

Circuit Court for Caroline County
Case No. 05-K-16-011256

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2647

September Term, 2016

STEVEN LEE ALLEN

v.

STATE OF MARYLAND

Wright,
Leahy,
Raker, Irma S.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Raker, J.

Filed: August 6, 2018

*This is an unreported opinion, and it may not be cited in any paper, brief, motion, or other document filed in this Court or any other Maryland Court as either precedent within the rule of *stare decisis* or as persuasive authority. Md. Rule 1-104.

Steven Allen, appellant, appeals his convictions in the Circuit Court for Caroline County of one count of attempted manufacturing of a controlled dangerous substance (methamphetamine) and two counts of possession of drug paraphernalia. He presents two questions for our review:

“1. Did the court deprive appellant of the right to a fair trial by compelling Ms. Smith’s testimony after it erroneously determined that her claim of the Fifth Amendment privilege was invalid?

2. Was the evidence insufficient to convict appellant of attempt to manufacture methamphetamine when the State failed to demonstrate that he took a substantial step beyond mere preparation?”

We shall hold that the court erred in compelling Rachel Smith’s testimony. Accordingly, we shall reverse.

I.

The Grand Jury for Caroline County indicted appellant on charges of one count of keeping a common nuisance,¹ one count of attempted manufacturing of a controlled dangerous substance, and two counts of possession of drug paraphernalia. The jury found appellant guilty of the attempted manufacturing and possession charges, and the court imposed a term of incarceration of five years suspended, consecutive to a six-year-six-month sentence stemming from a parole violation, followed by five years of supervised probation.

¹ The State entered a *nolle prosequi* to the common nuisance charge.

The following evidence was presented at trial: On the evening of April 14, 2016, Sergeant Richard Keys and two other Maryland State Police officers attempted to serve an arrest warrant on appellant at a lot with two trailers. As Sergeant Keys approached one of the trailers, appellant exited the trailer, saw Sergeant Keys, and ran into the woods. The officers chased him for a few minutes, but gave up when they lost his trail.

Returning to the trailer, the police found Rachel Smith sitting in a chair next to a red SUV, which was parked close to the trailer. Appellant had called Ms. Smith to tell her to pick up her car (the red SUV) at the lot, but when she arrived, the police cars were blocking it. She told Sergeant Keys that appellant lived in the trailer and that he made methamphetamine in the trailer.

Sergeant Keys approached the open trailer door to see if appellant had returned and saw an open green backpack on the kitchen table containing lighter fluid and lye. Sergeant Keys secured the trailer but did not enter it, and called the Caroline County Drug Task Force, which sent Corporal Andrew Durham to the scene to continue the investigation.

Corporal Durham entered the trailer and discovered that the backpack contained lye, an almost-empty salt container, cold-pack ammonium nitrate, aluminum foil, a funnel, coffee filters, aquarium tubing, strainers, miscellaneous hand tools (a pipe cutter, pliers, strippers, and vice grips), a glass dish, electrical tape, and an empty bottle of lighter fuel. He also found a digital scale on the floor next to the table and a portion of a rubber hose with a cap on its end just outside the trailer door. Corporal Durham sent the scale and tubing to the Maryland State Police Crime Lab to test residue on the items (which was found to be methamphetamine) and inventoried the rest of the materials.

At trial, the State called Ms. Smith to testify. Ms. Smith was the only non-law enforcement witness to testify for the State. She was reluctant to testify as she was good friends with appellant, both were addicts, and she was at the scene while the police attempted to arrest appellant.

She confirmed that she knew appellant and had “hung out” with him at the trailer every day for a couple of months. She testified that she had seen methamphetamine manufacturing in the trailer, and when the State followed that up with, “were you aware if [appellant] was involved in that . . . ,” the judge called counsel to the bench to express concern that Ms. Smith should be advised of her Fifth Amendment rights against self-incrimination.

