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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. JACKIE LYNN MORROW, Defendant and Appellant.	A097514 (Contra Costa County Super. Ct. No. 0106336)

Defendant appeals from the judgment following his conviction of manufacturing methamphetamine and possession of hydriodic acid, asserting two claims of instructional error. We remand to correct sentencing errors raised by the People, and otherwise affirm.

FACTUAL AND PROCEDURAL BACKGROUND

I. *Prosecution Case*

The police searched defendant's home on January 11, 2000, at 10:00 a.m. Although defendant was not present, some of his family members were. Antonio Iribarren arrived during the search and told officers he was living there. Officers searched Iribarren and found methamphetamine, a pocket scale and recipe for making ephedrine. Ephedrine is used to manufacture methamphetamine.

Officers discovered items related to the manufacture of methamphetamine scattered throughout defendant's backyard and on the side of the house. The officers found more manufacturing items in a storage shed. Next to the shed was a padlocked structure resembling a chicken coop. As they approached the coop, the officers smelled

the chemical odor associated with producing methamphetamine. Once the door was opened, the smell was very strong. Officers entered the coop and discovered a drug lab. From the chicken coop and attached shed, officers recovered 58 items related to making methamphetamine. The principal detective involved in the search opined that the laboratory had been in operation for at least four months.

In the chicken coop officers recovered a jar with the name "Jack M" on it. Defendant's fingerprints were found on a can of toluol, a solvent used to make methamphetamine, and on two flasks containing chemicals used to produce that drug.

II. *Defense Case*

Defendant had previously served a prison term for manufacturing methamphetamine. Upon his release in 1998, he returned to live with his wife and two daughters. Iribarren had moved into the house in defendant's absence. Defendant's wife, daughter Kelly and Iribarren used methampthemine. Defendant used the drug for a period in 1999, but quit. Because defendant and his wife were having marital problems he occasionally stayed with his cousin. On January 2, 2000, defendant moved out of the family home permanently and went to the coop to tell Iribarren that he was moving. The coop had originally been built as a playhouse, and defendant believed Iribarren had been using it to store computers and electronics. Defendant claimed he was last inside in mid-November 1999, helping Iribarren fix a computer. He did not see any drug items at that time. He never saw any laboratory items in the back yard.

Iribarren normally kept the coop locked, but on January 2 the door was open. Iribarren was not there. After defendant found the lab, he angrily dumped liquids in a large bucket and threw the rest of the items in a garbage bag, handling the items on which his fingerprints were found. Defendant claimed police found many more items during their search than he had seen on January 2. As defendant was leaving, Iribarren returned. Defendant told him to clean up the coop and get out.

Defendant's daughter Kelly testified that defendant went into the shed "once in awhile" in 1999 to help Iribarren with his computers. Kelly saw defendant go into the shed around Christmas, 1999. On January 11, Kelly phoned defendant at work and told

him the police found a drug lab. Defendant left work and never returned. He stayed in the mountains for awhile, then moved to Texas where he was arrested on a warrant.

Defendant's cousin owned a house and rented an in-law unit to Kathy Kilps. Kilps frequently saw defendant at the house in January 2000. Defendant told her he was staying there because he had separated from his wife. Defendant's supervisor testified that defendant was at work on January 11, 2000, from 8:00 a.m. to 12 p.m.

III. *Procedure*

Defendant and Iribarren were charged jointly, but tried separately. The jury convicted defendant of manufacturing methamphetamine and possessing hydriodic acid with the intent to manufacture the drug. The jury also found true an enhancement for manufacturing over ten gallons. The court found defendant had served a prison term and had suffered two prior convictions for offenses related to controlled substances. On count one, manufacturing methamphetamine, the court imposed the mid-term of five years and added five years for the quantity enhancement, for a total term of ten years in state prison. On count two, possession of hydriodic acid, the court imposed the mid-term of four years and added three years for defendant's controlled substance prior conviction. The court stayed imposition of sentence on count one and struck the remaining enhancements.

DISCUSSION

I. *The Court Did Not Err in Giving CALJIC No. 4.71*

The information alleged that the offenses occurred "[o]n or about January 11, 2000." After defendant's closing argument, the court read CALJIC No. 4.71 at the prosecutor's request.[1] Defendant now contends the court erred because he presented an alibi defense.

