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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE, Plaintiff and Respondent, v. JASON RICHARD BRINAR, Defendant and Appellant.	A100018 (Contra Costa County Super. Ct. No. 020772-0)

A jury convicted defendant Jason Richard Brinar of manufacturing methamphetamine (Health & Saf. Code, § 11379.6, subd. (a)); possession of ephedrine/pseudoephedrine with the intent to manufacture methamphetamine (Health & Saf. Code, § 11383, subd. (c)(1)); and possession of hydriodic acid with the intent to manufacture methamphetamine (Health & Saf. Code, § 11383, subd. (c)(2)).

The trial court sentenced defendant to three years in state prison, suspended that sentence, and committed defendant to the California Rehabilitation Center (CRC). Defendant challenges his conviction for possession of hydriodic acid, contending the trial court impermissibly instructed the jury with a mandatory presumption. Defendant also contends that his state prison sentence violates the provision against double punishment (Pen. Code, § 654). We reject the first contention on the merits and find the second contention premature. Accordingly, we affirm.

I. FACTS

The primary issue requires an understanding of the four-stage process of methamphetamine manufacture. The process is described in detail in expert testimony at defendant's trial.

Stage 1 is the pseudoephedrine extraction stage. Pseudoephedrine is a precursor of methamphetamine.[1] Pseudoephedrine is commonly available in over-the-counter cold and allergy medications such as Actifed and Sudafed. The methamphetamine manufacturer, or "cook," will buy a quantity of such medications and remove the tablets from their "blister packs."[2] The cook crushes the tablets and places them in a container such as a flask or a glass jar.

The cook then adds water, denatured alcohol, or toluene to act as a "liquid carrier" to separate the pseudoephedrine from the "binder," the binding agent used to keep the pseudoephedrine in tablet form. The pseudoephedrine separates from the binder and forms a clear solution, while the binder sinks to the bottom of the container. The cook either siphons off the pseudoephedrine solution or filters out the binder by pouring the contents of the container through a coffee filter. The cook then allows the liquid carrier to evaporate, leaving pure pseudoephedrine.

Stage 2 is the reaction stage, also called the cooking stage. The cook combines the extracted pseudoephedrine with two other methamphetamine precursors, red phosphorus and iodine, in a flask or coffee pot. California regulates the sales of red phosphorus and iodine, but the chemicals can be purchased on the black market or extracted from common household items, such as striker pads on matchbooks or tincture of iodine.

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[1] Both ephedrine and pseudoephedrine are precursors of methamphetamine. Apparently, the two chemicals are similar, and the manufacturing process requires one or the other, not both. We refer only to pseudoephedrine because that was the chemical possessed by defendant with the intent to manufacture methamphetamine.

[2] A blister pack is the 2" x 4" packet in which cold medications are packaged. The cold tablet is encased in a transparent plastic bubble, or blister, embedded in the packet.

When combined, red phosphorus and iodine create hydriodic acid ("HI"). Thus, the Stage 2 cooking mixture consists of pseudoephedrine and HI.

The cook adds water to the mixture of pseudoephedrine and HI, and usually heats the mixture on a stove or hot plate, or with a propane torch. When cooked, the HI turns the pseudoephedrine into methamphetamine—but in an unusable form, still containing reaction byproducts.[3]

Stage 3 is the methamphetamine extraction stage. The cook adds lye to the cooked methamphetamine mixture, which turns the mixture from a strong acid to a strong base. The cook than adds an organic solvent, such as toluene or Coleman fuel. This produces a two-layered solution. The solvent extracts the methamphetamine from other byproducts of the chemical reaction. The solvent layer, containing the methamphetamine, rises to the top.

Stage 4 is the "salting" or "gassing out" stage. The cook puts muriatic acid, which is used with swimming pools, in a bottle. He adds strips of aluminum foil to the acid, which creates hydrogen chloride (HCL) gas. The cook introduces the HCL gas into the methamphetamine solution through a tube. The gas causes usable methamphetamine, which resembles cottage cheese, to drop out of the solution. The cook then filters out the usable methamphetamine and allows it to dry. Acetone can be added to remove impurities and make the methamphetamine whiter.

