IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. RICHARD FRIEND LIAN, Appellant.	No. 38766-2-II UNPUBLISHED OPINION

Bridgewater, P.J. — Richard Friend Lian appeals his convictions for manufacturing a controlled substance and for possession of pseudoephedrine with intent to manufacture methamphetamine. We affirm his convictions but remand to the trial court to correct Lian's offender score.

FACTS

To manufacture methamphetamine, Lian enlisted the help of four others.[1] He sought their help to buy large quantities of cold medicine containing pseudoephedrine, a chemical used in manufacturing methamphetamine. In exchange for help procuring the cold medicine, Lian gave the others some of the methamphetamine that he made. The group bought cold medicine containing pseudoephedrine at least 28 times from 6 different pharmacies.

[1] Jeannette Lian, Jerre Coleman, Steve German, and Gennifer Campbell.

Officers eventually searched Lian's mobile home and found evidence of a methamphetamine lab, including empty packets of cold medicine. The State charged and a jury found Lian guilty of manufacturing methamphetamine and possession of pseudoephedrine with intent to manufacture methamphetamine.

ANALYSIS

I. No Unanimity Instruction was Necessary

Lian purchased pseudoephedrine on multiple occasions, and he contends that his purchases were distinct acts that required a unanimity instruction. We disagree.

When the State presents evidence of several distinct criminal acts but only charges the defendant with a single crime, either the State must elect the act upon which it will rely for conviction, or the trial court must instruct the jury to unanimously agree that the State has proven the same underlying criminal act beyond a reasonable doubt. *State v. Petrich*, 101 Wn.2d 566, 572, 683 P.2d 173 (1984). The State's failure to elect or the trial court's failure to give a unanimity instruction is a constitutional error that may be raised for the first time on appeal. *State v. Kitchen*, 110 Wn.2d 403, 411, 756 P.2d 105 (1988).

However, a unanimity instruction is not necessary when the evidence demonstrates a continuous course of conduct. *Petrich*, 101 Wn.2d at 571. To determine whether the defendant's conduct constitutes one continuous act, the facts must be evaluated in a commonsense manner. *Petrich*, 101 Wn.2d at 571. "[E]vidence that a defendant engages in a series of actions intended to secure the same objective supports the characterization of those actions as a continuing course of conduct rather than several distinct acts." *State v. Fiallo-Lopez*,

78 Wn. App. 717, 724, 899 P.2d 1294 (1995) (citing *State v. Handran*, 113 Wn.2d 11, 17, 775 P.2d 453 (1989)).

In the present case, Lian and four others purchased cold medicine containing pseudoephedrine at least 28 time from 6 different pharmacies. Each purchase and possession was not a distinct criminal act because Lian used the pseudoephedrine he obtained from those purchases in his continuing effort to make methamphetamine. He needed large quantities of pseudoephedrine to make methamphetamine but purchasing too much cold medicine containing pseudoephedrine from one location is illegal. RCW 69.43.110. Lian therefore intended the multiple purchases of pseudoephedrine to serve the sole objective and enterprise of continuously making methamphetamine. *See e.g.*, *State v. Simonson*, 91 Wn. App. 874, 884, 960 P.2d 955 (1998) (no unanimity instruction needed where evidence showed defendant committed a single continuous methamphetamine manufacturing offense during a six-week period), *review denied*, 137 Wn.2d 1016 (1999).

II. Proper Knowledge Instruction

Lian next argues that instruction 5, the knowledge instruction, relieved the State of its burden of proving an element of the offense. He is incorrect.

Instruction 5 provided:

> A person knows or acts knowingly or with knowledge when he or she is aware of a fact, circumstance or result described by law as being a crime, whether or not the person is aware that the fact, circumstance or result is a crime.
>
> If a person has information which would lead a reasonable person in the same situation to believe that facts exist which are described by law as being a crime, the jury is permitted but not required to find that he or she acted with knowledge.
>
> *Acting knowingly or with knowledge also is established if a person acts intentionally*.

CP at 47 (emphasis added). To establish that Lian manufactured methamphetamine, the State had to prove that Lian manufactured a controlled substance and that he knew the substance he manufactured was controlled. Lian contends that instruction 5 allowed the jury to find that proof of Lian manufacturing a controlled substance also established that he knew the substance he manufactured was controlled.

Lian incorrectly relies on *State v. Goble*, 131 Wn. App. 194, 126 P.3d 821 (2005). In *Goble*, the defendant assaulted a police officer, and the State had to prove that he knew the victim was an officer. *Goble*, 131 Wn. App. at 200. Lian's reliance on *Goble* is misplaced, however, because that case dealt with two mental states. *Goble*, 131 Wn. App. at 202-03. Instead, we find the reasoning in *State v. Sims*, 119 Wn.2d 138, 142, 829 P.2d 1075 (1992), persuasive.