Outside the presence of the jury, the judge advised Ms. Smith of her Fifth Amendment rights as follows:

“THE COURT: As far as I know, you’re not charged with any crime in connection with this matter, but I want you to understand since you don’t have a lawyer here to represent you, that the Fifth Amendment to the United States Constitution guarantees you the right to remain silent and not to have to answer any question that might tend to incriminate you in the commission of a crime. So, if at any time, I want you to be aware of that, if at any time during the examination that you undergo here in court, either by the Defense or the State, if you feel that the answer to the question might implicate you in the commission of a crime, you can say, I refuse to answer on Fifth Amendment grounds.

[MS. SMITH]: I think a lot of this includes things of that nature, so, so I’m little uncomfortable.

THE COURT: Well, well, most respectfully, I can’t offer you legal advice. I’m not your lawyer, so I can’t tell you what you should object to or not object to. But I do want, since you’re

not here with a lawyer, I want to make sure you understand that you do have that right. Do you have any questions about it?

[MS. SMITH]: (No audible response)

THE COURT: All right, please return . . .”

Before proceeding, defense counsel sought immunity and counsel for the witness. The court determined that the prosecutor could immunize the witness and likely would do so if necessary, but declined to appoint counsel for Ms. Smith. The court then proceeded to permit the State to question Ms. Smith outside the jury’s presence to ascertain if she would (and could) invoke her Fifth Amendment rights in response to any question. The State started questioning her as follows:

“THE COURT: All right, Ms. Smith, [the State] is going to ask you a number of questions and we wanted to do it outside of the presence of the jury just to see what your answers would be. So again, I explained what your Fifth Amendment rights are and that is to, not to answer any question that might tend to incriminate you in the commission of a crime. So, again, listen to the question and if you want to raise your Fifth Amendment rights, you can certainly do that and if you don’t want to raise your Fifth Amendment rights you can answer the question, if you’re able to answer the question, honestly and truthfully. Okay?

[MS. SMITH]: (No audible response)

[DEFENSE COUNSEL]: Would the Court simply note my continuing objection to this hybrid procedure that we discussed (unintelligible)?

THE COURT: Yes, certainly.

[DEFENSE COUNSEL]: Thank you, Your Honor.

[THE STATE]: I think the last couple of questions I asked you dealt with, you know, how long had you been there, had you been inside and had you been inside with [appellant]. Right?

[MS. SMITH]: (No audible response)

[THE STATE]: At any point in time were you made aware that inside that trailer was illegal CDS activity?

[MS. SMITH]: I don't really know how to answer that. I mean like I didn't know for a fact, I just know based off what I was told from other people.

[THE STATE]: So you never . . .

THE COURT: So, well most respectfully, is your answer yes I knew but it's because other people told me?

[MS. SMITH]: Yes.

THE COURT: Okay.

[THE STATE]: Did you ever talk to [appellant] about what he was doing in that trailer?

[MS. SMITH]: Not really. I mean we had conversation and things came up, like he had to get something out of the trailer, but it was never anything specifically saying anything related to methamphetamine.

[THE STATE]: Okay. Did you tell, did you tell Sergeant Keys that you knew [appellant] was staying there?

[MS. SMITH]: There were a couple of times I came there to check on him and he had been sleeping there, so yes I told Sergeant Keys that he was staying there.

[THE STATE]: Did, did you tell Sergeant Keys that [appellant] was in bad shape?

[MS. SMITH]: All of us were. We were all addicts, so yes I did.

[THE STATE]: Okay. Did you tell Sergeant Keys that [appellant] was fighting an addiction?

[MS. SMITH]: Yes.

[THE STATE]: Do you know what that addiction was to?

[MS. SMITH]: Heroin.

[THE STATE]: Did you tell Sergeant Keys that [appellant] was making meth in the trailer?

[MS. SMITH]: Do I have to answer that?

THE COURT: Pardon?

[MS. SMITH]: Do I have to answer that one?