According to the expert testimony, a methamphetamine cook will often enlist the aid of others in obtaining the various precursor chemicals needed to make methamphetamine. These would include the over-the-counter cold and allergy medications containing pseudoephedrine.

We now turn to the facts which led to defendant's arrest and conviction.

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[3] Adding heat from an external source is not necessary. When combined, pseudoephedrine, red phosphorus, iodine and water produce an exothermic reaction, i.e., a chemical reaction that generates its own heat. An external heat source simply quickens the cooking process.

On June 18, 2001, officers of the Department of Justice's Bureau of Narcotic Enforcement served a search warrant on the residence at 2652 Sheppard Way in Antioch. The officers found defendant sitting on a couch in one of the bedrooms. There were two women in the room with him. The room was "a mess." There was "a lot of stuff on the floor," including "the blister packets of what appeared to be pseudoephedrine tablets." Many loose pseudoephedrine pills were lying on the floor, along with hundreds of packets of cold medicine containing pseudoephedrine, both empty and unopened.

A search of the room revealed a gallon container of muriatic acid and a black nylon bag. The black bag contained numerous items, including a baggie of red phosphorus, a baggie of a white powder containing ephedrine, and a plastic container of iodine crystals. An expert on methamphetamine manufacturing gave his opinion that the pseudoephedrine pills, red phosphorus, and iodine found in the room with defendant were possessed for the purpose of manufacturing methamphetamine.

As the search warrant was being executed, officers stopped a woman driving her car past the residence. A search of the trunk revealed several hundred blister-packed pseudoephedrine tablets. Police determined that the woman lived at the residence.

The officers found more direct evidence of methamphetamine manufacture. A trailer was on the side of the residence, with an electrical cord running from the residence to the trailer. The trailer emitted strong chemical odors consistent with a clandestine methamphetamine lab. The officers entered the trailer and found almost two dozen items used in the manufacture of methamphetamine. They also found several empty boxes of over-the-counter medications containing pseudoephedrine. A criminalist testified, in essence, that the trailer was a clandestine methamphetamine lab.

A set of keys found in the bedroom with defendant fit the trailer's door. One of defendant's fingerprints was found on a one-quart can of Ace toluol found in the trailer.[4]

[4] The record includes testimony that the most common form of organic solvent used in East Contra Costa methamphetamine labs is toluene, a paint thinner, available at stores such as Ace Hardware and Orchard Supply. Toluol is apparently a trademark or

Defendant told police he might have opened a few of the blister packs in the bedroom. He believed the pseudoephedrine was going to be used to manufacture methamphetamine, but he denied ever manufacturing any. He admitted using methamphetamine.

Defendant was charged with manufacturing methamphetamine in count I, possession of ephedrine/pseudoephedrine with intent to manufacture methamphetamine in count II, and possession of HI with intent to manufacture methamphetamine in count III. The jury convicted him on all three counts. The trial court sentenced defendant to three years in prison on count I, two years on count II, and two years on count III. The sentences on counts II and III were made concurrent to the sentence on count I, for a total sentence of three years. The court found that defendant was addicted to narcotics or was in imminent danger of addiction, suspended the state prison sentence, and committed defendant to CRC. (Welf. & Inst. Code, § 3051.)

II. DISCUSSION

Defendant challenges only his conviction on count III and his prison sentence. He contends he was improperly convicted of possession of HI with the intent to manufacture methamphetamine, because the trial court instructed the jury with an improper mandatory presumption—i.e., that possession of red phosphorus and iodine, the ingredients of HI, was the same as possession of HI itself. He also contends his sentences on counts II and III should have been stayed pursuant to Penal Code section 654. We disagree with the first contention and find the second premature.

With regard to count III, the jury was instructed as follows:

"Every person who with intent to manufacture methamphetamine possesses hydriodic acid or any product containing hydriodic acid is guilty of a violation of Health and Safety Code section 11383, subdivision (c)(2), a crime.

