[Cite as *State v. Naples*, 2018-Ohio-2562.]

STATE OF OHIO	)	IN THE COURT OF APPEALS
	)ss:	NINTH JUDICIAL DISTRICT
COUNTY OF LORAIN	)	

STATE OF OHIO Appellee v. ANTHONY NAPLES Appellant	C.A. No. 17CA011169 APPEAL FROM JUDGMENT ENTERED IN THE COURT OF COMMON PLEAS COUNTY OF LORAIN, OHIO CASE No. 13CR088493

DECISION AND JOURNAL ENTRY

Dated: June 29, 2018

TEODOSIO, Judge.

{¶1} Appellant, Anthony Naples, appeals from his conviction in the Lorain County Court of Common Pleas. This Court affirms.

I.

{¶2} In August of 2013, Mr. Naples and his friend ("Mr. Ashton") were in a garage attached to the home of another friend ("Mr. Osborne") in Amherst. The two men were engaged in the process of using butane to extract tetrahydrocannabinol ("THC") from marijuana plants to produce a more concentrated form of THC, commonly known as either butane honey oil or butane hash oil ("BHO"). THC is the principal psychoactive constituent of the cannabis plant. *Nationwide Mut. Fire Ins. Co. v. McDermott*, 603 Fed. Appx. 374, 375 (6th Cir.2015), fn. 2. The two men were placing marijuana plants into a device known as an "extractor" and then forcing butane through it. The butane would remove THC from the marijuana plants and end up in a Pyrex dish or hot plate. Once the butane evaporated, BHO remained. A fire erupted when some

butane gas inevitably found its way to the lit pilot light of a water heater located in the garage. The two men could not open the garage door because it was on fire, but instead escaped through a door to the house and woke up Mr. Osborne, who had been asleep on a recliner in the living room. The three men all ran out the front door of the house and across the street to a pizza restaurant to call 911. Police and firefighters arrived, but the fire ultimately destroyed the house and garage.

{¶3} After a bench trial, the trial court found Mr. Naples guilty of illegal assembly or possession of chemicals for the manufacture of drugs, but not guilty of aggravated arson and arson. The court sentenced him to one year in prison and fined him $5,000.00, but stayed the sentence and fine "pending review." The court further ordered restitution in the amount of $8,000.00 to be paid to the homeowner.

{¶4} Mr. Naples now appeals from his convictions and raises three assignments of error for this Court's review.

II.

ASSIGNMENT OF ERROR ONE

A PROSECUTION FOR POSSESSION OF CHEMICALS WITH INTENT TO MANUFACTURE A CONTROLLED SUBSTANCE CANNOT BE PREDICATED ON A CULTIVATION OF MARIJUANA OFFENSE

{¶5} In his first assignment of error, Mr. Naples essentially argues that the trial court erred in either ignoring or misinterpreting the reference to R.C. 2925.04 contained within the language of R.C. 2925.041. He contends that his offense involved marijuana and argues that R.C. 2925.04 states any violation involving marijuana is illegal cultivation of marijuana. Therefore, he could not be convicted of illegal assembly or possession of chemicals for the

manufacture of drugs because any and all offenses involving marijuana are categorized as illegal cultivation of marijuana, not illegal manufacture of drugs. We disagree.

{¶6} Mr. Naples was convicted of illegal assembly or possession of chemicals for the manufacture of drugs under R.C. 2925.041(A), which states: "No person shall knowingly assemble or possess one or more chemicals that may be used to manufacture a controlled substance in schedule I or II with the intent to manufacture a controlled substance in schedule I or II in violation of section 2925.04 of the Revised Code." Due to its reference within R.C. 2925.041(A), Mr. Naples directs us to review the language of R.C. 2925.04. Pursuant to R.C. 2925.04(A), "[n]o person shall knowingly cultivate marihuana or knowingly manufacture or otherwise engage in any part of the production of a controlled substance." Cultivation includes "planting, watering, fertilizing, or tilling." R.C. 2925.01(F). "'Manufacture' means to plant, cultivate, harvest, process, make, prepare, or otherwise engage in any part of the production of a drug, by propagation, extraction, chemical synthesis, or compounding, or any combination of the same * * *." R.C. 2925.01(J). Mr. Naples then refers us to the language of R.C. 2925.04(C)(1), which states: "Whoever commits a violation of [R.C. 2925.04(A)] that involves any drug other than marihuana is guilty of illegal manufacture of drugs, and whoever commits a violation of [R.C. 2925.04(A)] that involves marihuana is guilty of illegal cultivation of marihuana." He specifically relies on the phrase "involves marihuana" to posit that marijuana can only be involved in illegal cultivation of marijuana offenses and can never be involved in the manufacture or production of other controlled substances. Therefore, he argues that he could not have been convicted of illegal assembly or possession of chemicals for the *manufacture* of drugs because marijuana was *involved* in the offense. Mr. Naples provides no case law supporting his

proposed interpretation of the statute and provides no definition of the word "involve" for our review. His argument, while certainly creative, is not persuasive to this Court and must fail.

