

III. The punishment imposed by the trial court which included a fine of \$50,000.00 was excessive.

After thorough consideration of the entire record before us on appeal, including the original record, transcripts, briefs, and exhibits of the parties, we find that modification is required under the law and evidence. We find in Proposition I that Hayner's conviction for Unlawfully Manufacturing Mehtamphetamine is modified to Attempting to Unlawfully Manufacture Methamphetamine.¹ We find in Proposition II that Hayner was not denied any lesser-included offense instructions.² We find in Proposition III that Hayner's indigence does not render his fine excessive.³

¹ *McArthur v. State*, 862 P.2d 482 (Okl.Cr.1993)(this court has the power to modify the judgment to the offense supported by the evidence pursuant to 22 O.S.2001, § 1066). Hayner correctly asserts that there was no proof that he manufactured methamphetamine. The evidence established that Hayner was attempting to manufacture methamphetamine but had not completed the process when the search was conducted. As a result, Hayner should not have been convicted of manufacturing but rather attempting to manufacture. The evidence overwhelming establishes Hayner's guilt for this offense. He had the ingredients and necessary items to make methamphetamine, and had created a lab in the bedroom closet. Moreover, he admitted that it was his methamphetamine lab in closet in a written statement to police. As a result, this Court modifies Hayner's conviction in the Judgment from Unlawfully Manufacturing Methamphetamine to Attempting to Unlawfully Manufacture Methamphetamine. A modification of the sentence is not required as both offenses are prohibited by the same statute and have the same range of punishment.

² Hayner argues that the trial court erred in failing to instruct on the lesser-included offenses of attempting to manufacture methamphetamine, possession of precursors, or "endeavoring" to manufacture methamphetamine. Each of these offenses criminalizes some aspect of the production process, and each requires slightly different evidence to convict. However, the legislature has made all these offenses punishable in identical fashion. 63 O.S.Supp.2003, § 2-401(G) and 63 O.S.2001, § 2-408. Thus, the legislature has created an area where there are no lesser-included offenses but merely alternative ones by mandating that a defendant will be subject to same punishment for participating in any aspect of the manufacture or attempted manufacture of methamphetamine.

³ 63 O.S.Supp.2003, § 2-401(G). The jury imposed the minimum fine required for this offense. The fine is justified due to the severity of the offense.

Decision

Hayner's **CONVICTION** for Unlawfully Manufacturing Methamphetamine is **MODIFIED** to Attempting to Unlawfully Manufacture Methamphetamine. As so modified, Hayner's Judgment and Sentence is **AFFIRMED**. Pursuant to Rule 3.15, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2006), the **MANDATE** is **ORDERED** issued upon the delivery and filing of this decision.

ATTORNEYS AT TRIAL

DANIEL P. STAKE
STAKE AND HENRY
1515 SOUTH SEVENTH STREET
KINGFISHER, OKLAHOMA 73750
ATTORNEY FOR THE DEFENDANT

E.A. GATES
ASSISTANT DISTRICT ATTORNEY
KINGFISHER COUNTY COURTHOUSE
ROOM 25
101 SOUTH MAIN STREET
KINGFISHER, OKLAHOMA 73750
ATTORNEY FOR THE STATE

ATTORNEYS ON APPEAL

PATTI J. PALMER
PALMER & LAMIRAND
520 SOUTH LEAHY
PAWHUSKA, OKLAHOMA 74066
ATTORNEY FOR APPELLANT

W.A. DREW EDMONDSON
ATTORNEY GENERAL OF OKLAHOMA
THEODORE M. PEEPER
ASSISTANT ATTORNEY GENERAL
112 STATE CAPITOL
OKLAHOMA CITY, OKLAHOMA 73105
ATTORNEYS FOR APPELLEE

OPINION BY: CHAPEL, P. J.

LUMPKIN, V.P.J.:	CONCUR IN PART/DISSENT IN PART
C. JOHNSON, J.:	CONCUR
A. JOHNSON, J.:	CONCUR
LEWIS, J.:	CONCUR

LUMPKIN, VICE-PRESIDING JUDGE: CONCUR IN PART/DISSENT IN PART

I agree with the Court's decision to affirm the sentence in this case, but I must dissent to the decision to modify the conviction for manufacturing to attempted manufacturing. The evidence in this case shows Appellant was in the process of cooking or manufacturing the methamphetamine when the officers arrived. That this process was interrupted by the officers' arrival does not reduce Appellant's actions to a mere attempt to manufacture.

Further, this Court has not required evidence of the finished or completed methamphetamine in order to sustain a conviction for manufacturing. *See Vilandre v. State*, 2005 OK CR 9, ¶ 6, 113 P.3d 893, 897 (manufacturing conviction upheld where "controlled dangerous substances . . . seized consisted of precursors and methamphetamine in the manufacturing stage, in liquid form"). Where the evidence shows that all of the materials and ingredients necessary to manufacture methamphetamine are present and the chemical processes of extraction and synthesis have begun, the evidence has been found sufficient to support a conviction for manufacturing.¹ I would therefore affirm the judgment as rendered.

¹ This issue seems to have been addressed more frequently in unpublished decisions. *See Estes v. State*, Case No. F-2004-939 (opinion not for publication, Sept. 27, 2005).