asks whether the evidence "has created an issue for the jury to decide regarding each element of the offense." *State v. Turner*, 11th Dist. No. 2010-A-0060, 2011-Ohio-5098, ¶52. "In reviewing the sufficiency of the evidence underlying a criminal

conviction, an appellate court examines the evidence in order to determine whether such evidence, if believed, would support a conviction." *Ford*, 2009-Ohio-6046, at ¶45.

{¶53} As was noted previously, the first count against appellant was for illegal manufacturing of drugs under R.C. 2925.04. To establish the elements of this offense, the state had to prove that appellant knowingly manufactured or otherwise engaged in the production of methamphetamine, a schedule II substance.

{¶54} This particular charge was based upon the contention that appellant had assisted in the "cooking" of methamphetamine at Martin's apartment. During the course of his trial testimony, Martin stated that, on two occasions immediately prior to April 2010, Whitfield and appellant came to his apartment alone. Martin further stated that, during the first visit, Whitfield "gassed" the methamphetamine in the kitchen while appellant remained in the living room. According to Martin, the same procedure occurred during the second visit, except that appellant helped Whitfield pour the liquid through a funnel in order to obtain the final product of powder methamphetamine.

{¶55} As part of the jury instructions on this specific charge, the trial court stated that appellant could be found guilty as either the principal offender or in complicity with Whitfield. Under R.C. 2923.03(A)(2), a person can be found guilty of complicity in the commission of a criminal act when he aided or abetted the principal offender in the execution of the offense and acted with the same required degree of legal culpability.

{¶56} Pursuant to the expert testimony which the state presented concerning the procedure for the production of methamphetamine, the act of funneling the liquid was part of the production process. Thus, because the state presented some evidence that appellant assisted Whitfield in making the final product while at Martin's apartment on

the second occasion, the trial record did contain some evidence going to each element of the first charged offense.

{¶57} Under the second count of the indictment, appellant was charged with the illegal assembly or possession of chemicals for the manufacturing of drugs. As noted above, R.C. 2925.041(A) provides that an individual can be found guilty of this offense if he knowingly assembles or possesses one of the chemicals employed in the production of an illegal drug with the specific intent to manufacture that drug. As to appellant, this charge was predicated upon the role he played in obtaining the anhydrous ammonia in southern Ohio.

{¶58} The state's evidence on the second count was based upon the testimony of Angela Keene. According to her, it was appellant who loaded the three tanks in the back of her minivan at the outset of the trip. She further stated that appellant went with Whitfield on each of the two nights, and that the two men came back to the vehicle with the anhydrous ammonia on the second night. In addition, Keene testified that, after the two men had failed the first night, she saw appellant working on a valve for one of the three tanks.

{¶59} At the very least, the foregoing testimony demonstrated that appellant had assisted Whitfield in the procurement of the anhydrous ammonia. To this extent, even if appellant did not have possession of the substance, he did knowingly aid and abet in its assembly for use in the production of methamphetamine. Furthermore, given Keene's testimony as to appellant's prior participation in the manufacturing of the illegal drug at Whitfield's residence, there was some evidence to support the finding that it was his intent that the anhydrous ammonia would be used at a subsequent date to create more

methamphetamine. Therefore, since the trial court did not err in denying appellant's motion for a directed verdict, the second assignment in this appeal lacks merit.

{¶60} Under his next assignment, appellant submits that his convictions on the two counts were against the manifest weight of the evidence. In support of this specific argument, he states that the jury should have rejected the testimony of the witnesses who were required to testify as a result of their plea bargains.

{¶61} In relation to the standard for reviewing questions of the manifest weight of the evidence, this court has indicated:

{¶62} "Generally, the weight to be given to the evidence and the credibility of the witnesses is primarily for the trier of fact to determine. *State v. Thomas* (1982), 70 Ohio St.2d 79, ***, at the syllabus. When reviewing a manifest weight challenge, however, the appellate court sits as the 'thirteenth juror.' [*State v. Thompkins* (1997), 78 Ohio St.3d 380, 387] (citation omitted). The reviewing court must consider all the evidence in the record, the reasonable inferences, and the credibility of the witnesses, to determine whether, 'in resolving conflicts in the evidence, the jury clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered. ***.' *Id.*, quoting *State v. Martin* (1983), 20 Ohio App.3d 172, 175, ***." *Turner*, 2011-Ohio-5098, at ¶55.

{¶63} As to the charge of illegal assembly or possession of chemicals, a review of Angela Keene's testimony does not reveal any inherent inconsistencies; hence, even though her testimony was the product of a plea bargain, the jury still could have logically found her versions of the events to be credible. Furthermore, Keene made a number of statements which could be interpreted to show that appellant knowingly aided Whitfield

in procuring the anhydrous ammonia. As a result, the trial record does not support the conclusion that the jury lost its way in finding appellant guilty.

