

Wendell A. Lake appeals his conviction of Dealing in Methamphetamine,¹ a class A felony, Possession of Methamphetamine,² a class C felony, Possession of Chemical Reagents or Precursors with Intent to Manufacture Controlled Substances³ and Maintaining a Common Nuisance,⁴ both class D felonies, and Possession of Marijuana⁵ and Possession of Paraphernalia,⁶ both class A misdemeanors. Lake presents the following restated issues for review:

1. Was the evidence sufficient to support the conviction for possession of paraphernalia?
2. Was the evidence sufficient to support the conviction for possession of chemical reagents or precursors with intent to manufacture controlled substances?
3. Was the evidence sufficient to support the conviction for maintaining a common nuisance?
4. Was the evidence sufficient to support the convictions for dealing and possessing methamphetamine?
5. Did the convictions for both manufacturing and possessing methamphetamine violate the double jeopardy clause of the Indiana Constitution?

We affirm in part, reverse in part, and remand with instructions.

¹ Ind. Code Ann. § 35-48-4-1 (West, PREMISE through 2006 Second Regular Session).

² I.C. § 35-48-4-6 (West, PREMISE through 2006 Second Regular Session).

³ I.C. § 35-48-4-14.5 (West, PREMISE through 2006 Second Regular Session).

⁴ I.C. § 35-48-4-13 (West, PREMISE through 2006 Second Regular Session).

⁵ I.C. § 35-48-4-11 (West, PREMISE through 2006 Second Regular Session).

⁶ I.C. § 35-48-4-8.3 (West, PREMISE through 2006 Second Regular Session).

The facts favorable to the convictions are that Paul Harrison was a member of the Indiana State Police Clandestine Drug Lab Entry Team (the Drug Lab Entry Team). At approximately 2:15 p.m. on August 25, 2003, Trooper Harrison and Indiana Excise officers went to Lake's residence to execute a search warrant. When a knock at the front door was not answered, the officers entered the residence and, almost immediately, Trooper Harrison smelled "a meth lab in process." *Transcript* at 127. The officers found Lake and Robert Wilson sitting in the living room. Lake and Wilson were placed in handcuffs and taken outside. Once outside, Lake denied that any illegal drug activity was taking place in his residence. Trooper Harrison re-entered the residence and began to search it. Tracing a strong chemical odor to a back bedroom in the residence, he opened the door to that room and was met by "an overwhelming ... chemical cloud". *Id.* at 129. Believing that to be evidence of an active meth lab on the premises, Harrison called other members of the Drug Lab Entry Team and asked them to send a safety truck.

While preparing to further search the residence, officers at the scene searched Lake's person and found cigarette rolling papers and marijuana, whereupon Lake admitted he smoked marijuana. Officers also found store receipts for recent purchases of numerous items related to the manufacture of methamphetamine, including nasal decongestants, pseudoephedrine, coffee filters, latex gloves, matchbooks, antifreeze, and hydro-peroxide.

Upon searching the residence, officers discovered matchboxes with the strike plate removed (strike plates contain red phosphorus, which is used in the manufacture of

methamphetamine), at least sixteen cans of auto brake cleaner, twenty-eight cans of starter fluid, coffee filters – some with white residue, a liquid that contained methamphetamine, a cup with a plastic bag containing a white, powdery substance, hydrochloric acid, a glass jar containing a reddish substance, a hot plate, an empty bottle of Red Devil lye or sodium hydroxide, hydrogen peroxide, acetone, ten empty bottles of cold medicine, allergy medicine, numerous blister packs (packaging for cold and allergy medicine), an HCL accelerator, and 1.66 grams of methamphetamine. Bradley Morrin, an Indiana State Police forensic scientist, testified that, based upon the number of empty boxes of cold medicine, if the manufacturing yield was fifty percent, which was evidently toward the low end of the possible spectrum, Lake would have produced ten grams of methamphetamine. Lake was charged with possession of chemical reagents or precursors with intent to manufacture controlled substances, dealing in methamphetamine, possession of methamphetamine, maintaining a common nuisance, possession of marijuana, and possession of paraphernalia. Following a jury trial, Lake was found guilty on all counts.

