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**STATE OF MINNESOTA
IN COURT OF APPEALS
A13-0763**

State of Minnesota,
Respondent,

vs.

Joseph Michael Malmø,
Appellant.

**Filed May 12, 2014
Affirmed in part, reversed in part, and remanded
Bjorkman, Judge**

Clearwater County District Court
File No. 15-CR-12-277

Lori Swanson, Attorney General, Michael Everson, Assistant Attorney General, St. Paul, Minnesota; and

Richard C. Mollin, Clearwater County Attorney, Bagley, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Davi E. Axelson, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Bjorkman, Presiding Judge; Ross, Judge; and Hooten, Judge.

UNPUBLISHED OPINION

BJORKMAN, Judge

Appellant challenges his four controlled-substance convictions, arguing that (1) the evidence is insufficient to support his convictions of methamphetamine

manufacturing and methamphetamine crime involving children and (2) the district court erred by convicting him of attempted methamphetamine manufacturing and possession of methamphetamine precursors because they are lesser-included offenses of methamphetamine manufacturing. We reverse and remand for vacation of his attempted-methamphetamine-manufacturing adjudication but otherwise affirm.

FACTS

On June 7, 2012, a concerned person contacted the White Earth Police Department about a verbal confrontation between appellant Joseph Malmo and his fiancé Misty Littlewolf. Before police could respond, Malmo left the scene with Littlewolf and two children. Officer Kristopher Larson located Malmo's van parked in a wooded area near Island Lake. As he approached the van, he observed Malmo in the driver's seat and an infant in a car seat located on the ground near the van. Malmo was wearing a heavy duty rubber glove and holding a propane torch and a silver folding knife. Officer Larson smelled a "strong chemical odor" from Malmo that was consistent with methamphetamine manufacturing. Malmo lit a cigarette with the propane torch. He told Officer Larson that he was camping with Littlewolf and the two children. There were no other people in the area and Officer Larson did not observe food or other signs that Malmo was camping. Littlewolf was near the lake with the toddler-aged child.

There were two fires near the van: one 15 feet from the van and a second fire 20 to 25 feet from the van. Malmo initially told Officer Larson that he lit both fires. Officers found methamphetamine-manufacturing materials in and around a tree ten feet from the second fire. The items included a tube hanging from the tree, a plastic bag containing a

plastic bottle with “Y-U-K” written on the side and a clear liquid inside, a plastic one-liter bottle approximately one-quarter full of an unknown white chunky substance, white tissues, and tin foil. Malmo said he had seen the items but did not know what they were, and denied lighting or even being near the second fire. A lit cigarette butt matching the brand that Malmo was smoking was found near the second fire.

Malmo was arrested and paramedics brought the children to a hospital as a precaution. The items found near the second fire were sent to the Minnesota Bureau of Criminal Apprehension for analysis, and a forensic scientist identified the clear liquid as methamphetamine. Investigator Chris Benson of the White Earth Police Department testified about the one-pot cook method of manufacturing methamphetamine, which involves using a solvent to extract pseudoephedrine or ephedrine from cold medications or similar substances. The one-pot method produces a liquid form of methamphetamine, which is then converted or dried into a solid form using hydrochloric gas. Methamphetamine is useable once it is converted to a solid. Investigator Benson also testified that every item necessary to produce methamphetamine was at the scene, but that the final step needed to make the methamphetamine useable was not completed. The state also introduced evidence that Malmo purchased ten loratadine pills, which contain pseudoephedrine, at a pharmacy in Bemidji on May 23, 2012.

The jury found Malmo guilty of manufacturing methamphetamine, attempted manufacturing of methamphetamine, possession of a precursor substance with intent to manufacture methamphetamine, and committing a methamphetamine-related crime involving children. The district court adjudicated convictions on each count and

sentenced Malmo to 110 months for the manufacturing offense and a concurrent term of 21 months for the methamphetamine crime involving children.

D E C I S I O N

I. Sufficient evidence supports Malmo’s convictions of methamphetamine manufacturing and methamphetamine crime involving children.

When the sufficiency of the evidence is challenged, we carefully analyze the record to determine whether the jury could reasonably find the defendant guilty of the offense charged based on the facts in the record and the legitimate inferences that can be drawn from them. *State v. Buckingham*, 772 N.W.2d 64, 71 (Minn. 2009). We view the evidence in the light most favorable to the conviction, assuming that the jury believed the state’s witnesses and disbelieved any evidence to the contrary. *State v. Chambers*, 589 N.W.2d 466, 477 (Minn. 1999). Interpretation of a criminal statute is a question of law, which we review de novo. *State v. Rucker*, 752 N.W.2d 538, 545 (Minn. App. 2008), *review denied* (Minn. Sept. 23, 2008). We interpret the words and phrases in a statute in accordance with their plain and ordinary meaning; if a statute is unambiguous, we apply its plain language. *Johnson v. State*, 820 N.W.2d 24, 26 (Minn. App. 2012). Any “reasonable doubt concerning legislative intent should be resolved in favor of the defendant.” *State v. Colvin*, 645 N.W.2d 449, 452 (Minn. 2002).