{¶7} The State proceeded at trial on the theory that Mr. Naples knowingly assembled or possessed butane and several other items, including marijuana, in a garage with the intent to manufacture a concentrated or purified form of THC, colloquially known as BHO; it did not allege any intent to cultivate more marijuana plants. The marijuana plants in this case were not involved as the desired byproduct or end result of illegal cultivation, but were instead involved as one of several ingredients or elements intended for use in the manufacture or production of BHO. In reaching its guilty verdict, the trial court chose not to subscribe to Mr. Naples' proposed interpretation of R.C. 2925.04(C)(1), but instead relied on the language in R.C. 2925.04(A) stating "[n]o person shall knowingly cultivate marihuana or knowingly manufacture **or otherwise engage in any part of the production** of a controlled substance." (Emphasis sic.). The court stated, "There is no question that * * * [Mr.] Naples[] engaged in the illegal assembly or possession of chemicals for [the] manufacture of drugs for the purpose of producing a controlled substance" and ultimately found him guilty beyond a reasonable doubt.

{¶8} Because statutory interpretation involves a question of law, we review a trial court's interpretation and application of a statute under a de novo standard. *State v. Myers*, 9th Dist. Medina Nos. 3260-M and 3261-M, 2002-Ohio-3195, ¶ 14. When applying a de novo standard of review, this Court gives no deference to the trial court's legal determinations. *State v. West*, 9th Dist. Lorain No. 04CA008554, 2005-Ohio-990, ¶ 33.

> A court may interpret a statute only where the statute is ambiguous. A statute is ambiguous if its language is susceptible to more than one reasonable interpretation. When a court must interpret a criminal statute, the language should be strictly construed against the state and liberally construed in favor of the accused. However, strict construction should not override common sense and evident statutory purpose.

(Citations omitted.) *Myers* at ¶ 15. "Words and phrases shall be read in context and construed according to the rules of grammar and common usage." R.C. 1.42.

{¶9} The word "involve" is not defined in the Revised Code, and Mr. Naples has provided us with no definition of it, but the word can ordinarily be defined as "to relate closely"; "connect"; "to have within or as part of itself"; "include." *Merriam-Webster Collegiate Dictionary*, 660 (11th Ed.2005). However, the word is repeatedly used within R.C. 2925.04 when differentiating between drugs that are the byproduct or end result of either cultivation or manufacturing, as the statute clearly establishes separate penalties for cultivating or manufacturing each type of drug. *See* R.C. 2925.04(C)(2) (stating the penalties if the drug *involved* is any compound, mixture, preparation, or substance included in Schedule I or II, with the exception of methamphetamine or marijuana); R.C. 2925.04(C)(3) (stating the penalties if the drug *involved* is methamphetamine); R.C. 2925.04(C)(4) (stating the penalties if the drug *involved* is any compound, mixture, preparation, or substance included in Schedule III, IV, or V); R.C. 2925.04(C)(5) (stating the penalties if the drug *involved* is marijuana). In reading the word "involve" within the full context of R.C. 2925.04 and in construing it according to the rules of grammar and common usage, this Court cannot conclude that the word is susceptible to more than one reasonable interpretation within the statute, and the word is therefore not subject to court interpretation. *See Myers* at ¶ 16.

{¶10} As the language utilized in the statute does not appear to be ambiguous and the statute does not, on its face, state that any involvement of marijuana in the manufacture or production of other controlled substances precludes prosecution for illegal assembly or possession of chemicals for the manufacture of drugs, we decline Mr. Naples' invitation to read such a precarious restriction into the statute. We instead read both R.C. 2925.041 and R.C.

2925.04 as the trial court did in this case. While R.C. 2925.04 prohibits the illegal cultivation of marijuana plants, it also distinctly prohibits the manufacture or production of other controlled substances, listing no exceptions for offenses that somehow incorporate marijuana into the manufacturing process. An offender such as Mr. Naples may therefore be convicted of illegal assembly or possession of chemicals for the manufacture of drugs under R.C. 2925.041 whether marijuana is a part of the illicit process or not. We note that the Twelfth District Court of Appeals has upheld a conviction for the illegal manufacture of drugs under R.C. 2925.04 when the offender used an extraction method to create hashish that was strikingly similar to the process utilized by Mr. Naples and Mr. Ashton in this case. *See State v. Couch*, 12th Dist. Butler No. CA2016-03-062, 2016-Ohio-8452, ¶ 13-18 (affirming a conviction for illegal manufacture of drugs when the evidence showed the defendant packed marijuana into a glass tube and sprayed butane into the tube, over the marijuana, through a coffee filter, and into a Pyrex dish to extract THC, before heating the dish to evaporate the butane and ultimately produce hashish).