CALJIC No. 4.71 provides: "When, as in this case, it is alleged that the crime charged was committed 'on or about' a certain date, if you find that the crime was

[1] During deliberations the jurors asked the court for "[c]larification on the term 'on or about'." The court sent a note to the jurors asking, "What do you want clarified regarding 'on or about'." Apparently, the jury did not respond to the court's note.

committed, it is not necessary that the proof show that it was committed on that precise date; it is sufficient if the proof shows that the crime was committed on or about that date."

The comment to CALJIC No. 4.71 provides in part: "This instruction is improper if the People's evidence fixes the commission of the offense at a particular time to the exclusion of any other time and the defendant has presented evidence of an alibi as to that particular time." (Com. to CALJIC No. 4.71 (6th ed. 1996), p. 225.) The California Supreme Court expressly approved the instruction's cautionary comment in *People v. Jones* (1973) 9 Cal.3d 546, stating that it "accurately recognizes the rule as developed by the courts." (*Jones*, *supra*, at p. 557, overruled on other grounds in *Price v. Superior Court* (2001) 25 Cal.4th 1046, 1056-1059.)

Defendant relies on *Jones*, *supra*, 9 Cal.3d at page 546, in which a police officer testified that he purchased marijuana from the defendant on March 24. Because the defendant presented evidence that he was in Texas on that date, the Supreme Court concluded that it was error to instruct the jury with CALJIC No. 4.71. Defendant also relies on *People v. Barney* (1983) 143 Cal.App.3d 490, 497, in which the defendant was charged with committing a lewd act upon his granddaughter "on or about February 8." The victim's testimony limited the act to the weekend of February 7 and 8. The defendant presented evidence that relatives were with him on those dates, suggesting a lack of opportunity to commit the offense. The *Barney* court determined that it was error for the trial court to give CALJIC No. 4.71 because there was "a substantial possibility the jury was misled concerning the necessity to agree defendant molested the child during the weekend of February 7 and 8." (*Id.* at p. 498.)

Defendant argues that, just as in *Barney*, there was a "substantial possibility" the jury was misled here. He contends the testimony of his alibi witnesses demonstrates that he could not have been manufacturing methamphetamine "on or about" January 11. Defendant points to his supervisor's testimony that defendant was at work during the police search and to other testimony establishing that defendant no longer resided at the house after January 2, 2000. Defendant argues that giving CALJIC No. 4.71 deflected

the jury's attention from the crucial time period of "on or about January 11," as provided in the information.

As the comment to CALJIC No. 4.71 makes clear, it is the prosecution's evidence, not the date stated in the information, that determines the relevant time period for the jury's consideration. In *People v. Jennings* (1991) 53 Cal.3d 334, 358-359, the Supreme Court emphasized this distinction, referring to *Barney*, *supra*, 143 Cal.App.3d at page 497: "As is clear, the *Barney* court did not hold that *the information* must plead the exact date of the offense. Instead, it merely held that when the prosecution's proof establishes the offense occurred on a particular day to the exclusion of other dates, and when the defense is alibi . . . , it is improper to give the jury an instruction using the 'on or about' language." (Italics in original.)

Unlike *Jones*, *supra*, 9 Cal.3d 546 and *Barney*, *supra*, 143 Cal.App.3d 490, the evidence here did not establish that the offense occurred on a particular date to the exclusion of all other dates. Thus, it was not error for the court to instruct with CALJIC No. 4.71. While the information charged that the offenses occurred "on or about January 11, 2000," the prosecution's evidence established that the drug laboratory had been operating for at least four months before its discovery. Manufacturing methamphetamine, unlike a drug sale or act of sexual misconduct, is an ongoing process rather than a discrete act occurring on a particular date. (*People v. Lancellotti* (1993) 19 Cal.App.4th 809, 813.) In finding defendant guilty, the jury obviously rejected defendant's claim that he knew nothing of the methamphetamine laboratory until January 2. The jury reasonably could have found that defendant was involved in the manufacturing of methamphetamine, even if it believed defendant attempted to dismantle the lab on January 2 and thereafter left the premises. Given the nature of the offense and the prosecutor's evidence, an alibi accounting for defendant's whereabouts between January 2 and January 11, even if accepted by the jury, did not preclude his conviction. The giving of CALJIC No. 4.71 was not error.

