IN THE COURT OF APPEALS OF IOWA

No. 3-792 / 12-1745
Filed October 23, 2013

STATE OF IOWA,
Plaintiff-Appellee,

vs.

THADDEUS DYLAN USHER,
Defendant-Appellant.

Appeal from the Iowa District Court for Clayton County, Margaret L. Lingreen, Judge.

Thaddeus Usher appeals his conviction following a jury trial for manufacturing a controlled substance (methamphetamine), in violation of Iowa Code section 124.401(1)(c)(6) (2009). **REVERSED AND REMANDED FOR DISMISSAL.**

Mark C. Smith, State Appellate Defender, and Vidhya K. Reddy, Assistant Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Darrel Mullins, Assistant Attorney General, Alan Heavens, County Attorney, for appellee.

Heard by Vogel, P.J., and Danilson and Mullins, JJ.

VOGEL, P.J.

Thaddeus Usher appeals his conviction following a jury trial for manufacturing a controlled substance (methamphetamine), in violation of Iowa Code section 124.401(1)(c)(6) (2009). Usher claims the district court erred in denying his motion to dismiss based on double jeopardy and merger grounds, because he previously pleaded guilty to possession of methamphetamine based on the same facts. Usher further asserts the district court erred when it found sufficient evidence to support the manufacturing conviction, and when it declined to issue a jury instruction outlining possession as a lesser included offense of manufacturing. Finally, Usher argues trial counsel was ineffective when he failed to make evidentiary objections to various testimony, as well as when he failed to request a spoliation instruction. Because we find the Double Jeopardy Clause and merger doctrine barred Usher's second prosecution for manufacturing methamphetamine following his guilty plea to possession, we need not reach the merits of Usher's other claims. We reverse and remand for dismissal.

I. Factual and Procedural Background

At trial, the jury could have found the following facts. On December 1, 2009, after receiving a tip from a confidential informant, police conducted a search of the trashcans outside the residence of Kevin Meder. They found several rolled up coffee filters, portions of miniature baggies, razor blades, pieces of folded-up tinfoil, one of which had black residue on it, and a meat wrapper containing the name Jim Stegger. On December 22, police again searched the trash and found multiple coffee filters, several pieces of tinfoil with a white substance that tested positive for methamphetamine, a twenty-ounce bottle with

a hole in the cap, rubber tubing matching the hole in the bottle cap, pseudoephedrine bubble packs, empty lithium battery packages, two rubber gloves, miniature baggies, and two receipts showing the purchase of pseudoephedrine by Kevin Meder and Scott Pierce. Police searched the trashcans for a third time on December 29 and found more of the same items, as well as additional papers for Scott Pierce. Based on this evidence, law enforcement obtained a search warrant for the residence to look for items linked to the use, manufacture, or sale of methamphetamine.

On December 29, police executed the search warrant. Upon entering the house, officers observed Meder, Roger Tomkins, and Usher in the living room, as well as "some tinfoil . . . that appeared to have methamphetamine on it" and drug paraphernalia on the coffee table. Police also detected a haze of methamphetamine smoke in the air. Investigator Mark Kautman asked Usher "if there [are] any hazardous chemicals or containers that may be dangerous if law enforcement officers come about them." Usher replied "there [were] items in his room and walked [the officers] over there."[1]

Police proceeded to search the room. Usher "pointed out some areas where some items may be," and officers noted "a little locked box" and empty glass jars. When asked what the jars were for, Usher responded "you know." At trial, Investigator Kautman testified the glass jars had a film or haze on their

[1] Usher was never asked, and never explicitly stated, whether he was living at the house. However, at trial, Officer Derek Chambers testified police received information from the confidential informant that Usher had been with Meder earlier the day of December 29, and that he had been living at Meder's residence for the past month. The informant did not testify at trial, though, nor did police have independent information corroborating this testimony.

surface, which is consistent with what appears "on and around everything that's near" where methamphetamine is manufactured, and that these jars can be used in the manufacturing process. However, these jars were never tested for methamphetamine, fingerprinted, or preserved for evidence, as law enforcement destroyed them because they likely contained hazardous material.