THE COURT: Well, ma'am, that, the fact, if you answered yes, that doesn't implicate you in the commission of a crime. It just means that you knew what he was doing, if you knew. Of course, I'm sure [defense counsel] is going to ask what the basis of knowledge is, because if it's anything other than [what appellant] told you, then it probably, it would be objectionable.

[DEFENSE COUNSEL]: And he told her nothing, Your Honor, per her answer.

THE COURT: I'm sorry?

[DEFENSE COUNSEL]: And he told her nothing, according to her answer about that issue. Manufacturing.

THE COURT: Well, this is another question, so yes you may, you may answer the question.

[THE STATE]: And I'll repeat it just in case you forgot what I said. My question was did you tell Sergeant Keys that he was making meth inside the trailer?

[MS. SMITH]: Yes, I believe I did.

[THE STATE]: Did you tell him that he was selling meth inside the trailer?

[MS. SMITH]: Um, I really don't want to do this.

THE COURT: Are you raising your Fifth Amendment rights, ma'am?

[MS. SMITH]: Yeah.

THE COURT: All right. Well . . .

[THE STATE]: Well, Your Honor, I would argue that the answer to that is not incriminating.”

The judge then determined that, in accordance with *Dickson v. State*, 188 Md. App. 489 (2009), he needed to assess if the witness's Fifth Amendment claim was justified. The outside-the-jury questioning continued as follows:

“[THE STATE]: Did you observe [appellant] manufacturing and selling meth out of that trailer?

THE COURT: Again, ma'am, you're under oath and so you have to answer that, that question. I don't believe that implicates you in either the manufacture or the sale of the drug and if you believe that it does in some way, tell me how you believe that it does.

[MS. SMITH]: I'm sorry, I just really don't want to do this.

THE COURT: I'm sorry, ma'am?

[MS. SMITH]: I just really don't want to do this.

THE COURT: Well, ma'am . . .

[MS. SMITH]: I know, I know . . .

THE COURT: You heard what I've read.

[MS. SMITH]: Can you repeat the question?

THE COURT: And it says that if, in fact, you have a good faith basis for fearing that you'll be prosecuted, then you have a right to raise this, you have a right to make that objection. But if your only reason is I don't want to get [appellant] in trouble, I feel badly about it, that's not a proper reason and you do have to . . .

[MS. SMITH]: It's not just that.

THE COURT: And if that's your reason for not wanting to answer the question, that's not a proper reason for not answering it and you do have to answer it.

[MS. SMITH]: It's not just that.

THE COURT: Well, again, I'm giving you an opportunity to explain to me why you believe that that in some way might incriminate you, an answer to that question. Assuming that the answer is yes, why it might incriminate you.

[MS. SMITH]: Can you ask the question again, please?

[THE STATE]: Um, have you seen [appellant] in the past, at that location, manufacturing and/or selling methamphetamine?

THE COURT: Well, again, that's a compound question.

[THE STATE]: Have you seen [appellant] manufacturing methamphetamine in that trailer?

[MS. SMITH]: Yes.

[THE STATE]: [H]ave you ever seen [appellant] selling methamphetamine out of that trailer?

THE COURT: Again, ma'am, if you want to raise your Fifth Amendment right, you can do that, but you have to tell me why you think that giving an answer to that question, assuming that the answer is yes, in some way incriminates you.

[DEFENSE COUNSEL]: Your Honor, I must object to the process because if she succeeds in persuading you, she's incriminated herself here today.

THE COURT: No, I don't believe that it could be used against her, because I think it would be compelled at that point.

[DEFENSE COUNSEL]: I would feel better if she had Counsel, I guess . . .

THE COURT: Pardon?

[DEFENSE COUNSEL]: I'd feel better if she had Counsel before she answers the Court's questions.