Four of the five issues presented by Lake contest the sufficiency of the evidence supporting the convictions. We review those claims mindful that when considering a challenge to the sufficiency of evidence to support a conviction, we respect the fact-finder's exclusive province to weigh conflicting evidence, and therefore neither reweigh the evidence nor judge witness credibility. *McHenry v. State*, 820 N.E.2d 124 (Ind. 2005). We will consider only the probative evidence and reasonable inferences

supporting the verdict, and “must affirm ‘if the probative evidence and reasonable inferences drawn from the evidence could have allowed a reasonable trier of fact to find the defendant guilty beyond a reasonable doubt.’” *Id.* at 126 (quoting *Tobar v. State*, 740 N.E.2d 109, 111-12 (Ind. 2000)).

1.

Lake contends the evidence is insufficient to prove that he possessed paraphernalia because “there was no evidence that he possessed an object to be used primarily for testing the strength, effectiveness, or purity of a controlled substance.” *Appellant’s Brief* at 2.

Lake was found in possession of cigarette rolling papers and charged with possession of paraphernalia under I.C. § 35-48-4-8.3(a)(2), which provides that a person commits possession of paraphernalia when he or she “possesses a raw material, an instrument, a device, or other object that the person intends to use for ... testing the strength, effectiveness, or purity of a controlled substance.” Although on the facts of this case Lake almost certainly violated subsection (a)(1), which prohibits possession of an instrument or device used for “introducing into the person’s body a controlled substance”, he was not charged under that subsection. We have dealt with precisely this issue in a previous case.

In *Atkinson v. State*, 810 N.E.2d 1190 (Ind. Ct. App. 2004), we were confronted with the same argument in a similar factual scenario. Atkinson was found in possession of rolling papers and admitted to being a marijuana smoker. He was charged with,

among other things, possession of paraphernalia in violation of I.C. § 35-48-4-8.3(a)(2). He was convicted of that offense following a trial. Atkinson claimed on appeal the evidence was insufficient to show “‘he intended to use the cigarette rolling papers to test the strength, effectiveness or purity of a controlled substance,’ as the State had alleged in the charging information.” *Atkinson v. State*, 810 N.E.2d at 1194 (quoting the appellant’s brief in that case at p. 8). The following excerpt from *Atkinson* is equally applicable here:

Atkinson ... contends that there was no evidence presented as to how the cigarette rolling papers that were found in his pockets could be used to “test” the strength, effectiveness or purity of marijuana. In considering this argument, it is apparent that the State may, indeed, have proved the offense under subsection one of the statute [i.e., that he possessed the rolling papers for the purpose of introducing a controlled substance into his body] in light of Atkinson’s admission that he used the papers to smoke marijuana, yet it failed to prove the offense that was actually charged. To be sure, our review of the record reveals that there was no evidence establishing that Atkinson possessed the cigarette papers to test the strength or effectiveness of the drug.

Atkinson v. State, 810 N.E.2d at 1194.

We note, as did the *Atkinson* panel, that the evidence adduced at trial would have supported a possession conviction under subsection (a)(1) of the statute. Because Lake was actually charged under subsection (a)(2) of the statute, however, and the State presented no evidence as to how Lake could use the rolling papers to test the strength, effectiveness, or purity of the marijuana, we must conclude that his conviction for this offense may not stand. *Atkinson v. State*, 810 N.E.2d 1190. Also, because we are reversing on grounds of insufficient evidence, Lake may not be retried for possession of paraphernalia based upon these events. *See id.*

2.

Possession of reagents or precursors with intent to manufacture as a class D felony is defined by I.C. § 35-48-4-14.5(c), which provides, “[a] person who possesses two (2) or more chemical reagents or precursors with the intent to manufacture ... Methamphetamine, a schedule II controlled substance under I.C. § 35-48-2-6 ... commits a Class D felony.” The State alleged Lake possessed two chemical reagents or precursors, i.e., red phosphorous and sodium hydroxide (lye). Lake claims, “[t]he record reveals no evidence that Lake possessed either of the two precursors necessary to sustain a conviction, red phosphorous and sodium hydroxide.” *Appellant’s Brief* at 18. We note here that a criminal conviction may be based solely upon circumstantial evidence. *Fultz v. State*, 849 N.E.2d 616 (Ind. Ct. App. 2006).

Red phosphorous and sodium hydroxide, or lye, are statutory precursors and are the specific substances cited by the State in charging Lake with possession of chemical reagents or precursors with intent to manufacture controlled substances. I.C. § 35-48-4-14.59(A)(12) & (14). Police experts testified that red phosphorous is obtained from the striker plates of matchboxes, and that a search of Lake’s residence revealed many matchboxes with the striker plates removed.