A. Methamphetamine Manufacturing

Malmo argues that the evidence is not sufficient to support his manufacturing conviction because the state did not prove that the manufacturing process was complete

or that he produced useable methamphetamine.¹ A person is guilty of a first-degree controlled-substance crime “if the person manufactures any amount of methamphetamine.” Minn. Stat. § 152.021, subd. 2a(a) (2012). “‘Manufacture,’ in places other than a pharmacy, means and *includes* the production, cultivation, quality control, and standardization by mechanical, physical, chemical, or pharmaceutical means, packing, repacking, tableting, encapsulating, labeling, relabeling, filling, or by other process, of drugs.” Minn. Stat. § 152.01, subd. 7 (2012) (emphasis added).

Malmo first contends that the statutory definition of manufacture must be construed in the conjunctive; the state must prove the defendant completed all the listed processes (production, cultivation, quality control, and standardization of methamphetamine) to sustain a conviction. We are not persuaded. The legislature’s use of “includes” indicates the terms that follow are not an exclusive list. *See LaMont v. Indep. Sch. Dist. No. 728*, 814 N.W.2d 14, 19 (Minn. 2012) (“The word ‘includes’ is not exhaustive or exclusive.”); *The American Heritage Dictionary* 888 (5th ed. 2011) (defining “include” as “[t]o contain or take in as a part, element, or member” and “[t]o consider as part of or allow into a group or class”). The word “includes” implies a disjunctive conjunction to form a list of alternative and independently illegal manufacturing actions. This grammatical construction makes practical sense. The definition of manufacture applies to controlled substances other than methamphetamine. Minn. Stat. § 152.01, subd. 7. Construing the list following “includes” as alternatives

¹ At oral argument, Malmo conceded that the evidence is sufficient to support a conviction for attempted methamphetamine manufacturing.

reflects the varying processes used to manufacture different controlled substances. For instance, if we read the definition of manufacture as conjunctive, a person could never be convicted of manufacturing methamphetamine because methamphetamine is not cultivated; it is created through a chemical process. *See The American Heritage Dictionary* 442 (5th ed. 2011) (defining cultivate as to grow or tend a plant or crop). Because the definition is not exclusive or exhaustive, a person may be convicted of manufacturing methamphetamine based on any of the enumerated processes or even methods that the statute does not list.

Malmo next argues that his conduct does not meet the definition of manufacture because he did not produce a useable form of methamphetamine. This argument is unavailing. First, the language of the manufacturing statute does not require that a person manufacture useable methamphetamine. *See* Minn. Stat. § 152.021, subd. 2a(a). Second, in the context of possession offenses, our supreme court has not required the state to prove the defendant had a useable form of the controlled substance. *See State v. Peck*, 773 N.W.2d 768, 773 (Minn. 2009) (holding that liquid bong water that tests positive for the presence of methamphetamine falls within the statutory definition of “mixture” for purposes of controlled-substance crimes); *State v. Traxler*, 583 N.W.2d 556, 562 (Minn. 1998) (concluding evidence was sufficient to prove that defendant possessed methamphetamine when liquids tested positive for methamphetamine and trace amounts of methamphetamine were found on coffee filters from defendant’s garage and truck); *State v. Siirila*, 292 Minn. 1, 8, 193 N.W.2d 467, 472 (1971) (holding that possession of

unusably small amount of marijuana is a crime). We discern no reason to distinguish the possession and manufacturing offenses as Malmo suggests.

We are also guided by the analysis of courts in other jurisdictions that, like Minnesota, model their controlled-substance laws on the Uniform Controlled Substances Act. *See State v. Ali*, 613 N.W.2d 796, 798-99 (Minn. App. 2000) (finding the reasoning in outside jurisdictions persuasive in interpreting Minnesota statute criminalizing possession of cathinone), *review denied* (Minn. Sept. 13, 2000). For example, the California appellate court affirmed the methamphetamine-manufacturing conviction of a defendant who was arrested at an intermediate stage of the manufacturing process. *People v. Lancellotti*, 19 Cal. App. 4th 809, 811-13 (Cal. App. 1993). The court noted that methamphetamine manufacturing is an “incremental and not instantaneous process.” *Id.* at 813; *see also State v. Martens*, 54 P.3d 960, 965 (Kan. 2002) (noting that definition of manufacture in the Uniform Controlled Substances Act does not require that product is in its final form to sustain a manufacturing conviction); *Robinson v. Commonwealth*, 181 S.W.3d 30, 36 (Ky. 2005) (finding no requirement that methamphetamine be in a useable form to establish methamphetamine manufacturing).

Because we do not read the manufacturing statute to require production of methamphetamine in a useable form and Malmo concedes that liquid methamphetamine was present at the scene, we conclude that sufficient evidence supports Malmo’s methamphetamine-manufacturing conviction.