Also in the bedroom, police found two small bags containing a powdery substance that tested positive for methamphetamine, as well as a small glass vial containing a white powder that was never tested. Investigator Kautman testified the methamphetamine found in one of the bags was somewhat wet and had likely been manufactured in the past eight to ten hours. This was consistent with the fact the bags also tested positive for "CMP," a by-product resulting from methamphetamine produced using the metal-ammonia reduction method with ephedrine, lithium, and anhydrous ammonia. Other items consistent with manufacturing methamphetamine were found elsewhere in the house, such as the basement and Meder's bedroom.

After completing the search of the residence, officers transported Usher to the police station, where Usher admitted "[t]hat he had been using that evening and the [glass mason jars] that were found in his room did contain methamphetamine." Usher was then charged with possession of drug paraphernalia and possession of methamphetamine in violation of Iowa Code section 124.401(5). He pleaded guilty to the possession charge on June 22, 2010, and was sentenced the same day.

Because of some miscommunication between the city police officer and the county sheriff's office, the DCI lab report stating the confiscated items

contained substances consistent with the manufacture of methamphetamine was not received by the city police until November 11, 2010. On December 27, 2010, a criminal complaint was filed charging Usher with manufacturing methamphetamine, and a trial information was filed on January 5, 2011. The trial information was subsequently amended to charge Usher as a habitual offender pursuant to Iowa Code section 902.8, and included the section 124.411 sentencing enhancement for second or subsequent offenses. The amendment also changed the offense date from December 27 to December 29, 2009.

Usher filed a motion to dismiss on May 15, 2012, claiming the prior conviction for possession of methamphetamine barred the instant prosecution under double jeopardy and merger principles. The district court denied his motion and the case proceeded to trial on May 17. At the close of the State's case and again at the close of all the evidence, Usher moved for a judgment of acquittal on the ground the evidence was insufficient to establish that he personally took part in manufacturing the methamphetamine. The district court denied the motion. Usher also requested the jury be instructed that possession is a lesser included offense of manufacturing. The district court denied this request as well, relying on its previous ruling that possession is not a lesser included offense of manufacturing. The jury returned a guilty verdict on May 18, 2012.

On June 13, 2012, Usher filed a motion for a new trial and in arrest of judgment, which again asserted the claims outlined above. A hearing was held, and on August 21, 2012, the court issued an order denying Usher's motions.

Usher was sentenced on September 13, 2012, to an indeterminate term not to exceed fifteen years, with a mandatory minimum of three years.

Usher now appeals, asserting several bases of error. He first claims the district court erred in denying his motion to dismiss based on double jeopardy and merger grounds, because he had previously pleaded guilty to possession of methamphetamine based on the same facts. Usher further claims the district court erred when it found a sufficient factual basis to support the conclusion Usher personally manufactured the methamphetamine, and when it declined to issue a jury instruction outlining possession as a lesser included offense of manufacturing. Finally, Usher argues trial counsel was ineffective when he failed to make evidentiary objections to various testimony, as well as when he failed to request a spoliation instruction.

II. Whether the Possession Conviction Barred the Prosecution for Manufacturing Methamphetamine

Usher argues the possession of methamphetamine charge is a lesser included offense of manufacturing methamphetamine, such that the Double Jeopardy Clause of the United States Constitution prohibits the successive prosecution of manufacturing methamphetamine following Usher's plea and sentence to the possession charge. Additionally, both the double jeopardy and merger doctrines prohibit the successive punishment that occurred after sentence was already entered on the lesser included possession offense. The State responds possession is not a lesser included offense of manufacturing because it is conceivable a defendant could be guilty of manufacturing without

actually possessing the controlled substance; therefore, the double jeopardy and merger doctrines do not bar the manufacturing conviction.