As indicated previously, Harrison was certified as a member of the Drug Lab Entry Team. He testified that the two most common methods of manufacturing methamphetamine are the “Nazi” method and the red phosphorous method. *Transcript* at 117. He described red phosphorous as a substance that is difficult to obtain. Through his

experience and training, he learned that to obtain the substance, many people will remove the red phosphorous from striker plates on matchbook covers. He explained, “What we might find on these meth labs is hundreds of --- with the red phosphorous method, we’ll find hundreds of matchbooks were [sic] we find the striker plates have been removed.” *Id.* at 122. When Trooper Harrison entered Lake’s house to conduct the search, he encountered an “overwhelming, chemical cloud” emanating from a room. *Id.* at 129. According to the trooper, that was indicative of a red phosphorous methamphetamine lab. A search of Lake’s person revealed receipts for the purchase of matchbooks, dated less than two weeks before these events took place. Inside the residence, officers “filled” a collection tub with boxes of matches with the striker plates removed. *Id.* at 144. Moreover, Morrin, the scientist employed to work on-site with the Drug Lab Entry Team and who assisted in the search, indicated the officers found additional matchbooks in a garbage bag. “That garbage bag was full of matchbooks and we found more still.” *Id.* at 188. Most or all of the matches appeared to be there, but the covers with the striker plates had been removed. Trooper Harrison testified, “I’ve not seen anyone take striker plates off matchbooks covers for any other purpose [any purpose other than operating a methamphetamine lab, that is] in my experience.” *Id.* at 145. Considering the totality of the foregoing circumstantial evidence, we conclude it was sufficient to prove Lake possessed red phosphorous.

Lake next contends the evidence was insufficient to prove he possessed lye. According to Lake, the evidence revealed only that police found two empty bottles that at one time had contained lye. This claim is factually incorrect. Morrin testified:

The method I believe was used in this particular location was combing ephedrine or pseudoephedrine with red phosphorus and iodine and water and cooking that mixture for an extended period of time and then once that mixture has been, uh, is done cooking then they will, uh, add solvent to it as well as sodium hydroxide, which would be something like Red Devil lye, *which we also found at the location.*

Id. at 177 (emphasis supplied). A short time later in his testimony, Morrin described items depicted in a photograph that was entered into evidence. He stated, “This is the tall cabinet immediately to the left of that second sink. You’ll see that there is a bottle or a container of Red Devil lye, that’s the sodium hydroxide I was referring to a minute ago.”

Id. at 178. Although it is theoretically possible that this statement described an empty bottle, the best inference that can be drawn from Morrin’s testimony is that the bottle contained lye at the time it was discovered in the cabinet.

The evidence was sufficient to support his conviction of possession of reagents or precursors with intent to manufacture methamphetamine under I.C. § 35-48-4-14.5(c).

3.

Lake contends the evidence was insufficient to support his conviction for maintaining a common nuisance. Specifically, he contends, “[t]here was insufficient evidence to support [his] conviction for maintaining a common nuisance, because there was no evidence that at least two persons had used controlled substances inside his

home.” *Appellant’s Brief* at 20.

In order to obtain a conviction for maintaining a common nuisance based upon an allegation of knowingly or intentionally maintaining a building that is used by “persons” to unlawfully use controlled substances, the State must prove that more than one person unlawfully used controlled substances within the building. *Hook v. State*, 775 N.E.2d 1125 (Ind. Ct. App. 2002), *trans. denied*. “[T]he existence of paraphernalia might be conclusive of whether a controlled substance was used in the residence[.]” *Zuniga v. State*, 815 N.E.2d 197, 200 (Ind. Ct. App. 2004).

Lake and Wilson were searched after they were removed from Lake’s residence. Officers found on Lake rolling papers and a cigarette butt containing marijuana. Indeed, at that time he admitted he was a pot smoker. On Wilson, officers found methamphetamine, a pen used to ingest methamphetamine, and pills that constituted Schedule IV controlled substances. Moreover, Lake testified that Wilson had occasionally stayed at Lake’s residence since Wilson left his wife a month before these events occurred. Considered together with the facts that methamphetamine and an active methamphetamine lab were found in Lake’s residence, the foregoing permits a reasonable inference that both Lake and Wilson unlawfully used controlled substances there. Therefore, the evidence was sufficient to support this conviction.

4.