In order to prove this crime, each of the following elements must be proved:

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chemical name for a type of toluene. It is clear the can of Ace toluol found in the trailer was used in methamphetamine manufacture.

1. A person possessed hydriodic acid or a product containing hydriodic acid;

2. That person had the specific intent to manufacture methamphetamine.

Possession of essential chemicals sufficient to manufacture hydriodic acid with the intent to manufacture methamphetamine shall be deemed to be possession of hydriodic acid."

The italicized sentence is taken almost verbatim from Health and Safety Code section 11383, subdivision (f).[5] Defendant contends that subdivision (f) and the challenged instruction create an unconstitutional mandatory presumption that if a defendant possesses the precursors of HI—red phosphorus and iodine—then he necessarily possesses HI in violation of the statute.[6]

Defendant claims the jury was told that if they found he possessed the two ingredients of HI, the jury must find that he possessed HI itself and was therefore guilty of count III. We disagree with defendant because the statute and instruction do not create a mandatory presumption. They simply criminalize the possession *with intent to manufacture methamphetamine* of two substances, themselves regulated by law, whose immediate combination produces a necessary methamphetamine precursor—HI.

In light of this conclusion we need not discuss at length the law of mandatory presumptions. It suffices to note that a mandatory presumption tells the jury it must presume an ultimate fact—commonly an element of the offense—from the presence, or proof, of designated basic facts. As such, a mandatory presumption "limits the jury's freedom independently to assess all of the prosecution's evidence in order to determine whether the facts of the particular case establish guilt beyond a reasonable doubt."

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[5] Henceforth we refer to Health and Safety Code section 11383 as "section 11383," and to subdivision (f) of that statute as "subdivision (f)."

[6] Defendant concedes his trial counsel failed to object to the quoted instruction. While we normally do not review assignments of error not preserved for appeal by proper objection, we review the present mandatory presumption issue because it speaks directly to the justice of the proceedings and involves the defendant's substantial rights. (Pen. Code, § 1259.)

(*People v. Roder* (1983) 33 Cal.3d 491, 498 (*Roder*); see *Sandstrom v. Montana* (1979) 442 U.S. 510, 521-524.) Generally, a mandatory presumption is invalid unless "the basic fact proved *compels* the inference of guilt beyond a reasonable doubt." (*Roder, supra,* at p. 498, fn. 7.)

Using cooking analogies, defendant argues that subdivision (f) and the cognate instruction create a mandatory presumption. He contends that possession of eggs, flour and milk is not possession of a cake, and that possession of a chicken and an onion is not possession of chicken soup. But this case does not involve innocent kitchen production of everyday—and legal—foods, or foods like cakes and soups which have far more ingredients than those listed by defendant. We deal here with two substances, whose sales are regulated and which are not commonly found in the average home in sufficient quantities to cook methamphetamine—not chicken soup—and are possessed with the intent to "cook" an illegal drug.

When a statute is subject to more than one reasonable interpretation, we must choose the selection which is closest to the apparent intent of the Legislature, and may consider legislative history in making that choice. (See *Wilcox v. Birtwhistle* (1999) 21 Cal.4th 973, 977-978.)

Subdivision (f) is subject to two reasonable interpretations: (1) that it creates a mandatory presumption, as defendant contends, or (2) that it merely criminalizes possession of the two ingredients of HI, an essential chemical component of the process to manufacture methamphetamine. We believe the latter is the reasonable interpretation, especially in light of the legislative history of section 11383 in general and subdivision (f) in particular.

Section 11383 was enacted in 1972, and criminalized the possession of chemicals involved in methamphetamine manufacture. (Stats. 1972, ch. 1407, § 3, p. 3024.) In 1977, the Legislature amended the statute to also criminalize possession of chemicals involved in the manufacture of PCP. At the same time, the Legislature added a provision, similar to what is now subdivision (f), making it criminal to possess "immediate precursors" of methamphetamine and PCP. The Legislature provided that possession of

such precursors "shall be deemed to be" possession of the end product of the manufacture. (Stats. 1977, ch. 165, § 3.6, p. 640.)