{¶64} Regarding the charge of illegal manufacturing of drugs, a similar analysis would apply. Again, our review of Michael Martin's testimony fails to reveal any inherent inconsistencies or other problems that might call into question the basic truthfulness of his assertions. Under such circumstances, it cannot be said that the fact that Martin agreed to testify in return for the amendment of the pending charges against him rendered his testimony completely lacking in credibility. In other words, the trial record does not indicate that the jury abused its discretion in finding that Martin was believable.

{¶65} Appellant asserts that the state never presented any evidence that he was complicit in the production of methamphetamine at Martin's apartment. This assertion is simply incorrect. Martin specifically testified that, on one occasion, he saw appellant assist Whitfield in pouring the "cooked" substance though a funnel to obtain powder methamphetamine. As this act on appellant's part aided Whitfield in completing the production of the illegal drug that particular instance, the jury could justifiably find that appellant was not simply a bystander waiting to use the drug, but an actual participant in the manufacturing process.

{¶66} Since the trial record contains some competent, credible evidence supporting the conclusion that the jury did not lose its way in finding appellant complicit in the commission of the two charged offenses, his conviction was not against the manifest weight of the evidence. Thus, his third assignment of error is not well taken.

{¶67} Appellant's fourth and sixth assignments will be reviewed together. Under the fourth assignment, he argues that the trial court erred in allowing the state to amend

the first count of the indictment at the close of the evidence. Appellant asserts that the amendment of the date of this particular offense was not permissible because it altered the nature of the charged crime. Under the sixth assignment, he maintains that he was denied effective assistance of trial counsel when his attorney failed to properly object to the amendment.

{¶68} In the first count of the indictment, it was expressly alleged that appellant had engaged in the manufacturing of methamphetamine at some point between the first and sixth day of April 2010. However, during his trial testimony, Michael Martin stated that the two occasions appellant and Whitfield had visited the apartment had occurred in March 2010. As a result, before case was submitted to the jury, the trial court allowed the state to amend the "date" allegation to conform to the trial evidence.

{¶69} Crim.R. 7(D) provides that a trial court may amend an indictment in form or substance following the conclusion of the trial, so long as "no change is made in the name or identity of the crime charged." In applying this rule, this court has held that an amendment of the date upon which the offense allegedly took place does not change the name or identity of the charged crime when the precise time or date is not an actual element of the offense. *See State v. Chapman*, 11th Dist. No. 98-P-0075, 2000 Ohio App. LEXIS 1074 (Mar. 17, 2000), *20-21. In the instant matter, our review of R.C. 2925.04(A) readily shows that the time or date of the illegal manufacturing of drugs is not a listed element of this particular offense. Accordingly, because the identity of the charged crime was not altered when the date of the offense was amended to "fit" the state's evidence, the trial court did not err in allowing the amendment.

{¶70} Based upon the foregoing analysis, it likewise follows that appellant was

not denied effective assistance of trial counsel in relation to the "amendment" question. Therefore, both the fourth and sixth assignments lack merit.

{¶71} Under his fifth assignment, appellant contests the trial court's decision to overrule his motion to suppress the evidence obtained during the search of the minivan and Martin's apartment. Regarding the vehicle, he argues that Officer Moreland did not have a reasonable suspicion of criminal activity to justify a traffic stop. Concerning the apartment, he maintains that Officer Moreland's initial search was illegal because no exception to the requirement of a warrant was applicable in this instance.

{¶72} As was noted above, the trial court's ruling on the motion to suppress was based in part upon the conclusion that appellant lacked standing to contest the validity of any of the searches. In asserting the "suppression" issue before this court, appellant has not tried to contest the trial court's 'standing" analysis. In *State v. Kitcey*, 11th Dist. No. 2007-A-0014, 2007-Ohio-7124, ¶57, we generally held that a criminal defendant does not have the standing to challenge a search of a motor vehicle when he did not have a possessory interest in the vehicle or the seized property.

{¶73} In the instant action, the evidence before the trial court demonstrated that appellant was not owner of the minivan; instead, there was no dispute that it belonged to Keene. Furthermore, appellant never claimed to own any of the drug paraphernalia found in the vehicle, including the three containers. Similarly, as to Martin's apartment, there was simply no evidence to indicate that appellant was a leasee of the premises at that time. Moreover, he never claimed that any of the paraphernalia in the apartment belonged to him.

{¶74} Given that the trial court's "standing" analysis was legally correct, there is

no need to address the merits of the trial court's ruling on the actual validity of the two searches. Appellant's fifth assignment of error does not have merit.

{¶75} Pursuant to the foregoing analysis, each of appellant's six assignments fails to establish any error in the trial proceedings. Hence, it is the judgment and order of this court that the judgment of the Lake County Court of Common Pleas is affirmed.

TIMOTHY P. CANNON, P.J.,

MARY JANE TRAPP, J.,

concur.