

and consecutively to Count 2. From the Judgment and Sentence imposed, Appellant perfected this appeal.

Appellant raised two propositions of error:

1. Mr. Dueitt's convictions for Manufacturing Methamphetamine and for Possession of a Precursor Substance violate the prohibitions against double jeopardy and double punishment, and
2. The trial evidence was insufficient to support Mr. Dueitt's convictions because the evidence failed to exclude every reasonable hypothesis except that of Appellant's guilt.

After thorough consideration of the propositions raised, including the Original Record, transcripts, and briefs and arguments of the parties, we have determined that Count 2 should be reversed and remanded with instructions to dismiss for the reasons set forth below. Counts 1, 3 and 4 are affirmed.

Appellant challenges the sufficiency of the evidence going to Counts 1 and 2 in Proposition Two. Viewing the evidence in a light most favorable to the State, we find there was sufficient evidence presented from which the jury could find all of the elements of manufacturing beyond a reasonable doubt. *Spuehler v. State*, 1985 OK CR 132, ¶ 7, 709 P.2d 202, 203-204. It is up to the jury to determine the weight and credibility to be given the witnesses' testimony, consider their motives, and resolve conflicts in the evidence presented. This Court accepts those determinations. *Plantz v. State*, 1994 OK CR 33, ¶ 43, 876 P.2d 268, 281.

Because we find Count 2 should be reversed for the reasons set forth in Proposition One, we need not discuss the sufficiency of the evidence relating to that Count. The record in this case reveals Appellant was bound over at

preliminary hearing for possession of the precursor substance, red phosphorus, based upon his suspected possession of that substance found at the methamphetamine lab. In fact, the State specifically stated at the preliminary hearing that it was making “no allegations as to the red phosphorus that was found in the automobile...”¹ However, at trial, the State changed its theory of the case to prove Appellant possessed the precursor substance found in the automobile. Prior to trial, defense counsel argued the variance in the State’s theory created a notice problem and objected to the State’s use of a lab report showing the substance found in the car was red phosphorus. The trial court denied the objection.

An accused is entitled to notice of the charge he must be prepared to defend against. *Cole v. Arkansas*, 333 U.S. 196, 201, 68 S.Ct. 514, 517, 92 L.Ed. 644 (1948). A variance between the charge made in the Information, and the evidence or theory presented at trial, is not fatal to the conviction unless it either deprived the defendant of adequate notice of what he had to defend against, or subjects him to double jeopardy. *United States v. Randall*, 171 F.3d 195, 203 (4th Cir.1999); *see also Patterson v. State*, 2002 OK CR 18, ¶¶ 23-25, 45 P.3d 926, 931.

Under the unique facts of this case, we find The trial court’s ruling was in error and Appellant’s conviction for Possession of a Precursor Substance without a Permit (Count 2) should be **REVERSED AND REMANDED FOR A NEW TRIAL.**

¹ Preliminary Hearing Transcript at p. 35-36

DECISION

The Judgment and Sentences imposed in Oklahoma County District Court, Case No. CF 2001-504, Counts 1, 3 and 4, are hereby **AFFIRMED**.
Count 2 is **REVERSED AND REMANDED FOR A NEW TRIAL**.

APPEARANCES AT TRIAL

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OPINION BY: JOHNSON, P.J.

LILE, V.P.J. : CONCUR IN PART/DISSENT IN PART
LUMPKIN, J.: CONCUR
CHAPEL, J.: CONCUR
STRUBHAR, J.: CONCUR

LILE, VICE PRESIDING JUDGE: CONCURS IN PART/DISSENTS IN PART

I would affirm Count 2 because the defendant had sufficient notice prior to trial.