THE COURT: Well, you know, you know, believe me, I would too. As the person responsible for conducting a fair trial, I couldn't agree with you more, but here we are in the middle of the trial and I, I don't think it's going to be logistically possible to just go out on the street and find a lawyer and say, hey lawyer get in here and give this lady legal advice. And quite frankly, if we did that and I were in her shoes, I don't know whether I'd want to take legal advice that was given to me 'on the fly', quote, unquote as that would be.

[DEFENSE COUNSEL]: Well, perhaps the Court could inquire . . .

THE COURT: Pardon?

[DEFENSE COUNSEL]: Perhaps the Court could inquire of her on that issue.

THE COURT: What? No, I decline to, sir. Thank you. So do you have any other questions that you want to ask her now prior to asking the questions in front of the jury?

[THE STATE]: Yeah, so have you observed [appellant] selling methamphetamine out of the trailer?

[MS. SMITH]: Yes.

[THE STATE]: And I don't need a strict number, but approximately, just around, how many times have you seen [appellant] make it in the trailer?

[MS. SMITH]: I really honestly don't know.

[THE STATE]: Once?

[MS. SMITH]: It was more than once, yeah.

[THE STATE]: Okay. Then what about selling, more than once?

[MS. SMITH]: Yeah.

[DEFENSE COUNSEL]: May I ask her a question?

THE COURT: You may.

[DEFENSE COUNSEL]: Have you ever supplied him with the ingredients he used to manufacture the meth?

THE COURT: All right, ma'am, and again, you have the right to raise the Fifth Amendment to that question.

[THE STATE]: And Your Honor, I would object because that's not relevant. How he got his manufacturing equipment is not relevant to whether he was manufacturing or not. It doesn't matter if it was me or him or you or Mr. Morris (sic).

THE COURT: Well, it, it goes to the witness's bias, sir.

[DEFENSE COUNSEL]: Well, I would also argue, Your Honor, if I may, that my question is more specific to the extent that you observed my client manufacture, while you were observing that, had you bought, procured any of the ingredients that he was using to manufacture the methamphetamine?

[THE STATE]: And again, Your Honor, I guess . . .

THE COURT: But, again, I find that that, the question is, is, is a, goes to her bias as a witness. Does she have an interest in the outcome of this case?

[THE STATE]: How, I guess my question would be, if she funded his manufacturing, how, how would that have anything to do with the, whether . . .

THE COURT: She would want, she would want, she would not want to take the blame herself. She would want to foist it on someone else and that's why I think in this case it probably would be appropriate for her to raise her Fifth Amendment rights. So you, ma'am, again it's up to you. You can raise your Fifth Amendment right.

[MS. SMITH]: Yes.

THE COURT: Okay.

[MS. SMITH]: I would like to do that.

THE COURT: And not answer that question. And I believe that that is an appropriate invocation of her right against self incrimination.”

Appellant's counsel objected, arguing that Ms. Smith's testimony about appellant's past manufacturing of methamphetamine constituted prior bad acts evidence. The State advised the court that if Ms. Smith “is not allowed to testify, the State could rest its case.” The judge overruled the objection because the evidence fit into non-propensity uses of the prior bad acts. After the objection, appellant's counsel brought up the Fifth Amendment again as follows:

“[DEFENSE COUNSEL]: It certainly seems clear to me that if he is permitted to ask those questions and I subsequently ask a question that the Court and she agree fall under her Fifth Amendment right, that [appellant] would be prejudiced by that. In other words, the State will, is permitted to mine certain areas

but when I ask questions to the extent that they're relevant, then if she takes the Fifth Amendment, she's sort of rewarded.

THE COURT: Well . . .

[DEFENSE COUNSEL]: After you judge it.

THE COURT: Most respectfully, sir, the difference is whether or not she would be incriminating herself. In this case, my finding after having heard the questions propounded by the State and the witness's answer to them, is that they don't incriminate her. If, in fact, you ask her a question, if you ask her did you ever sell any of these drugs to anybody, that clearly would incriminate her and I don't believe your client is prejudiced by allowing her to raise her Fifth Amendment rights to object to answering that question.