B. Methamphetamine Crime Involving Children

Under Minn. Stat. § 152.137, subd. 2(b) (2012), “[n]o person may knowingly cause or permit a child . . . to inhale, be exposed to, have contact with, or ingest methamphetamine, a chemical substance, or methamphetamine paraphernalia.” A chemical substance means “a substance intended to be used as a precursor in the manufacture of methamphetamine or any other chemical intended to be used in the manufacture of methamphetamine.” Minn. Stat. § 152.137, subd. 1(b) (2012). Methamphetamine paraphernalia means “all equipment, products, and materials of any kind that are used, intended for use, or designed for use in manufacturing, injecting, ingesting, inhaling, or otherwise introducing methamphetamine into the human body.” *Id.*, subd. 1(d) (2012). Although the statute does not define expose, in its common usage it means “to subject or allow to be subjected to an action, influence, or condition.” *The American Heritage Dictionary* 625 (5th ed. 2011).

Malmo urges us to interpret the statute narrowly, arguing that the evidence of exposure is insufficient because the children did not require medical treatment and the liquid methamphetamine at the scene was in a sealed container. We are not persuaded. First, the statute does not require that a child need medical treatment to prove exposure to methamphetamine, and Malmo does not cite any legal support for this assertion. Second, the plain meaning of the term expose does not require direct contact with methamphetamine. It is undisputed that the bottle containing liquid methamphetamine was in close proximity to both the infant in a car seat and the toddler at the nearby lakeshore. And it is undisputed that all of the equipment and chemical precursors

necessary to manufacture methamphetamine were present at the scene. Officer Larson detected a strong odor of methamphetamine coming from within the van and from Malmo. Officer Benson testified that the chemicals involved in manufacturing methamphetamine are highly corrosive, capable of burning a person's lungs or skin, and that the mixture of chemicals is highly explosive. On this record, we conclude that sufficient evidence supports Malmo's conviction of exposing a child to methamphetamine and methamphetamine paraphernalia.

II. The district court erred by adjudicating Malmo's conviction of attempted methamphetamine manufacturing.

Malmo argues that if we do not reverse his manufacturing conviction, we should vacate his attempted-methamphetamine-manufacturing and possession-of-methamphetamine-precursors convictions because they are lesser-included offenses of methamphetamine manufacturing. A person may be convicted of either the crime charged, or a lesser-included offense, but not both. Minn. Stat. § 609.04, subd. 1 (2012). The legislature defines a lesser-included offense, in part, as “[a]n attempt to commit the crime charged; or . . . [a] crime necessarily proved if the crime charged were proved[.]” *Id.* Whether an offense is a lesser-included offense of another offense is a legal question we review de novo. *State v. Cox*, 820 N.W.2d 540, 552 (Minn. 2012). To determine whether one crime is necessarily proved by proof of another, we look at the statutory definitions of the crimes, not the facts of the case. *State v. Carr*, 692 N.W.2d 98, 102 (Minn. App. 2005). If the district court adjudicates convictions of an offense and a

lesser-included offense, the adjudication of the lesser-included conviction should be vacated. *See State v. LaTourelle*, 343 N.W.2d 277, 284 (Minn. 1984).

A. Attempted Methamphetamine Manufacture

A person is guilty of the attempt offense if the person intended to manufacture methamphetamine and took a “substantial step” toward its manufacture. Minn. Stat. §§ 152.021, subd. 2a(a), 609.17, subd. 1 (2012). The state concedes that attempted methamphetamine manufacturing is a lesser-included offense of methamphetamine manufacturing. We agree. An attempt to manufacture methamphetamine is an attempt to commit the charged crime of methamphetamine manufacturing. Accordingly, the adjudication of Malmo’s attempted-methamphetamine-manufacturing conviction must be vacated.

B. Possession of Methamphetamine Precursors

A person is guilty of possessing methamphetamine precursors if the person “possesses any chemical reagents or precursors with the intent to manufacture methamphetamine.” Minn. Stat. § 152.0262, subd. 1 (2012). The words “chemical reagents or precursors” refers to “substances that can be used to manufacture methamphetamine.” *Id.* (listing substances, including pseudoephedrine). A person is guilty of a first-degree controlled-substance crime if the person manufactures any amount of methamphetamine, where manufacture means “the production, cultivation, quality control, and standardization by mechanical, physical, chemical, or pharmaceutical means, packing, repacking, tableting, encapsulating, labeling, relabeling, filling, or by other process, of drugs.” Minn. Stat. § 152.01, subd. 7.

Malmo asserts that possession of methamphetamine precursors is a lesser-included offense of methamphetamine manufacturing. We disagree. The two offenses do not have the same elements, and possession of precursors is not necessarily proved by proving the manufacturing offense. While in most instances a person engaged in the manufacture of methamphetamine might use precursor chemicals, the elements of the manufacturing offense does not require proof that a person possesses any of the substances listed in section 152.0262, subdivision 1. As discussed above, the definition of manufacture is broad and can support a variety of manufacturing processes. Because possession of precursors is not a lesser-included offense of manufacturing methamphetamine, the district court did not err by adjudicating Malmo's convictions of both offenses.

Affirmed in part, reversed in part, and remanded.