In *Sims*, the issue was whether a defendant's information for unlawful possession of a controlled substance with intent to manufacture or deliver was constitutionally sufficient. *Sims*, 119 Wn.2d at 140. The defendant argued that his information was defective for failing to include the common law element of "guilty knowledge," i.e., an understanding of the identity of the product being manufactured or delivered. *Sims*, 119 Wn.2d at 141. The court did not find the defendant's argument persuasive:

> It is impossible for a person to intend to manufacture or deliver a controlled substance without knowing what he or she is doing. By intending to manufacture or deliver a controlled substance, one necessarily knows what controlled substance one possesses as one who acts intentionally acts knowingly. Without knowledge of the controlled substance, one could not intend to manufacture . . . that controlled substance. Therefore, there is no need for an additional mental element of guilty knowledge.

Sims, 119 Wn.2d at 142 (internal citations omitted). Accordingly, our Supreme Court held that

"guilty knowledge" was not an additional element; the defendant's intent to manufacture or deliver establishes such knowledge. *Sims*, 119 Wn.2d at 142-43. Here, the State had to prove that Lian manufactured a controlled substance and that he knew the substance was controlled. To argue that Lian did not have knowledge that the substance *he manufactured* was controlled is nonsensible. If he is found to have manufactured a controlled substance, he necessarily is found to have known what that controlled substance would be.

III. Recalculated Offender Score

The State concedes that the trial court miscalculated Lian's offender score but nonetheless disagrees with Lian's recalculation. The State calculates his offender score at 13 points while Lian calculates it at 11; both are wrong.

The State and Lian agree on a couple parts of the calculation. They agree that the correct score for Lian's prior conviction for manufacturing a controlled substance is 3 points. RCW 9.94A.525(13). And they agree that the correct score for Lian's current offenses is 3 points. RCW 9.94A.525(13). While they agree to these 6 points, they nonetheless disagree whether to count his burglary and theft convictions as 1 point and whether to add 1 point for his community custody status.

First, Lian contends that his prior burglary and theft convictions counted as 1 point together, not 1 point each. Lian's prior convictions for burglary and theft were found to encompass the same criminal conduct. Under RCW 9.94A.525(5)(a)(i), "offenses which were found . . . to encompass the same criminal conduct, shall be counted as one offense." His burglary and theft convictions, therefore, should add only 1 point to his offender score, not 2.

Because Lian had four other felonies,[2] the total offender score for his prior felony convictions is 5 points.[3] RCW 9.94A.525(7).

Second, Lian contends that his offender score does not include 1 point for community custody. He is incorrect. Although the State failed to include 1 point for community custody in its calculation of his offender score, the trial court found that Lian was on community custody at the time of the offense.[4] *See State v. Jones*, 159 Wn.2d 231, 247, 149 P.3d 636 (2006) (trial court may determine community custody status at the time of sentencing), *cert. denied sub nom.*, *Thomas v. Washington*, 549 U.S. 1354 (2007). The trial court's finding that Lian was on community custody increases his offender score by 1 point. RCW 9.94A.525(19).

In total, Lian's correct offender score is 12 points. Lian's offender score remains greater than 9, and his standard range thus remains the same. RCW 9.94A.517-.518. We decline to remand for a resentencing, however, as the trial court sentenced Lian at the highest end of the standard range due to Lian's rapidity of his reoffense, and a reduction in Lian's offender score has no bearing on this fact. Yet to ensure an accurate judgment and sentence, we remand to the trial

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[2] Third degree rape of a child, two possessions of methamphetamine, and bail jumping.

[3] The bulk of the original miscalculation is the result of the State including Lian's two convictions of possession of methamphetamine into its calculation of "drug offense" under RCW 9.94A.525(13). The result was to increase his offender score by 3 points for each possession charge. RCW 9.94A.525(13). But because possession convictions are not a "drug offense," Former RCW 9.94A.030(24)(a) (2008), the State should have counted Lian's two possession convictions as a prior felony, which receive only 1 point each. RCW 9.94A.525(7).

[4] At the sentencing hearing, the trial court said, "The extensive criminal history here with the fact that the last conviction was for manufacturing methamphetamine and *had not been out of custody more than five or six months when this event occurred* leads me to believe that the only thing I can do is lock Mr. Lian up as long as I can to keep him from doing this again because he's demonstrated that that's what he's going to do." RP (Jan. 12, 2009) at 12 (emphasis added).

court to correct the score only.

We affirm Lian's conviction but remand to the trial court to correct his offender score.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record pursuant to RCW 2.06.040, it is so ordered.

Bridgewater, P.J.

We concur:

Hunt, J.

Quinn-Brintnall, J.