[DEFENSE COUNSEL]: I, I would think he would be and . . .

THE COURT: Well . . .

[DEFENSE COUNSEL]: I (unintelligible), Judge.

THE COURT: And again, sir, most respectfully, you can make your objection.

[DEFENSE COUNSEL]: Right.

THE COURT: And I suppose that we ought to ask you now, if you want to do it now, otherwise we'll do it at the end of the State's questioning, you should tell us in advance just as [the State] did, what questions you're going to ask her so that if she does raise her Fifth Amendment rights, she can do so outside the hearing of the jury and I can make a decision as to whether or not she should be compelled to answer the question.

[DEFENSE COUNSEL]: Well, I'd like to reserve on that because I don't know what, if anything, else he's going to ask her.

THE COURT: Okay. And I will allow you to do so.

[DEFENSE COUNSEL]: Finally, Your Honor, I guess, you've noted my objection and I appreciate that. We, at this point would ask for a mistrial, because I just think this, this hybrid process without the benefit of Counsel, has prejudiced my client in terms of responding in any fashion to this witness.

THE COURT: Well, how so, sir? I don't understand how that's the case.

[DEFENSE COUNSEL]: Well, the jury has heard her placement of my client there, a phone call from my client. She's now going to be permitted to indicate that he has sold, that he has manufactured on occasions that are not on this day and now she's going to offer her Fifth Amendment, if the Court lets her, when I ask a question.

THE COURT: Well, again, the Court can't give you an advisory opinion. And let's just, again, I want to make sure everybody gets a fair trial. If you want to ask her now, before she testifies in front of the jury what her basis of knowledge is to answer these questions, to make sure that she has a personal basis of knowledge per Rule 5-602, I'll allow you to do that now.

[DEFENSE COUNSEL]: No, sir, I don't want to do that.

THE COURT: You don't.

[DEFENSE COUNSEL]: I, the, I asked her a question and the Court agreed that she had a Fifth Amendment right to the only question I've asked her since the jury went away.

THE COURT: The question is did he sell, did he, do you know whether he sold meth out of the, out of the trailer before. [The State] did not ask her what her basis of knowledge is, which the Rule requires and I would believe that you would want to find out, if her basis of knowledge is it's what John Jones told me, then I wouldn't allow her testimony to come in because it's not based on her personal knowledge or an admission by your client.

[THE STATE]: Your Honor, I'm just . . .

THE COURT: So, again, if you want to ask those questions of her, you can ask her what her basis of knowledge is now.

[DEFENSE COUNSEL]: Without withdrawing any objections, I would like to ask her a couple of questions.

THE COURT: Well you may do without . . .

[DEFENSE COUNSEL]: But I still . . .

THE COURT: Without withdrawing any objections. I'm kind of suggesting you do it, [defense counsel] . . .

[DEFENSE COUNSEL]: Well, I know you are, Your Honor, but I guess initially we have moved for a mistrial here. I'd like a ruling on that please.

THE COURT: Well, the Motion is respectfully denied.

[DEFENSE COUNSEL]: May I ask the witness questions (unintelligible) with my objections still in place?

THE COURT: You may. And again as to her basis of knowledge.

[DEFENSE COUNSEL]: I understand, Your Honor.

THE COURT: As and in terms of her answers to the question of did you see him manufacture or do you know that he manufactured and do you know that he sold.

[DEFENSE COUNSEL]: Were you present in the trailer when [appellant] made methamphetamine?

[MS. SMITH]: Yeah.

THE COURT: Okay.

[DEFENSE COUNSEL]: Were you present in the trailer when [appellant] sold methamphetamine from that trailer?

[MS. SMITH]: I mean not necessarily every time, but I saw it, yes.

[DEFENSE COUNSEL]: On one occasion were you present?

[MS. SMITH]: Yes.

[DEFENSE COUNSEL]: And did you participate in any way in the sale of that methamphetamine?