A. Standard of Review

We review constitutional double jeopardy claims de novo and merger claims for correction of errors at law. *State v. Finnel*, 515 N.W.2d 41, 43 (Iowa 1994).

B. Whether Possession is a Lesser Included Offense of Manufacturing

The Double Jeopardy Clause in both the United States and Iowa Constitutions protect against cumulative punishment and successive prosecutions for the same offense. U.S. Const. amend. V;[2] Iowa Const. art. I, § 12; *Brown v. Ohio*, 432 U.S. 161, 165 (1977) (the Double Jeopardy Clause of the United States Constitution prohibits "multiple punishments for the same offense" and "a second prosecution for the same offense after acquittal . . . . [or] conviction." (internal citations omitted)); *State v. Lindell*, 828 N.W.2d 1, 4 (Iowa 2013) (stating the Iowa Constitution's double jeopardy provision is distinct from the federal constitution and "merely requir[es] that '[n]o person shall after acquittal, be tried for the same offence'" (quoting Iowa Const. art. I, § 12)). The merger doctrine is codified in Iowa Code section 701.9 and Iowa Rule of Criminal Procedure 2.6(2), and prohibits conviction for both a public offense and a lesser included offense. Iowa Code § 701.9; Iowa R. Crim. P. 2.6(2); *State v. Bullock*, 638 N.W.2d 728, 731 (Iowa 2002).

[2] This provision is applicable to the states through the Due Process Clause of the Fourteenth Amendment. *Benton v. Maryland*, 395 U.S. 784, 794 (1969).

Because the merger statute "codifies the double jeopardy protection against cumulative punishment," we analyze double jeopardy and merger claims in the same manner. *State v. Gallup*, 500 N.W.2d 437, 445 (Iowa 1993). "If the Double Jeopardy Clause is not violated because the legislature intended double punishment, section 701.9 is not applicable and merger is not required." *State v. Halliburton*, 539 N.W.2d 339, 344 (Iowa 1995). Therefore, we must determine whether the two offenses at issue are the same, that is, we must resolve whether the crimes satisfy the "legal elements test" for lesser included offenses. *Blockburger v. United States*, 284 U.S. 299, 304 (1932); *Bullock*, 638 N.W.2d at 731–32. "To apply the legal elements test for lesser included offenses, we compare the elements of the two offenses to determine whether it is possible to commit the greater offense without also committing the lesser offense." *Halliburton*, 539 N.W.2d at 344.

When reviewing whether the elements are the same, we must take into consideration how the State charged each offense. *State v. Anderson*, 565 N.W.2d 340, 343–44 (Iowa 1997). "When a statute provides alternative ways of committing the offense, the alternative submitted to the jury controls." *Id.* at 344. Consequently, when there has been a jury trial, our inquiry "may logically begin with the court's marshaling instruction on the greater offense." *State v. Turecek*, 456 N.W.2d 219, 223 (Iowa 1990).

Iowa Code section 124.401(5), the possession charge to which Usher pleaded guilty in 2010, states:

> It is unlawful for any person knowingly or intentionally to possess a controlled substance unless such substance was obtained directly from, or pursuant to, a valid prescription or order of a practitioner

> while acting in the course of the practitioner's professional practice, or except as otherwise authorized by this chapter.

Iowa Code § 124.401(5). Section 124.401(1), the subsection upon which Usher's manufacturing conviction was based, states that "it is unlawful for any person to manufacture, deliver, or possess with the intent to manufacture or deliver, a controlled substance, a counterfeit substance, or a simulated controlled substance . . . ." *Id.* § 124.401(1). Specifically, the jury instruction employed in this case required the jury to find: "1) On or about the 29th day of December, 2009, the Defendant Thaddeus Dylan Usher manufactured methamphetamine. 2) The Defendant knew that the substance he manufactured was methamphetamine."[3]