II. *The Statute and Instruction Do Not Create A Mandatory Presumption*

Hydriodic acid is a key component in the manufacturing of methamphetamine. Defendant was charged with possessing hydriodic acid with the intent to manufacture methamphetamine in violation of Health and Safety Code[2] section 11383, subdivision (c)(2). The statute provides: "Any person who, with intent to manufacture methamphetamine . . . , possesses hydriodic acid . . . is guilty of a felony and shall be punished by imprisonment in the state prison for two, four, or six years." Subdivision (f) provides in pertinent part: "[P]ossession of essential chemicals sufficient to manufacture hydriodic acid, with intent to manufacture methamphetamine, shall be deemed to be possession of hydriodic acid."

Incorporating the language of section 11383, subdivision (f), the court instructed the jury as follows: "Every person who possesses hydriodic acid or any product containing hydriodic acid with the intent to manufacture methamphetamine is guilty of a violation of Health and Safety Code section 11383 (c)(2), a crime. [¶] For purposes of this instruction, possession of essential chemicals sufficient to manufacture hydriodic acid with the intent to manufacture methamphetamine, shall be deemed to be possession of hydriodic acid. [¶] In order to prove this crime, each of the following elements must be proved: [¶] 1. A person possessed hydriodic acid or a product containing hydriodic acid; and [¶] 2. That person did so with the specific intent to manufacture methamphetamine."

Defendant argues that the instruction, and necessarily the statute on which it is based, create an impermissible mandatory presumption that possession of the essential chemicals is sufficient to prove possession of hydriodic acid.

A mandatory presumption is one that "tells the trier of fact that it *must* assume the existence of the ultimate, elemental fact from proof of specific, designated basic facts." (*People v. Roder* (1983) 33 Cal.3d 491, 498, italics in original.) Mandatory presumptions in criminal statutes may be unconstitutional because they relieve the prosecution from

[2] Subsequent statutory references are to the Health and Safety Code, unless otherwise stated.

having to prove each element of the offense beyond a reasonable doubt. (*Id.* at pp. 496-497.) Here, defendant contends that the instruction compelled the jury to find the ultimate fact, possession of hyriodic acid, from proof of the basic fact, possession of its essential chemicals sufficient to make hydriodic acid.

Defendant cites *Sandstrom v. Montana* (1979) 442 U.S. 510, 521-524, for the proposition that a mandatory presumption may be constitutional only if it is accurate beyond a reasonable doubt. Under defendant's interpretation of the statute, the mandatory presumption is unconstitutional. Red phosphorous and iodine, the essential chemicals at issue here, are not the same chemical substance as hydriodic acid. Hydriodic acid does not come into existence until these essential chemicals are synthesized. The prosecution's expert testified that many methamphetamine manufacturers mix red phosphorous and iodine with water to create hydriodic acid because sale of that substance is monitored by the government, making it difficult to purchase.

However, we do not interpret subdivision (f) in the manner urged by defendant. A statute is ambiguous when it is susceptible of more than one reasonable construction. (*Hughes v. Board of Architectural Examiners* (1998) 17 Cal.4th 763, 776.) "[I]f the statutory language permits more than one reasonable interpretation, courts may consider various extrinsic aids, including the purpose of the statute, the evils to be remedied, the legislative history, public policy, and the statutory scheme encompassing the statute. [Citation.] In the end, we ' "must select the construction that comports most closely with the apparent intent of the Legislature, with a view to promoting rather than defeating the general purpose of the statute, and avoid an interpretation that would lead to absurd consequences." [Citation.]' [Citation.]" (*Torres v. Parkhouse Tire Service, Inc.* (2001) 26 Cal.4th 995, 1003.) "And, wherever possible, 'we will interpret a statute as consistent with applicable constitutional provisions, seeking to harmonize Constitution and statute.' [Citation.]" (*People v. Superior Court (Zamudio)* (2000) 23 Cal.4th 183, 193.)