THE COURT: And ma'am, again, if you believe the answer is going to incriminate you, if he asks you were you selling with him and you say, oh, if I say yes, I'm going to incriminate myself and that's a true answer, then you don't have to give that answer. You can say, I stand on my Fifth Amendment rights. Obviously, if the answer is no, I didn't help him sell it, then that answer could not implicate you in the commission of a crime, if you're saying I didn't help him. So you can, if in fact your answer would be yes, then you could raise your Fifth Amendment and say I don't want to answer that question.

[MS. SMITH]: Well, what do you mean by help him sell it? Like get it together and go sell it to people or . . .

[DEFENSE COUNSEL]: There's a thought. I mean is that what you did?

[MS. SMITH]: Just give him a ride or what do you mean?

[DEFENSE COUNSEL]: Well, what did you do? What did you do?

THE COURT: Well, ma'am, again, you can raise your Fifth Amendment rights if you want to. Or not, it's up to you.

[MS. SMITH]: I never personally helped him sell anything, no.

[DEFENSE COUNSEL]: What did you personally help him do?

[MS. SMITH]: Nothing.

[DEFENSE COUNSEL]: Did you buy any of the ingredients?

[MS. SMITH]: I already said I raise my Fifth Amendment rights to that one, so . . .

[DEFENSE COUNSEL]: So I would just be stuck in front of the jury with, all, the State would get all its good stuff and anything I wanted to ask would be closed and the jury will get half the story.

THE COURT: Well, most respectfully, sir, this lady has rights as well as your client does. So, again, the Court's going to allow [the State] to ask those four questions. On cross examination you may ask her any question you want to ask her, but again, if she wants to raise her Fifth Amendment objection to it, she may."

After the jury returned to the courtroom, the State completed its examination of Ms.

Smith as follows:

"[THE STATE]: So my next question is prior to April 14, 2016, had you ever observed [appellant] manufacture meth, methamphetamine in that trailer?

[MS. SMITH]: Yes.

[THE STATE]: Had you seen him do it more than once?

[MS. SMITH]: Yes.

[THE STATE]: Prior to April 14, 2016, had you seen [appellant] sell methamphetamine out of that trailer?

[MS. SMITH]: Yes.

[THE STATE]: Was that more than once?

[MS. SMITH]: Yes."

After the State's direct examination, appellant again moved for mistrial on the same grounds as before, and the court denied the motion. Appellant's counsel impeached Ms.

Smith with a prior theft conviction on cross-examination, but did not ask her any other questions.

In addition to Ms. Smith, the State called several police officers to testify. Sergeant Keys and Corporal Durham testified about the events of April 14, 2016. Corporal Durham also testified as an expert witness on methamphetamine production that the materials in the backpack, as well as the scale and hose, are used in the “one pot” method of cooking methamphetamine. He conceded on cross-examination, however, that other necessary elements (a water bottle, pseudoephedrine, and lithium metal) were not present. Elizabeth Schneider of the Maryland State Police Forensic Sciences Division testified that the residue on the scale and hose had tested positive for methamphetamine.

At the end of the State’s case, appellant moved for a Judgment of Acquittal on the grounds that the missing necessary ingredients demonstrated that no substantial step toward manufacturing methamphetamine had occurred, and that Ms. Smith’s testimony established, at best, that appellant had made methamphetamine before April 14, not on the day set out on the charges. The court denied the motion. Appellant elected not to testify and presented no evidence in the defense case.

The jury convicted appellant and the judge sentenced him to five years suspended and also five years of supervised probation on the attempted manufacture charge. This timely appeal followed.

II.