Lake was convicted of dealing in methamphetamine in an amount of three or more grams, and of possessing methamphetamine, which was enhanced to a class C felony

because the amount was three grams or greater. Lake contends, with respect to both of those convictions, that the evidence was not sufficient to prove that the amount was three grams or greater. The State concedes that Lake is correct on both counts. In point of fact, the evidence showed that the amount of methamphetamine found at Lake's residence was 1.78 grams. Therefore, the dealing conviction must be reduced from a class A to a class B felony, *see* I.C. § 35-48-4-1(a). We will discuss below a different challenge to the possession of methamphetamine conviction.

5.

The double jeopardy analysis under the Indiana Constitution involves dual inquiries utilizing what have come to be known as the “statutory elements test” and the “actual evidence test.” *Davis v. State*, 770 N.E.2d 319 (Ind. 2002). Lake contends his convictions of possessing and dealing methamphetamine violate the actual evidence test. That is, according to Lake, the evidentiary facts used by the fact-finder to establish the essential elements of the dealing offense were also used to establish all of the elements of the possession offense.

Multiple convictions are prohibited under the actual evidence test if there is “a reasonable possibility that the evidentiary facts used by the fact-finder to establish the elements of one offense may also have been used to establish the essential elements of a second challenged offense.” *Id.* at 323 (quoting *Richardson v. State*, 717 N.E.2d 32, 53 (Ind. 1999)). “Application of the actual evidence test requires us to identify the essential elements of each challenged crime and to evaluate the evidence from the jury’s

perspective, considering where relevant the jury instructions, argument of counsel, and other factors that may have guided the jury's determination." *Caron v. State*, 824 N.E.2d 745, 753 (Ind. Ct. App. 2005) (quoting *Lamagna v. State*, 776 N.E.2d 955, 959 (Ind. Ct. App. 2002)), *trans. denied*.

The charging informations for the dealing in methamphetamine and possessing methamphetamine were similar to each other and general in nature. The information for dealing alleged that Lake "did then and there unlawfully, knowingly, or intentionally manufacture methamphetamine, pure or adulterated, in an amount more than three (3) grams." *Appellant's Appendix* at 9. The charging information for possession alleged that Lake "did then and there, unlawfully, without a valid prescription or order of a practitioner acting in the course of his professional practice, knowingly or intentionally possess methamphetamine, in an amount more than three (3) grams." *Id.* at 10. Therefore, the charging informations do not identify two separate and discrete quantities of methamphetamine.

At trial, the State presented evidence that methamphetamine was found in four places. Officers found inside Lake's residence (1) a coffee filter containing a white residue that was later identified as methamphetamine, (2) a liquid containing methamphetamine, (3) a plastic bag containing 1.66 grams of methamphetamine, and (4) another plastic bag or coffee filter containing .12 grams of methamphetamine. Other than identifying the separate locations in which methamphetamine was found, no attempt was made at trial or during opening or closing arguments to distinguish or segregate one

source from another. In opening argument, the State spoke extensively about the charge that Lake was operating a methamphetamine lab and manufacturing. We cannot find any allusion to Lake possessing methamphetamine that is separate from the discussion concerning his involvement in the manufacturing process. The same can be said for the State's closing argument. The prosecuting attorney alleged generally that Lake was operating a methamphetamine lab when police served the search warrant. According to the State, "He was caught red handed. Caught red handed in a lab in his own home with evidence that he was participating in it in his pocket." *Transcript* at 251. That "evidence" consisted of receipts for the purchase of precursors that were discovered during a search of Lake's person.

In summary, we can find no meaningful distinction made at trial between quantities of methamphetamine that would have supported the possession conviction but not the manufacturing conviction. Thus, there is a reasonable possibility that the evidentiary facts used by the jury to establish the elements of dealing methamphetamine may also have been used to establish the essential elements of possessing methamphetamine. *See Davis v. State*, 770 N.E.2d 319. The possession conviction therefore violates the double jeopardy prohibitions of the Indiana Constitution and cannot stand.

The convictions for possession of chemical reagents or precursors with intent to manufacture controlled substances and maintaining a common nuisance are affirmed. The conviction for manufacturing methamphetamine is reduced from a class A to a class B

felony. The convictions for possession of paraphernalia and possession of methamphetamine are reversed. This matter is remanded with instructions to vacate Lake's abstract of judgment and to enter a new one consistent with this opinion, and to conduct a new sentencing hearing pursuant to the corrected judgment.

Judgment affirmed in part, reversed in part, and remanded with instructions.

MATHIAS, J., and BARNES, J., concur.