STATE OF MINNESOTA
IN COURT OF APPEALS
A07-0240

State of Minnesota,
Respondent,

vs.

James J. Schmidt,
Appellant.

Filed April 29, 2008
Affirmed in part, reversed in part, and remanded
Collins, Judge[*]

Rice County District Court
File No. 66-CR-06-532

Lori Swanson, Attorney General, James B. Early, Assistant Attorney General, 1800 Bremer Tower, 445 Minnesota Street, St. Paul, MN 55101-2134; and

G. Paul Beaumaster, Rice County Attorney, 218 Northwest Third Street, Faribault, MN 55021 (for respondent)

Lawrence Hammerling, Chief Appellate Public Defender, Jessica B. Merz Godes, Assistant Public Defender, Suite 300, 540 Fairview Avenue North, St. Paul, MN 55104 (for appellant)

Considered and decided by Hudson, Presiding Judge; Worke, Judge; and Collins, Judge.

[*] Retired judge of the district court, serving as judge of the Minnesota Court of Appeals by appointment pursuant to Minn. Const. art. VI, § 10.

U N P U B L I S H E D O P I N I O N

COLLINS, Judge

Following a jury trial, appellant was convicted of first-degree controlled-substance crime – manufacture of methamphetamine – under Minn. Stat. § 152.021, subd. 2a(a) (2004), and possession of substances with intent to manufacture methamphetamine under Minn. Stat. § 152.0262 (Supp. 2005). Because the evidence is insufficient to establish that appellant manufactured any amount of methamphetamine, we reverse his conviction of first-degree controlled-substance crime. But, because (a) appellant did not object to what became a midtrial amendment of the complaint to charge him with a new offense; (b) the jury was properly instructed on that charge; and (c) his defense was not hindered or adversely impacted, we affirm appellant's conviction of possession of substances with intent to manufacture methamphetamine and remand for resentencing.

FACTS

In July 2006, appellant James J. Schmidt was arrested during a traffic stop in Faribault. Schmidt was in the driver's seat of a van that was being towed by a vehicle driven by C.W., who had informed police that Schmidt would be in the area that morning driving a white van with a "meth lab" in the back. The van was owned by Nickolas Thibodeau, who was known to police as a manufacturer of methamphetamine in the Northfield area.

Schmidt was subsequently charged with three counts: (1) first-degree controlled-substance crime under Minn. Stat. § 152.021, subd. 2a(a) (2004); (2) attempt to commit controlled-substance crime in the first degree under Minn. Stat. §§ 152.021, subd. 2a(a),

609.17 (2004); and (3) attempted manufacture of methamphetamine, possession of precursor ingredients, under Minn. Stat. § 152.021, subd. 2a(b) (2004). At Schmidt's initial appearance the prosecutor withdrew count three, stating that it was "put in [the complaint] in error." Schmidt pleaded not guilty and the case was tried.

At the outset of the trial the prosecutor moved to amend the complaint to add additional charges, including conspiracy to manufacture methamphetamine and possession of methamphetamine. Defense counsel objected, and the district court denied the motion. The district court's preliminary instructions and each party's opening statement informed the jury that Schmidt was being tried on two counts: first-degree manufacture of methamphetamine and attempt to manufacture methamphetamine.

Called by the state, Thibodeau testified that he and Schmidt drove from Northfield to Faribault in Thibodeau's van with plans to finish manufacturing some methamphetamine. According to Thibodeau, Schmidt knew that there was a meth lab in the van, Thibodeau told Schmidt that he needed a place to work, and Schmidt directed him to a friend's trailer home. Thibodeau testified that while Schmidt was not "physically doing it" by making product or cooking methamphetamine, Schmidt provided him with a safe place, helped him carry some things from the van into the trailer, including a flask, some salt, some acid, and "some jugs with methamphetamine water in them," and "clean[ed] out some dishes."

Thibodeau explained that "[t]here was meth already made [in the van] that we worked on to try and gain more from the drugs" and that he was not attempting to cook methamphetamine but merely to "pull" it, or recover some product from the residue on

items in the van. Thibodeau told Schmidt that he could have what had been manufactured. Thibodeau fell asleep from the effects of the gas produced during the activity and when he awoke, "everything was gone"; Schmidt had left with Thibodeau's van.

A deputy sheriff testified that after stopping the van and securing Schmidt in custody, he observed a mason jar containing a white liquid, a case of mason jars, and at least one tote in plain sight in the van. A further search of the van and of C.W.'s vehicle revealed meth-lab components, ingredients, and coffee filters containing a red substance later found to contain methamphetamine.

Following the testimony of Thibodeau and the deputy sheriff, the prosecutor renewed his motion to amend the complaint to add a charge of conspiracy and a charge of aiding and abetting, to which defense counsel objected; and the district court again denied the motion. The trial judge then informed the attorneys of his discovery (albeit mistaken) that the count-two charge of attempt to commit first-degree controlled-substance crime – manufacture of methamphetamine, "no longer exists" because the legislature deleted it in 2005 and "creat[ed] a new offense." The judge stated that the new offense is renumbered as Minn. Stat. § 152.0262 and "is now possession of substances with intent to manufacture methamphetamine."