{¶11} Accordingly, we conclude that the trial court did not err in refusing to adopt Mr. Naples' proposed interpretation of the statute. Mr. Naples cautions us that such a decision effectively converts the mere possession of a butane lighter with the intent to smoke a marijuana cigarette into a felony offense. However, Mr. Naples was not convicted under R.C. 2925.041 for using a butane lighter to smoke a marijuana cigarette, so any theoretical argument as to whether the inhalation of marijuana smoke supports a conviction for illegal assembly or possession of chemicals for the manufacture of drugs is not based on the facts of this case, and we therefore decline to address it.

{¶12} Mr. Naples' first assignment of error is overruled.

ASSIGNMENT OF ERROR TWO

NAPLES[’] CONVICTION FOR POSSESSION OF CHEMICALS WITH INTENT TO MANUFACTURE A CONTROLLED SUBSTANCE WAS NOT SUPPORTED BY SUFFICIENT EVIDENCE

{¶13} In his second assignment of error, Mr. Naples argues that his conviction is not supported by sufficient evidence. We disagree.

{¶14} Whether a conviction is supported by sufficient evidence is a question of law, which this Court reviews de novo. *State v. Thompkins*, 78 Ohio St.3d 380, 386 (1997). "Sufficiency concerns the burden of production and tests whether the prosecution presented adequate evidence for the case to go to the jury." *State v. Bressi*, 9th Dist. Summit No. 27575, 2016-Ohio-5211, ¶ 25, citing *Thompkins* at 386. "The relevant inquiry is whether, after viewing the evidence in a light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt." *Id.*, quoting *State v. Jenks*, 61 Ohio St.3d 259 (1991), paragraph two of the syllabus. However, "we do not resolve evidentiary conflicts or assess the credibility of witnesses, because these functions belong to the trier of fact." *State v. Hall*, 9th Dist. Summit No. 27827, 2017-Ohio-73, ¶ 10.

{¶15} Mr. Naples first argues that the trial court erred when it found that a "chemical synthesis" had occurred because the term is not defined in the Ohio Revised Code and the State's expert could not precisely define or explain the term at trial, even admitting at one point that he may be misusing the term. Although not otherwise defined in the Revised Code, the term "chemical synthesis" appears within the Code's definition of the word "manufacture": "to plant, cultivate, harvest, process, make, prepare, or otherwise engage in any part of the production of a drug, by propagation, extraction, *chemical synthesis*, or compounding, or any combination of the same * * *." (Emphasis added.) R.C. 2925.01(J). At trial, the State presented evidence, if

believed, that a chemical synthesis occurs during the manufacture or production of BHO. Detective Olen Martin testified that a chemical synthesis occurs when butane is forced through marijuana plants to extract THC, and the butane then evaporates to result in an end product of BHO. He testified, "[M]aybe I'm misusing the word 'synthesis.' I don't know that I am. I believe that this is a chemical synthesis that's taking place, the evaporation." In its judgment entry, the trial court found that Mr. Naples possessed over 165 grams of marijuana, dozens of canisters of butane, an "extractor," and a hot plate "for the purpose of engaging in the manufacture of BHO, a substance containing isolated THC *extracted* from the leafy plant material of the marijuana through the process of *chemical synthesis*, which resulted in a more potent, purified form of THC." (Emphasis sic.)

{¶16} In focusing on the absence of a precise definition for "chemical synthesis" being elicited at trial and in challenging whether a chemical synthesis actually occurs when BHO is produced, Mr. Naples ignores the fact that a litany of other actions and processes apart from chemical synthesis—including extraction—also satisfies the definition of "manufacture" in the Revised Code. *See* R.C. 2925.01(J). The State presented evidence at trial, if believed, that supported the trial court's finding that Mr. Naples knowingly possessed chemicals along with the requisite intent to extract THC from marijuana plants and produce BHO. At trial, defense counsel asked Detective Martin, "So prior to the butane coming off, there's no manufacturing because there's no chemical synthesis?" The detective replied, "No, the extraction process is manufacturing." Forensic drug analyst Elizabeth Doyle also testified that the process of making BHO is an extraction. Mr. Ashton was asked at trial, "[W]hat were you doing that day? You said you were making hash oil. What is hash oil?" He replied that he and Mr. Naples were making "[b]utane *extracted*, like, hash from marijuana." (Emphasis added.). Thus, the trial

court's language that the extraction of THC from marijuana plants occurs "through the process of chemical synthesis" was inconsequential surplusage, as engaging in any part of the production of a drug by extraction alone is sufficient to establish the manufacture of that drug. *See* R.C. 2925.01(J).