With respect to the actual elements of the two crimes, to be guilty of possession, the State must prove the defendant 1) exercised dominion and control over the controlled substance, 2) had knowledge of its presence, and 3) had knowledge the material was a controlled substance. *State v. Bash*, 670 N.W.2d 135, 137 (Iowa 2003). To prove the defendant manufactured a controlled substance, the State must show the defendant knowingly manufactured a substance he knew was a controlled substance. *See State v. Royer*, 632 N.W.2d 905, 907 (Iowa 2001). Our supreme court has also held that,

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[3] This instruction indicates Usher was charged under the first part of subsection one, rather than the crime of conspiracy under the portion of subsection one that makes it unlawful "to act with, enter into a common scheme or design with, or conspire with one or more other persons to manufacture, deliver, or possess with the intent to manufacture or deliver a controlled substance, a counterfeit substance, or a simulated controlled substance." Iowa Code § 124.401(1); *see also State v. Maghee*, 573 N.W.2d 1, 7 (Iowa 1997) (holding a defendant can only be convicted of one violation of section 124.401(1)); *State v. Williams*, 305 N.W.2d 428, 431 (Iowa 1981) (holding that, to comply with double jeopardy principles, a defendant can only be sentenced for one crime under Iowa Code section 204.401(1), Iowa's drug trafficking statute as it existed then).

to be guilty of manufacturing five grams or more of methamphetamine in violation of Iowa Code section 124.401(1)(b)(7), "[i]t is necessary to show that the manufacturing process in fact yielded five grams or more of methamphetamine, its salts, isomers or salts of isomers, or analogs of methamphetamine . . . ." *Id.* at 909. That is, to be guilty of a manufacturing offense, an actual controlled substance must be produced. *Id.*; *see also State v. Kern*, 831 N.W.2d 149, 162 (Iowa 2013) (stating that "manufacturing involves affirmative acts or an activity."). Furthermore, manufacturing is defined as:

> [T]he production, preparation, propagation, compounding, conversion, or processing of a controlled substance, either directly or by extraction from substances of natural origin, or independently by means of chemical synthesis, or by a combination of extraction and chemical synthesis, and includes any packaging or repackaging of the substance or labeling or relabeling of its container . . . .

Iowa Code § 124.101(18).

Under the elements outlined above and given the specific facts of this case, we agree with Usher's contention that possession is a lesser included offense of manufacturing. To be guilty of manufacturing a controlled substance, pursuant to the first part of Iowa Code section 124.401(1) and under controlling case law, the defendant must produce an actual controlled substance. *Royer*, 632 N.W.2d at 909. Once the drug is created, the defendant knowingly possesses it, either actually or constructively. Therefore, despite the fact the statute does not expressly state the defendant must possess the controlled substance in order to manufacture it, we find possession is a lesser included offense of the crime of manufacturing under the first part of section 124.401(1). *See, e.g.*, *State v. Franzen*, 495 N.W.2d 714, 717 (Iowa 1993) (holding that

possession is a lesser included offense of failure to affix a drug tax stamp, and stating that "[a]lthough this subsection does not expressly require that the defendant 'knowingly or intentionally' possess a controlled substance, the State is required to prove both that the defendant knowingly or intentionally possessed a controlled substance, and that the defendant knew the substance he or she possessed was a controlled substance in the prosecution of charges under either [possession] or [manufacturing, delivering, or possession with intent to deliver]").

The State maintains this conclusion is precluded by a prior decision of this court that held possession is not a lesser included offense of manufacturing. *See State v. Spivie*, 581 N.W.2d 205, 209 (Iowa Ct. App. 1998) *abrogated on other grounds by State v. Webb*, 648 N.W.2d 72, 79 (Iowa 2002).[4] In that case, we reasoned "it [is] conceivable a defendant might be a part of the manufacture of a controlled substance by financing the manufacture without being in actual possession of the illegal substance." *Id.* However, there was no indication of which alternative of section 124.401(1) applied, that is, manufacturing or conspiracy to manufacture. It is indeed conceivable a defendant could be guilty of conspiring to manufacture and not ever possess the controlled substance. This proposition is also consistent with the statutory definition of manufacturing, which includes "preparation" as a method of manufacturing a controlled substance. Here, though, under the alternative charged to the Usher jury, methamphetamine had to have actually been produced, and so Usher must have necessarily possessed it, rendering the facts of *Spivie* distinguishable.