The parties agreed to an amendment of count two from "attempt to manufacture methamphetamine to possession of substances with intent to manufacture methamphetamine." The district court thereafter advised the jury that because of a

change in the law in 2005 the language pertaining to count two would charge Schmidt with "possession of substances with intent to manufacture methamphetamine."

Trial resumed with a sheriff's investigator's testimony that what was depicted in photos of the items seized from the van was a methamphetamine manufacturing operation in process. A Bureau of Criminal Apprehension chemist then testified regarding his analysis of methamphetamine found on items from inside the van.

In his own defense, Schmidt testified that despite his history of alcohol and chemical abuse, including methamphetamine use since 2001, he has never "made methamphetamine" and that he "never had to" because he "had people like Thibodeau to do that." He denied assisting Thibodeau in the process. He testified that he left the trailer early in the morning and when he returned Thibodeau was passed out. Schmidt decided to steal Thibodeau's van, but the battery was dead. With C.W.'s assistance, Schmidt decided to tow the van to another nearby trailer home, and was stopped along the way and arrested.

At the close of the evidence, the prosecutor again sought to add a charge of aiding and abetting. Defense counsel objected, and the district court again refused to allow the amendment.

During closing arguments, both attorneys explained that Schmidt was charged with manufacturing methamphetamine and with possessing substances with intent to manufacture methamphetamine. The district court accurately instructed the jury on these charges and their elements. The jury was also instructed on the requirement of corroboration of the testimony of an accomplice. The jury returned guilty verdicts on

both counts, and Schmidt was sentenced to 84 months in prison for first-degree controlled-substance crime as charged in count one. This appeal followed.

D E C I S I O N

I.

Schmidt challenges the sufficiency of the evidence to sustain his conviction of first-degree controlled-substance crime. This court's review is limited to a "painstaking" analysis of the record to determine whether the evidence, when viewed in the light most favorable to the conviction, is sufficient to allow the jury to reach the verdict that it did. *State v. Webb*, 440 N.W.2d 426, 430 (Minn. 1989). We must assume that the jury believed the state's witnesses and disbelieved any evidence to the contrary. *State v. Moore*, 438 N.W.2d 101, 108 (Minn. 1989).

Schmidt argues that the evidence was insufficient to prove that he manufactured any amount of methamphetamine, as required by Minn. Stat. § 152.021, subd. 2a(a) (2004).[1] The term "manufacture" is defined as including "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 (2004).

[1] Appellant was charged only as a principal, and despite several efforts by the prosecutor, the district court refused to amend the complaint or otherwise instruct the jury on aiding and abetting under Minn. Stat. § 609.05 (2004). Without such an instruction, we cannot infer that the jury found appellant guilty under this vicarious theory of liability. *Cf. State v. Osborne*, 715 N.W.2d 436, 447 (Minn. 2006) (when jury instructions did not encompass the alleged aggravating factors within the elements of the charged offenses, reviewing court will not infer from guilty verdict that jury necessarily found the uncharged alleged aggravating factors).

While the definition of the term "manufacture" is fairly broad and encompasses many activities, it nonetheless requires that the defendant participate in a "process" that includes some direct action such as combining ingredients, packaging, or filling. *See American Heritage College Dictionary* 1110 (4th ed. 2007) (defining "process" as "[a] series of operations performed in the making or treatment of a product: *a manufacturing process*"). Thus, the mere transporting or assembling of ingredients, preparing an area, or washing glassware may not be enough to establish that a person has engaged in the manufacturing of a substance.

The evidence material to Schmidt's conviction for manufacturing is limited to the facts that he directed Thibodeau to a friend's trailer home, where Thibodeau extracted methamphetamine from the ingredients found in the van; that Schmidt carried some things into the trailer; and that he washed some glassware and cleaned up the area before Thibodeau could "pull" or extract methamphetamine from residue present on some items from the van. Both Thibodeau and Schmidt testified that Schmidt did not assist in any of the processing. And their testimony strongly suggests, although it is not conclusive, that Schmidt was not even present when Thibodeau "pulled" methamphetamine from residue or when Thibodeau "gassed out" and fell asleep.

Thus, even when we view the evidence in the light most favorable to the verdict and assume that the jury rejected any evidence contrary to the verdict, we must conclude that the evidence is insufficient to support the conviction for manufacturing any amount of methamphetamine. *Cf. State v. Traxler*, 583 N.W.2d 556, 561-62 (Minn. 1998) (reversing conviction of first-degree controlled substance crime for insufficient

evidence). We therefore reverse Schmidt's conviction of first-degree controlled substance crime. [2]

II.

Next, Schmidt contends that the district court gave an erroneous jury instruction on count two, which resulted in the jury finding him guilty of a crime with which he was not charged. Count two, originally charging Schmidt with "substantial step" attempt to manufacture methamphetamine under Minn. Stat. §§ 152.021, subd. 2a(a), 609.17 (2004), was effectively amended during trial to reflect what the district court mistakenly believed was a renumbering of the statute governing attempt to commit first-degree controlled substance crime. Each party agreed to this change, the jury was instructed based on the renumbered statute, and the verdict form reflected the new statute, Minn. Stat. § 152.0262 (Supp. 2005).