Defendant's interpretation fails to consider subdivision (f) in view of the purpose and scheme of the statute and its legislative history. In 1972, the Legislature enacted

section 11383, proscribing the possession of chemicals associated with the manufacture of methamphetamine. (Stats. 1972, ch. 1407, § 3, p. 3024.) The Legislature expanded the statute in 1977, to include chemicals associated with the manufacture of phencyclidine (PCP), and also added what is now subdivision (f), criminalizing the possession of "immediate precursors" used to make the chemicals necessary for methamphetamine or PCP: "For purposes of this section, possession of immediate precursors sufficient for the manufacture of methylamine, phenyl-2-propaneone, piperidine, or cyclohexanone *shall be deemed to be* possession of such a derivative substance. Additionally, possession of any compound or mixture containing piperidine or cyclohexanone *shall be deemed to be* possession of such substance." (Italics added.) (Stats. 1977, ch. 165, § 3.6, p. 640.)

The statute was amended again in 1978, 1980, 1982, 1984 and 1985 to increase the number of chemicals associated with the manufacture of methamphetamine or PCP. In 1987, the Legislature added hydriodic acid to the list by enacting subdivision (c), prohibiting the simultaneous possession of hydriodic acid and ephedrine. The Legislature also amended what is now subdivision (f), formerly subdivision (e), to provide that "possession of immediate precursors sufficient for the manufacture of . . . hydriotic [*sic*] acid . . . *shall be deemed to be* possession of such a derivative substance." (Italics added.) (Stats. 1987, ch. 424, § 1, p. 1589.) However, only simultaneous possession of ephedrine and hydriodic acid or its immediate precursors was proscribed.

In 1995, the Legislature expanded section 11383 to prohibit the possession of hydriodic acid, its immediate precursors, or its "essential chemicals," regardless of whether ephedrine was also possessed. Specifically, the Legislature enacted the current subdivision (c)(2), which provides: "Any person who, with intent to manufacture methamphetamine . . . possesses hydriodic acid or any product containing hydriodic acid is guilty of a felony." The Legislature also amended subdivision (f) to add the sentence at issue here: "Additionally, possession of essential chemicals sufficient to manufacture hydriodic acid, with intent to manufacture methamphetamine, *shall be deemed to be* possession of hydriodic acid." (Italics added.) (Stats. 1995, ch. 571, § 1, pp. 4419-4420.)

As demonstrated by the growing number of chemicals enumerated in section 11383, the Legislature cast a wide net in its effort to criminalize the possession of chemicals used to make methamphetamine or PCP. The Legislature's efforts are reflected in the 1995 amendments, which found their genesis in Senate Bill No. 419 (1995-1996 Reg. Sess.). The purpose of proscribing the essential chemicals sufficient to make hydriodic acid was explained in a report of the Assembly Committee on Public Safety: "According to the Attorney General's Office, in the late 1980's, HI [hydriodic acid] was a substance sought after by operators of illegal methamphetamine laboratories and has been the main reducing agent used for manufacturing methamphetamine on the West Coast. As a result of the significant increase in the amount of HI purchased, Health and Safety Code section 11100 was enacted. [¶] Health and Safety Code section 11100 requires manufacturers, wholesalers and retailers that sell, transfer, or furnish [HI] to obtain a Precursor Business Permit from the [Department of Justice] and report those transactions to the [Department of Justice]. This law does not address essential chemicals. [¶] The Attorney General's Office has recently identified that the amount of iodine and iodine crystals sold has increased dramatically since HI was added to the list of controlled substances in 1993. 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 California Health and Safety Code reflect that individuals are buying between 100 and 500 pounds of iodine per purchase. [¶] Intelligence received confirms 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.)