In 1987, the Legislature criminalized the simultaneous possession of HI and ephedrine, and added a provision for what is now subdivision (f) to make possession of the immediate precursors of HI deemed possession of HI itself. (Stats. 1987, ch. 424, § 1, p. 1589.) In 1995, the Legislature amended section 11383 to criminalize the possession of HI with intent to manufacture methamphetamine, regardless of whether the defendant also possessed ephedrine. The Legislature also amended subdivision (f) to produce the current version, which contains the sentence at issue here and italicized in the instruction quoted above, which deems possession of the precursors of HI the same as possession of HI itself. (Stats. 1995, ch. 571, § 1, pp. 4419-4420.)

The history behind the 1995 amendment clearly shows the Legislature was closing a loophole: in light of increased regulation of the sale of HI by chemical supply houses, more and more methamphetamine manufacturers were simply making their own HI.

We find this passage in a report of the Assembly Committee on Public Safety: "Due to the restrictions placed on HI, clandestine chemists are manufacturing HI and an HI substitute using iodine or iodine crystals. Intelligence received confirms the fact that essential chemicals are used to make methamphetamine using a process to produce an HI substitute. Cash sales receipts collected by the Bureau of Narcotic Enforcement under [the] California Health and Safety Code reflect that individuals are buying between 100 and 500 pounds of iodine per purchase. [¶] Intelligence received confirmed the fact that HI and the precursor or essential chemicals used to manufacture methamphetamine are being clandestinely imported and regularly transported by clandestine lab operators. [¶] The Attorney General's Office believes that controlling HI by itself is not enough. The loophole which allows individuals to purchase chemicals that make HI or an HI substitute, for which there is no penalty, must be closed." (Assem. Com. on Public Safety, Rep. on Sen. Bill No. 419 (1995-1996 Reg. Sess.) as amended Mar. 28, 1995, p. 2.)

Elsewhere, the Legislature stated its intent to "make possession of iodine, for instance, with intent to manufacture methamphetamine, as culpable as possession of the finished product. . . . Thus, possession of iodine, which is used to make hydriodic acid, would be legally equivalent to possession of hydriodic acid." (Sen. Com. on Criminal Procedure, Rep. on Sen. Bill No. 419 (1995-1996 Reg. Sess.) Mar. 21, 1995, p. 6.)

Subdivision (f) amounts to nothing more that direct criminalization of chemicals which, when simply added together, become a common (and possibly essential) precursor of methamphetamine. It is not unreasonable for the Legislature to render criminal the possession, with the intent to manufacture methamphetamine, of the chemical ingredients of the methamphetamine precursor HI.

Subdivision (f) does not, as defendant claims, provide that possession of the ingredients of HI is the same as possession of HI itself. Rather, it says that the possession of the ingredients of HI, with the requisite intent, is itself a crime. Thus, subdivision (f) and the challenged instruction do not create an impermissible mandatory instruction because they do not relieve the prosecution from having to prove each element of the offense beyond a reasonable doubt.[7]

Defendant also challenges his sentence as violating Penal Code section 654's ban on double punishment. He argues his sentences on counts II and III should be stayed, rather than running concurrent to the sentence on count I. We need not consider this argument at this time because it is premature. Defendant's commitment to CRC renders his prison sentence an interim sentence. When defendant is discharged from CRC, there will be another sentencing hearing at which the trial court is entitled to modify defendant's sentence or even dismiss the charges. Review of defendant's sentence at this time is premature. (*People v. Barnett* (1995) 35 Cal.App.4th 1, 3-4.)

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[7] We are aware that *People v. McCall* (2002) 104 Cal.App.4th 1365 reached the opposite conclusion, but did not discuss the legislative history of section 11383, subdivision (f). That decision is now pending before the Supreme Court; review was granted March 26, 2003, S113433.

III. DISPOSITION

The judgment of conviction is affirmed.

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Marchiano, P.J.

We concur:

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Stein, J.

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Swager, J.