[4] We note our supreme court has stated, in regard to *Spivie*, that it "is no longer good law to the extent that its holding would apply to jointly occupied premises." *Kern*, 831 N.W.2d at 163.

Additionally, many of our sister states have held possession is a lesser included offense of manufacturing. *See Craig v. State*, 863 S.W.2d 825, 827 (Ark. 1993) (holding the defendant's "conviction for the possession offense is a lesser included offense of manufacturing; therefore, the manufacturing offense was barred by the double jeopardy clause."); *Patton v. People*, 35 P.3d 124, 131 (Colo. 2001) ("[W]e can envision no scenario in which an individual can manufacture methamphetamine without also possessing it."); *Mudd v. State*, 483 N.E.2d 782, 784 (Ind. Ct. App. 1985) (same); *Beaty v. Commonwealth*, 125 S.W.3d 196, 212–13 (Ky. 2003); *Spear v. Commonwealth*, 270 S.E.2d 737, 742 (Va. 1980) (noting "the intentional possession of methamphetamine is a lesser included offense of manufacturing").[5] We agree with this logic, and therefore find possession is a lesser included offense of manufacturing.

C. Whether the Double Jeopardy Clause and Merger Doctrine Apply

The State contends that, even if possession is a lesser included offense, merger and double jeopardy principles do not apply because the possession and

[5] In the states that have come to the opposite conclusion, that is, possession is not a lesser included offense of manufacturing, the crime of manufacturing can be committed in those states without actually possessing the controlled substance. *See Galbreath v. State*, 443 S.E.2d 664, 665–66 (Ga. Ct. App. 1994) (holding possession is not a lesser included offense of manufacturing marijuana because a defendant can be guilty of manufacturing marijuana simply by cultivating or planting seeds); *State v. Davis*, 72 P.3d 1134, 1137–38 (Wash. Ct. App. 2003) (holding possession is not a lesser included offense of manufacturing because under applicable Washington statutes, manufacturing can be committed if a defendant is working with lab equipment and partially processed methamphetamine; therefore, it is possible to be guilty of manufacturing without possessing the controlled substance). Under Iowa statute and case law, however, a controlled substance must actually be produced before a defendant can be guilty of manufacturing, rendering it impossible to commit the offense of manufacturing without at least constructively possessing the controlled substance. *See, e.g.*, *Kern*, 831 N.W.2d at 162; *Royer*, 632 N.W.2d at 909. Therefore, the cases from other jurisdictions that come to the opposite conclusion are distinguishable, given the differences in controlling statutes and case law.

manufacturing convictions were predicated on different evidence—the possession conviction was limited to the drugs found in the living room, whereas the manufacturing charge was based on the methamphetamine found elsewhere in the residence. While the Double Jeopardy Clause will not bar subsequent prosecutions when they are based on different factual scenarios, we do not believe this exception applies here. *See State v. Smith*, 573 N.W.2d 14, 19 (Iowa 1997) ("[M]ultiple punishments can be assessed after a defendant is convicted of two offenses that are not the same.").

Here, the underlying facts do not show distinct evidence under which Usher could have been charged with different crimes. The wording in the charging instruments, as well as the testimony and exhibits admitted at trial, support this conclusion. The complaint regarding the possession charge alleged: "Usher did have in his possession a clear plastic tube used for ingesting methamphetamine along with a white powdery substance, which field tested positive for methamphetamine. Usher had razors with burnt residue and burnt tin foil that is used in ingesting methamphetamine." The minutes of testimony reflect the complaint, stating:

> Officer Chambers will testify that Thaddeus Dylan Usher had in his possession a clear plastic tube used for ingesting methamphetamine along with a white powdery substance that later field tested positive for methamphetamine and that Mr. Usher had razors with burnt residue and burnt tin foil that are used for ingesting methamphetamine.