{¶17} Mr. Naples also argues that the trial court erred in finding that he manufactured a controlled substance because the testimony at trial established that the process of making BHO does not produce or create any additional THC. Mr. Naples' argument is misplaced though, as the State of Ohio was not required to prove that the manufacture of BHO somehow increases the amount of THC that is originally present in marijuana plants. The State was only required to prove that Mr. Naples knowingly assembled or possessed at least one chemical, such as butane, that may be used to manufacture a Schedule I or II controlled substance with the intent to manufacture a Schedule I or II controlled substance. *See* R.C. 2925.041(A). *See also* R.C. 2925.041(B) ("The assembly or possession of a single chemical * * * is sufficient to violate this section."). At trial, the State presented sufficient evidence, if believed, that Mr. Naples knowingly assembled or possessed chemicals for the manufacture of drugs under R.C. 2925.041. Detective Martin testified that in order to make BHO, one would need butane, marijuana, and a tube or vessel to catch the butane. Mr. Ashton also testified that one would need butane, marijuana, a hot plate or Pyrex dish, and an "extractor" to "stuff [] with marijuana and blast the butane through it." Mr. Ashton further testified that he and Mr. Naples had all of those items when they were making BHO in the garage, and he identified pictures of the items they used to make BHO during his testimony. Firefighter William Niehart also testified and identified pictures he personally took of 23 butane canisters, a hot plate, and other items he located in the garage. We find no merit in Mr. Naples' argument that the failure to show an increase in the

level or amount of THC when it is extracted from marijuana plants to produce BHO demonstrated insufficient evidence that a controlled substance was or could be manufactured. As we previously stated, manufacturing can be established through evidence that the offender engaged in any part of the production of a drug by extraction. *See* R.C. 2925.01(J).

{¶18} Next, Mr. Naples argues that BHO is not a Schedule I or II controlled substance. "'Controlled substance' means a drug, compound, mixture, preparation, or substance included in schedule I, II, III, IV, or V." R.C. 3719.01(C). Although true that BHO is not explicitly listed by name as a Schedule I or II controlled substance, Mr. Naples nonetheless concedes in his merit brief that "BHO is THC, no different. * * * BHO is * * * just a slang term." Detective Martin testified at trial that BHO is "9-tetrahyrdrocann[a]binol. It's actual THC" and that BHO is just a colloquial or street name for THC in that form. THC is plainly listed as a controlled substance under R.C. 3719.41, Schedule I (C)(27). Marijuana is also a Schedule I controlled substance, but is listed separately from THC. *See* R.C. 3719.41, Schedule I (C)(19). However, Mr. Naples argues that the particular THC found in this case, to wit: delta-9-tetrahydrocannabinol, is not specifically listed under R.C. 3719.41, Schedule I (C)(27). While this appears true at first glance, Mr. Naples ignores the noteworthy parenthetical at the end of R.C. 3719.41, Schedule I (C)(27), which specifically includes all other variations of THC not explicitly listed in the definition of "tetrahydrocannabinols":

> Tetrahydrocannabinols (synthetic equivalents of the substances contained in the plant, or in the resinous extractives of Cannabis, sp. and/or synthetic substances, derivatives, and their isomers with similar chemical structure and pharmacological activity such as the following: delta-1-cis or trans tetrahydrocannabinol, and their optical isomers; delta-6-cis or trans tetrahydrocannabinol, and their optical isomers; delta-3,4-cis or trans tetrahydrocannabinol, and its optical isomers. (*Since nomenclature of these substances is not internationally standardized, compounds of these structures, regardless of numerical designation of atomic positions, are covered*.))[.]

(Emphasis added.). Thus, delta-9-tetrahydrocannabinol is included in the definition of tetrahydrocannabinols regardless of its numerical designation of atomic positions. Mr. Naples also argues that the only place delta-9-tetrahyrdrocannabinol can actually be found in the statute is under Schedule III:

> Dronabinol (synthetic) in sesame oil and encapsulated in a soft gelatin capsule in a United States food and drug administration approved drug product (some other names for dronabinol: (6aR-trans)-6a,7,8,10a-tetrahydro- 6,6,9-trimethyl-3-pentyl-6H-dibenzo[b,d]pyran-1-ol, or *(-)-delta-9-(trans)-tetrahydrocannabinol*).