Before this Court, appellant argues that the trial court improperly forced Ms. Smith to testify when answers to the State's questions could directly expose her to criminal liability, which is a reasonable basis to invoke the Fifth Amendment. He claims that Ms. Smith's direct observations of the manufacture and sale of methamphetamine establish her presence at the scene of crimes, which could tend to demonstrate her guilt in those crimes. Although presence at the scene of a crime alone is insufficient to support a conviction, appellant argues, it is an important factor and could provide a link in a chain of evidence that would support a conviction. The court's incorrect analysis of the Fifth Amendment issue, he says, deprived him of the right to a fair trial, which affords him standing to appeal on the basis of this violation of Ms. Smith's rights. Appellant points out that Ms. Smith's testimony was key in connecting appellant to the methamphetamine paraphernalia—the State said it could rest its case and would forego expert testimony if it could not get Ms. Smith's answers.

Appellant also contends that the State's evidence was insufficient to support a conviction for attempted manufacture because it did not establish a substantial step beyond mere preparation in the commission of the crimes. The State did not provide evidence that appellant possessed all the necessary materials needed to manufacture methamphetamine nor that he had started the manufacturing process.

Before this Court, the State contends that the trial court properly evaluated Ms. Smith's claims of Fifth Amendment privilege; therefore, it did not deprive appellant of a

fair trial. It says that the judge examined her claims to each question by the State and defense counsel outside the presence of the jury, ruling on each claim based on whether an answer would implicate her in a crime. The State argues that Ms. Smith's presence at the scene of appellant's crimes would not subject her to prosecution or furnish a link in the chain of evidence necessary to prosecute her. In any case, the fact that her answers were unfavorable to appellant would not, the State contends, make the rulings reversible on behalf of appellant as that fact does not render his trial unfair. The State points out that the defense's cross-examination question about purchasing ingredients, which resulted in a successful Fifth Amendment claim, more directly implicated Ms. Smith in a crime and was only intended to show bias. The State also argues that Ms. Smith did not materially change her testimony, and that there was sufficient evidence besides her testimony to support conviction, making any error harmless.

Finally, the State argues that the evidence was sufficient to support a factual finding that appellant had made a substantial step beyond mere preparation toward manufacturing methamphetamine. It contends that this case's combination of methamphetamine ingredients and appellant's flight from police allow that finding.

III.

We review the trial court's decision whether to admit relevant evidence under an abuse of discretion standard. *Taneja v. State*, 231 Md. App. 1, 11 (2016). A trial judge abuses its discretion by "exercis[ing] discretion in an arbitrary or capricious manner or . . . act[ing] beyond the letter or reason of the law." *Cooley v. State*, 385 Md. 165, 175 (2005)

(quoting *Jenkins v. State*, 375 Md. 284, 295–96 (2003)). To apply this standard, we will not second-guess any reasonable ruling on the admission of evidence, even if it could have gone the other way. *Peterson v. State*, 196 Md. App. 563, 585 (2010).

The Fifth Amendment to the United States Constitution guarantees that “[n]o person . . . shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law.”

We hold that the judge erred in compelling Ms. Smith to testify when she pled the Fifth Amendment. For a trial court to rule that the privilege does not apply, it must be “perfectly clear, from a careful consideration of all the circumstances in the case, that the witness is mistaken, and that the answer(s) cannot possibly have such tendency to incriminate.” *Richardson v. State*, 285 Md. 261, 267 (1979). The privilege extends not only to answers that fully support a conviction, but also to those that furnish “a link in the chain of evidence” supporting such a conviction. *Hoffman v. United States*, 341 U.S. 479, 486 (1951). The Court of Appeals has held that placing the witness at the scene of a crime provides such a link in a *Hoffman* analysis. *Richardson*, 285 Md. at 268. Ms. Smith’s testimony that she saw appellant make and sell methamphetamine is not sufficient to convict her on any charges related to appellant’s activities, but it does place her at the scene of crimes, which has a tendency to incriminate her. Because the testimony has a tendency to incriminate her, the judge abused his discretion in compelling her testimony.

The State indicated that it did not intend to prosecute Ms. Smith for charges related to the trailer’s methamphetamine activity and that it would offer her immunity if it needed to, but it never actually immunized Ms. Smith, leaving her at risk of self-incrimination.