In his plea, Usher stipulated to the minutes of testimony. Additionally, the complaint charging Usher with manufacturing methamphetamine stated:

> [M]aterials were recovered from the residence that are possibly used in the manufacturing of Methamphetamine. The items were

> sent to the DCI Laboratories to be chemically tested and the tests came back positive for the use in manufacturing of Methamphetamine. Also recovered in the search warrant was a total of 1.17 grams of manufactured methamphetamine.

This record does not distinguish between the methamphetamine found in the living room versus Usher's room, nor does it state what methamphetamine, found where, was used as the basis for each charge. Specifically, neither the complaint nor minutes of testimony limit the possession charge to the methamphetamine found in the living room—the "white powdery substance" could just as easily have been the methamphetamine contained in the glass vial found in Usher's room. The complaint for the manufacturing charge also does not base the charge solely on the methamphetamine found in Usher's room. Rather, it relies on the total amount of methamphetamine found at the residence, given it states the total quantity is 1.17 grams. This amount necessarily includes the methamphetamine in the living room. Therefore, while we recognize it may be possible to base different charges on discrete units of a controlled substance found in the same house, *see State v. Bundy*, 508 N.W.2d 643, 643–44 (Iowa 1993), the record here does not support this finding.

The State, though, relies on the testimony of Officer Derek Chambers, who stated in the hearing on the motion to dismiss that the possession prosecution was limited to the methamphetamine found in the living room. However, not only was the manufacturing complaint not limited to the methamphetamine found elsewhere in the house, the jury heard about the methamphetamine found in the living room when the DCI lab report was admitted, as well as when they heard Officer Kautman's testimony. The report

showed a "Smoking Device with Residue described as Burnt tin foil believed to be used to ingest methamphetamine" that "was found to contain methamphetamine, pseudoephedrine and CMP." Additionally, Officer Kautman testified he observed "some tinfoil that was laying on the coffee table that appeared to have methamphetamine on it." When asked about the chemical analysis of the residue found on the tinfoil, he stated it was "the end result of the manufacturing process . . . ." Furthermore, the officers were well aware of the methamphetamine and paraphernalia found in Usher's room before he was charged with possession. Therefore, while it is possible for some evidence to overlap to prove different charges, the record in this case provides no clear distinction so as to determine the particular methamphetamine on which the jury based its verdict.

We further note "[t]he Double Jeopardy Clause is not such a fragile guarantee that prosecutors can avoid its limitations by the simple expedient of dividing a single crime into a series of temporal or spatial units." *Brown*, 432 U.S. at 169 (holding separate prosecutions for one incident of stealing a vehicle under the law as written, even though the crime spanned a period of nine days, was barred by the Double Jeopardy Clause). We find this maxim instructive in this case. Therefore, the Double Jeopardy Clause and merger doctrine apply, and acted as a bar to Usher's conviction and sentence for manufacturing methamphetamine following his guilty plea to possession.

D. Applicability of Statutory Provisions

The State further relies on *Franzen* for the proposition the statutory provisions codifying the merger and double jeopardy principles do not apply,