The manner of closing the loophole was described in the report of the Senate Committee on Criminal Procedure: "This provision would make possession of iodine, for instance, with intent to manufacture methamphetamine, as culpable as possession of the finished product." (Sen. Com. on Criminal Procedure, Rep. on Sen. Bill No. 419 (1995-1996 Reg. Sess.) Mar. 21, 1995, p. 6.) The report also states: "This bill would provide that possession of any essential chemicals . . . sufficient to manufacture . . . methampetamine are deemed to be possession of the precursor itself. Thus, possession of iodine, which is used to make hydriodic acid, *would be legally equivalent* to possession of hydriodic acid." (*Ibid*., italics added.) The report of Assembly Committee on Public Safety explained: "[P]ossession of essential chemicals sufficient to manufacture hydriodic acid, with the intent to manufacture methamphetamine, shall be deemed to be possession of hydriodic acid, and is a felony punishable by imprisonment in the state prison for two, four, or six years." (Assem. Com. on Public Safety, Rep. on Sen. Bill No. 419, *supra*, p. 1.)

By extending the prohibition on possessing hydriodic acid to include its essential chemicals, the Legislature has criminalized both possession of hydriodic acid *and* possession of essential chemicals when the latter are sufficient to make hydriodic acid and are possessed with intent to manufacture methamphetamine. As used in the statute, the phrase "shall be deemed to be" means that possession of the essential chemicals shall be treated in the same manner as possession of hydriodic acid. As the legislative history indicates, the possession of the essential chemicals in these circumstances is the *legal* equivalent of possession of hydriodic acid. By contrast, under defendant's construction of the phrase, the essential chemicals and hydriodic acid are equated as the same chemical substance. This interpretation does not comport with the apparent intent of the Legislature and does not promote the general purpose of the statute. (*Torres v. Parkhouse Tire Service, Inc.*, *supra*, 26 Cal.4th at p. 1003.)

In view of this analysis upholding the constitutionality of the statute, the court did not err in instructing the jury.

III. *The Court Erred in Sentencing Defendant*

Relying on Penal Code section 1252,[3] the Attorney General requests that we correct two sentencing errors committed by the court. One error was adverse to the People and the other was adverse to defendant. Because the errors resulted in an unauthorized sentence, we review the claims despite the lack of objection below. (*People v. Smith* (2001) 24 Cal.4th 849, 852.)

On count one, manufacturing methamphetamine, the court sentenced defendant to a total term of ten years in state prison. It imposed the mid-term of five years for the manufacturing methamphetamine conviction (§ 11379.6, subd. (a)), and added the additional, mandatory term of five years in state prison for the volume enhancement. (§ 11379.8, subd. (a)(2).)

On count two, possession of hydriodic acid (§ 11383, subd. (c)(2)), the court imposed the mid-term of four years in state prison, and added the three-year enhancement for defendant's prior conviction related to controlled substances. (§ 11370.2, subd. (c).) The court found count two "to be a more accurate description of the criminal conduct that was involved here." It stated: "I can't say from the evidence that's presented here that I feel that you were the kingpin in this operation. My sense of the evidence suggests that Mr. Iribarren was the primary mover and shaker." The court then executed sentence on count two and stayed execution on count one pursuant to Penal Code section 654.

Penal Code section 654 states in relevant part: "An act or omission that is punishable in different ways by different provisions of law shall be punished under the provision that provides for the longest potential term of imprisonment, but in no case shall the act or omission be punished under more than one provision." Because count one carried a longer potential term of imprisonment than count two, the court erred in staying the sentence on count one and executing the sentence on count two.

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[3] Penal Code section 1252 provides in relevant part: "On an appeal by a defendant, the appellate court shall, in addition to the issues raised by the defendant, consider and pass upon all rulings of the trial court adverse to the State which it may be requested to pass upon by the Attorney General."

Further, the enhancement imposed on count two is applicable only to a conviction of transporting a controlled substance or possession for sale. (§ 11370.2, subd. (c).) Because defendant was not convicted of the predicate offense, the three-year enhancement was erroneously imposed.

Defendant does not dispute these sentencing errors, but asks that we remand the matter for resentencing. The People request that we correct the error and modify the judgment by executing the sentence on count one. We decline the People's request. We may properly remand for a complete resentencing after finding an error with respect to part of a sentence. (*People v. Calderon* (1993) 20 Cal.App.4th 82, 88.) The trial court here retains discretion to modify its sentence as it deems appropriate, consistent with the applicable sentencing regulations.

DISPOSITION

The judgment is affirmed.

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Corrigan, J.

We concur:

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McGuiness, P.J.

_____
Pollak, J.