(Emphasis added.) R.C. 3719.41, Schedule III (F)(1). However, this is the definition of the FDA-approved prescription drug Dronabinol, which contains synthesized THC. *See United States v. Koss*, 831 F.3d 259, 262 (5th Cir.2016) (Dennis, J., dissenting). "Although Dronabinol may also be called (-)-delta-9-(trans)-tetrahydrocannabinol, which includes the word 'tetrahydrocannabinol,' the drug listed as a Schedule III drug is Dronabinol, not tetrahydrocannabinol * * *." *Dowden v. State*, 455 S.W.3d 252, 256 (Tex.App.2015), fn. 3. Federal district courts have addressed this issue and found no problems with the "dual classification" of THC as a Schedule I drug and Dronabinol as a Schedule III drug. *See, e.g., United States v. Turcotte*, N.D.Ill. No. 06 C 5554, 2007 U.S. Dist. LEXIS 45678, *6 (June 21, 2007). Dronabinol was not at issue in Mr. Naples' case. We conclude that Mr. Naples' argument that BHO is not a Schedule I or II controlled substance is therefore without merit.

{¶19} Accordingly, Mr. Naples' second assignment of error is overruled.

ASSIGNMENT OF ERROR THREE

> DEFENDANT[']S CONVICTION FOR POSSESSION OF CHEMICALS WITH INTENT TO MANUFACTURE A CONTROLLED SUBSTANCE WAS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE

{¶20} In his third assignment of error, Mr. Naples argues that his conviction is against the manifest weight of the evidence. We disagree.

{¶21} This Court has stated:

> In determining whether a criminal conviction is against the manifest weight of the evidence, an appellate court must review the entire record, weigh the evidence and all reasonable inferences, consider the credibility of witnesses and determine whether, in resolving conflicts in the evidence, the trier of fact clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered.

State v. Otten, 33 Ohio App.3d 339, 340 (9th Dist.1986). "[W]hen reversing a conviction on the basis that it was against the manifest weight of the evidence, an appellate court sits as a 'thirteenth juror,' and disagrees with the factfinder's resolution of the conflicting testimony." *State v. Tucker*, 9th Dist. Medina No. 06CA0035-M, 2006-Ohio-6914, ¶ 5. This discretionary power "should be exercised only in the exceptional case in which the evidence weighs heavily against the conviction." *State v. Thompkins*, 78 Ohio St.3d 380, 387 (1997), quoting *State v. Martin*, 20 Ohio App.3d 172, 175 (1st Dist.1983). *See also Otten* at 340.

{¶22} Mr. Naples argues that (1) the State did not present any evidence that any controlled substance was or could have been created or manufactured, and (2) he could not have been convicted of illegal assembly or possession of chemicals for the manufacture of drugs when R.C. 2925.04 limits manufacturing offenses to those that do not involve marijuana.

{¶23} Mr. Naples' arguments under this assignment of error sound in sufficiency, not weight. Moreover, as we have already addressed these same issues above in Mr. Naples' other assignments of error, we decline to address them again ad nauseam. "[S]ufficiency and manifest weight are two separate, legally distinct arguments." *State v. Vincente-Colon*, 9th Dist. Lorain No. 09CA009705, 2010-Ohio-6242, ¶ 20. "A weight challenge tests the persuasiveness of the evidence the State produced while a sufficiency challenge tests the very production of that evidence." *State v. Hayes*, 9th Dist. Summit No. 26388, 2013-Ohio-2429, ¶ 9. "An argument

that the State failed to prove one of the elements of a crime is one sounding in sufficiency, not weight." *Id.*

{¶24} Mr. Naples' third assignment of error is overruled.

III.

{¶25} Mr. Naples' first, second, and third assignments of error are overruled. The judgment of the Lorain County Court of Common Pleas is affirmed.

Judgment affirmed.

There were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the Court of Common Pleas, County of Lorain, State of Ohio, to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App.R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App.R. 22(C). The Clerk of the Court of Appeals is instructed to mail a notice of entry of this judgment to the parties and to make a notation of the mailing in the docket, pursuant to App.R. 30.

Costs taxed to Appellant.

THOMAS A. TEODOSIO
FOR THE COURT

SCHAFER, P. J.
HENSAL, J.
CONCUR.

APPEARANCES:

MICHAEL E. STEPANIK, Attorney at Law, for Appellant.

DENNIS P. WILL, Prosecuting Attorney, and LINDSEY C. POPROCKI, Assistant Prosecuting Attorney, for Appellee.