considering the court in *Franzen* stated: "While [section 701.9] may bar conviction of the lesser included offense if the defendant is convicted of the greater offense, it does not prevent prosecution of the greater offense." *Franzen*, 495 N.W.2d at 719. The *Franzen* court also held Iowa Code section 816.1 "prohibits prosecution of the same or lesser included offense when the defendant has been convicted of the greater offense; it does not preclude prosecution of the greater offense upon conviction of the lesser offense." *Id.* However, the underlying facts and application of these legal principles differ substantially from our present case. The defendants in *Franzen* were charged with multiple counts in the same instrument and there were no successive punishments. *Id.* at 716–17. Specifically, the *Franzen* court noted: "When a defendant is *charged in multiple counts*, special circumstances may remove the case from the general principles of double jeopardy." *Id.* at 717 (emphasis added) (relying on *Ohio v. Johnson*, 467 U.S. 493, 500 (1984), which held double jeopardy principles do not bar a state from prosecuting a defendant for multiple offenses in a *single* prosecution); *see also State v. Trainer*, 762 N.W.2d 155, 158–59 (Iowa Ct. App. 2008) (holding the Double Jeopardy Clause did not bar the subsequent prosecution of the burglary charge following the defendant's guilty plea to the lesser-included offense of trespass, considering she was charged in the same instrument and the plea to the lesser-included offense was an attempt to avoid being prosecuted for the greater offense of burglary).

Franzen and the statutory provisions cited by the State are applicable to the line of cases in which a defendant is charged in one instrument with multiple counts and there are no successive punishments for both a lesser included and

greater offense. Here, however, Usher pleaded guilty to possession, was sentenced, and nearly two years later was prosecuted for manufacturing based on the same facts, as opposed to being charged with possession and manufacturing in the same charging instrument or in the same time frame. It is this scenario on which we rely in holding the Double Jeopardy Clause does not allow the subsequent manufacturing conviction. Therefore, *Franzen* and the line of cases it supports do not apply such that the Double Jeopardy Clause and statutory provisions do not bar Usher's subsequent conviction and sentence for manufacturing.

Based on these conclusions, we find the district court erred in holding double jeopardy and merger principles did not bar the subsequent prosecution for manufacturing. Because we are reversing on double jeopardy grounds, we need not reach the merits of Usher's other claims. However, were we to reach the issue of whether substantial evidence supports Usher's manufacturing conviction, as the special concurrence aptly states, the conviction could be reversed on those grounds as well.

REVERSED AND REMANDED FOR DISMISSAL.

Mullins, J., concurs; Danilson, J., concurs specially.

DANILSON, J. (concurring specially)

I specially concur in the result—the reversal of Usher's conviction for manufacturing methamphetamine—but for reasons different than those of the majority. I do not believe it is necessary to reach the double jeopardy and merger issues as there was insufficient evidence to support the conviction of manufacturing methamphetamine. Although the State may have established that methamphetamine had been manufactured by someone in the residence, the existence of evidence of the manufacturing process in the trash can outside the house does not necessarily lead to the conclusion that Usher participated in it or that it necessarily occurred in the house. There were several individuals residing in the residence and the two pseudoephedrine receipts found in the trash identified two other residents as the purchasers of the precursor. "Joint possession of a premises where the manufacturing of a controlled substance occurs would not alone support an inference that a joint occupant participated in the manufacturing of the controlled substance." *State v Kern*, 831 N.W.2d 149, 163 (Iowa 2013).

Moreover, Usher's possession of methamphetamine and two jars that can be used in the manufacturing process at best establishes his passive knowledge; it does not establish any affirmative act of manufacturing. *See id*. at 162 (concluding that manufacturing is an "active concept, requiring more than mere passive knowledge of the defendant" and "requires proof of an affirmative act of manufacturing"). The film or haze on the jars, supposedly consistent with what appears near where methamphetamine is manufactured, was not tested. There was also no evidence of who used the jars or when the jars were used. Usher

was clearly guilty of possession of methamphetamine, but there was no evidence that he made an affirmative act of manufacturing, just evidence that suggested someone somewhere sometime may have manufactured methamphetamine in the past.

I view the evidence too tenuous and speculative, even considering the evidence in a light most favorable to the State. I would reverse the conviction for manufacturing methamphetamine as there was insufficient evidence to support the guilty verdict beyond a reasonable doubt. *See id*. at 158.