“[A] prosecuting attorney’s indication in a particular case that he will not prosecute [is] not sufficient to defeat a claim of privilege under the standards of *Hoffman*.” *Choi v. State*, 316 Md. 529, 538 (1989). Ms. Smith remained in danger of self-incrimination and should have received Fifth Amendment protection.

The trial court committed an error, but appellant must have standing to appeal that error. Although appellant does not have standing to assert Ms. Smith’s Fifth Amendment right against self-incrimination (each person holds her own right, *Pinder v. State*, 70 Md. App. 218, 226–28 (1987)), “under certain circumstances the violation of another’s [F]ifth [A]mendment rights may rise to the level of a violation of defendant’s constitutional right to a fair trial” guaranteed by the Fifth Amendment’s Due Process Clause. *Id.* at 228.

In *Dickson v. State*, 188 Md. App. 489 (2009), this Court found that admitting critical evidence could prejudice a defendant’s defense sufficiently to warrant a new trial. *Id.* at 518. In that case, improperly compelling a witness to testify allowed the State to admit her prior inconsistent statements, which proved to be “critical pieces of evidence” against the defendant. *Id.* Ms. Smith’s eyewitness testimony of appellant’s manufacture and sale of methamphetamine provided the only direct evidence that he engaged in the illegal activity, as opposed to merely being in the same place as ingredients and residue. That testimony is probative enough to be critical to the State’s case. Thus, the violation of Ms. Smith’s Fifth Amendment right in turn violated appellant’s right to a fair trial, and he has standing to appeal the error.

We hold that this error was not harmless. An error cannot be harmless “unless a reviewing court, upon its own independent review of the record, is able to declare a belief,

beyond a reasonable doubt, that the error in no way influenced the verdict.” *State v. Mazzone*, 336 Md. 379, 400 (1994). In the case *sub judice*, the State said it would rest its case and not call its expert witnesses if Ms. Smith did not testify, suggesting how important it considered her testimony. The prior witnesses, all law enforcement, had testified to seeing appellant at the trailer and the materials and residue found in the trailer. No other evidence established that he owned or used the materials at the trailer, much less manufactured or sold methamphetamine. We cannot say beyond a reasonable doubt that Ms. Smith’s improperly admitted testimony in no way influenced the verdict. *See Dorsey v. State*, 276 Md. 638, 659 (1976).

IV.

We turn to appellant’s claim that the evidence was not sufficient to support the judgment of conviction. We review the sufficiency of evidence by asking “whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.” *Tichnell v. State*, 287 Md. 695, 717 (1980). This review includes Ms. Smith’s improperly admitted testimony. In *Emory v. State*, 101 Md. App. 585 (1994), Judge Charles E. Moylan, Jr., explained that upon appellate review of the sufficiency of the evidence, incorrectly admitted evidence is still considered for sufficiency as follows:

“[S]uch evidence should not have been admitted. At a retrial, it will not be admitted. At the moment, however, we are assessing the legal sufficiency of the evidence not at the trial that *will* be, but at the trial that *was*. This is one of those rare occasions when the propriety of the evidence has nothing to do

with the weight we may give it or, indeed, with whether we may give it any weight. We measure that legal sufficiency on the basis of all of the evidence in the case, that which was improperly admitted just as surely as that which was properly admitted.”

Id. at 629–30; *see also Lockhart v. Nelson*, 488 U.S. 33 (1988).

Ms. Smith’s testimony that she saw appellant make methamphetamine, along with the other evidence in the case, is sufficient to provide a basis for convicting appellant on the attempted manufacture charge.

**JUDGMENTS OF THE CIRCUIT COURT
FOR CAROLINE COUNTY REVERSED.
CASE REMANDED TO THAT COURT
FOR A NEW TRIAL. COSTS TO BE PAID
BY CAROLINE COUNTY.**