But section 152.0262 relates to possession of substances with intent to manufacture methamphetamine and replaced Minn. Stat. § 152.021, subd. 2a(b) (2004); it does not affect the offense of attempt to commit first-degree controlled-substance crime that is still chargeable under Minn. Stat. §§ 152.021, subd. 2a(a), 609.17 (2004). Thus the district court and the parties erred in their beliefs that the offense originally charged in count two was renumbered in 2005 and that a midtrial amendment to the complaint to

[2] Given our decision to reverse this conviction for insufficient evidence, we need not decide whether the district court erred in refusing to answer a question posed by the jury during deliberations. The jury's question, seeking to clarify whether "acts of . . . suggesting [or] providing a location to produce meth be considered producing under the law," demonstrates the jury's struggle to reconcile the evidence with the definition of manufacturing.

charge appellant with a new offense, possession of substances with intent to manufacture methamphetamine, was called for.

This court has held that a midtrial reformation of a criminal complaint that constructively amends the charge must comply with Minn. R. Crim. P. 17.05. *State v. Guerra*, 562 N.W.2d 10, 13 (Minn. App. 1997). That rule allows an amendment only if "no additional or different offense is charged and if substantial rights of the defendant are not prejudiced." Minn. R. Crim. P. 17.05. The purpose of restricting the prosecution to charges included in a complaint is to provide a defendant with notice and an opportunity to prepare his defense. *State v. Gisege*, 561 N.W.2d 152, 157 (Minn. 1997). It loosely follows, however, that a different offense may be substituted for an original charge if a defendant has ample notice of the new charge and has "invited error" by agreeing to the substitution, and if his defense has not been hindered or adversely affected by the amendment. *See id.* at 158-59 (discussing doctrine of invited error and standard of review).

Here, because the district court and the parties agreed to the amendment, there was no lack of notice. Similar to the "invited error" in *Gisege*, Schmidt was on notice that the amendment charged him with a different offense. And Schmidt's substantial rights do not appear to have been prejudiced by the amendment: the evidence presented during trial pertained to either offense; and the statutory penalty for the crime of possession of substances with intent to manufacture methamphetamine (10 years) is less severe than the penalty for the original count-two charge of attempt to commit first-degree controlled-substance crime (15 years).

Schmidt did object to the state's repeated attempts to amend the complaint during trial to include conspiracy and aiding and abetting, claiming prejudice in that he would have called additional witnesses and that he would be unable to adequately prepare a defense to the proposed charges. But a review of the record fails to support any claim that Schmidt's defense was hindered by the reformation of the complaint that occurred after the state's first two witnesses, Thibodeau and the deputy sheriff, testified. Schmidt fails to explain how his cross-examination of either of these witnesses would have been different had the count-two charge been similarly amended before the trial began. In sum, after the supposed need for amendment was raised by the district court the amendment was accepted by the parties and explained to the jury; the new charge was addressed in both closing arguments; and the jury was properly instructed on the charge.

Finally, when Schmidt testified, he was on notice of the new charge. His defense was that he did not know that the van contained a meth lab; that he was not present at the trailer when Thibodeau was pulling or cooking methamphetamine; and that he did not assist Thibodeau in any manner at any time during the manufacturing process. Schmidt argues that his conviction cannot be sustained based solely on the testimony of an accomplice. But Thibodeau's testimony was independently corroborated by the physical evidence found in the van and by details provided through Schmidt's own testimony. Schmidt fails to explain how his defense was in any way hindered by the midtrial amendment of the complaint to charge him with possession of substances with intent to manufacture methamphetamine.

This court has discretion to consider an error that was not objected to at trial if it is plain and affected a defendant's substantial rights. *State v. Griller*, 583 N.W.2d 736, 740 (Minn. 1998). But even if an error is plain and has affected a defendant's substantial rights, this court must still consider whether a new trial is necessary to "ensure fairness and the integrity of judicial proceedings." *Id.* at 742. In this case, Schmidt had ample notice of the revision of the count-two charge, the new charge was fully argued to the jury by both parties, the jury was properly instructed on the statutory definition and elements of possession of substances with intent to manufacture methamphetamine, and the evidence overwhelmingly supported Schmidt's conviction of this offense. As in *Griller*, a new trial is not necessary to ensure the fairness and integrity of the judicial proceedings here: granting Schmidt a new trial would be a "miscarriage of justice" because he was "afforded a complete adversarial trial[,]" was allowed to "thoroughly present[] his . . . theory of the case[,]" and it was rejected by the jury. 583 N.W.2d at 742.

We therefore reverse Schmidt's conviction of first-degree controlled-substance crime, but affirm his conviction of possession of substances with intent to manufacture methamphetamine and remand for resentencing on this offense.

Affirmed in part, reversed in part, and remanded.