IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. LORIN HUBBARD, Appellant.	No. 38889-8-II UNPUBLISHED OPINION

Hunt, J. – Lorin Hubbard appeals his sentence for unlawful manufacture of a controlled substance (methamphetamine) under RCW 69.50.401(1)(2)(b), Count I, and for unlawful possession of pseudoephedrine and/or ephedrine with intent to manufacture methamphetamine under RCW 69.50.440(1), Count II. He argues that (1) the trial court miscalculated his offender score because his two convictions involved the "same criminal conduct" for sentencing purposes and, thus, should count as one point, rather than two; and (2) defense counsel provided ineffective assistance at sentencing when she challenged his offender score solely on double jeopardy grounds, without arguing "same criminal conduct." Br. of App. at 1.

In his statement of additional grounds (SAG), Hubbard asserts that (1) he was "denied a forensic scientist to testify in [his] defense," (2) the trial court erred in failing to subpoena the Rite

Aid clerk "to testify if whether or not she made a call to police stating that [he] smelled like chemicals," (3) law enforcement violated his Fourth Amendment right to a reasonable expectation of privacy, and (4) the State failed to include in its discovery materials a photograph, Exhibit 7, of the "jug with smoking liquid." SAG at 1. We affirm.

FACTS

I. Methamphetamine Manufacture

On October 16, 2007, Pierce County Deputy Sheriff Mark Fry received a call from a local pharmacy reporting that Lorin Hubbard, who "smelled like chemicals," had purchased a package of pseudoephedrine tablets. CP at 2. The State Board of Pharmacy's pseudoephedrine logs[1] showed that Hubbard had purchased pseudoephedrine at multiple stores, exceeding the legal limit for purchases within a 24-hour period. Fry and other deputies located Hubbard near the pharmacy and followed him to several other area retail stores where they saw him make purchases indicating to the deputies that "he [was] picking up all of the consumable items for a [methamphetamine] lab," Verbatim Report of Proceedings (RP)(Jan. 20, 2009) at 12: a small metal pot; containers of Drano and propane and a package of lithium batteries; dry ice; and a pair of needle nose pliers.

Hoping that Hubbard would lead them to his lab's location, they followed him onto a wooded property owned by the City of Tacoma, on which a tent and a campsite had been erected, despite posted signs prohibiting camping and criminal trespass. Tacoma police officers joined the

[1] The State Board of Pharmacy maintains records of retail transactions involving the sale of ephedrine and pseudoephedrine. RCW 69.43.170(1).

deputies' search for Hubbard "going on all the trails." RP (Jan. 22, 2009) at 184. Eventually Detective Oliver Hickman found Hubbard in a small tent surrounded by debris. Visible through the tent's screen, was Hubbard leaning over a small metal pot, and several of the items he had purchased earlier in the day. When the officers ordered him to stand up, Hubbard left the tent. Inside the pot, Fry saw "loose pills" (later determined to be 46 in number) and "white residue," which indicated to Fry that "[Hubbard] was using [the] pot as a mortar and pestle to grind the pills up" to extract ephedrine for use in manufacturing methamphetamine. RP (Jan. 22, 2009) at 135. Fry arrested and handcuffed Hubbard. Fry advised Hubbard of his *Miranda*[2] rights.

Hickman searched Hubbard's person and tent incident to his arrest. In Hubbard's pockets, Hickman found two receipts from his (Hubbard's) purchases earlier that day and an unused coffee filter. In addition to the pot with pills Hickman found the following evidence of manufacturing methamphetamine in Hubbard's tent: (1) dry ice; (2) used coffee filters; (3) Drano, ether, and acetone, nail polish remover, and starter fluid; (4) a small glass jar with a lid containing coffee filters and liquid; (5) lithium batteries; (6) a small Ziploc bag containing white powder; (7) a pair of pliers and a spoon with white residue on its surface; and (8) empty pseudoephedrine packages.

Fry and Hickman also searched the surrounding area, which was littered with trash and debris, where they found and photographed an air-purifying respirator and a green jug containing acid that was visibly "fuming" (emitting) "a small amount of color[ed][ ] haze." RP (Jan. 22, 2009) at 96.

[2] *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

II. Procedure

The State charged Hubbard with unlawful manufacturing of a controlled substance, methamphetamine,[3] (Count I), and unlawful possession of pseudoephedrine and/or ephedrine with intent to manufacture methamphetamine[4] (Count II).

A. Pretrial CrR 3.6 Hearing

Fry testified that (1) the pharmacy had contacted him after "indentif[ying] an individual who they felt was suspicious in his purchases,"[5] RP (Jan. 20, 2009) at 8; (2) the Board of Pharmacy records demonstrated "that indeed [Hubbard] was purchasing over the legal limit" by purchasing pseudoephedrine pills from different stores within a 24-hour period, RP Jan. 20, 2009) at 8; (3) he (Fry) had located Hubbard and observed his additional purchases before following him and finding him in his tent on City property; (4) standing outside the tent, "[he (Fry)] was able to see some of the items that [Hubbard] had purchased, including a pot with loose red pills in it," RP (Jan. 20, 2009) at 17; and (5) he (Fry) "figured those were the pills that [Hubbard] had just purchased and he was in the process of starting to break them down and conduct an ephedrine extraction." RP (Jan. 20, 2009) at 17.

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[3] RCW 69.50.401(1)(2)(b).

[4] RCW 69.50.440(1).

[5] Fry had previously asked the pharmacy to contact him if Hubbard came into store. RP (Jan. 20, 2009) at 8.

B. Jury Trial

During a pre-trial colloquy, the State confirmed its witness list, noting that a forensic scientist and a records custodian from pharmacy would testify for the State. RP (Jan. 21, 2009) at 67-68. Hubbard presented no defense witness list.

Fry testified that Hubbard's October 16 purchases showed he was "gathering the items to make methamphetamine." RP (Jan. 22, 2009) at 87. The loose pills and white residue in the metal pot in the tent indicated that "[Hubbard] was starting to grind up the pills to make methamphetamine with [them]," which Fry characterized as "ephedrine extraction," the first stage of manufacturing methamphetamine. RP (Jan. 22, 2009) at 95. The dry ice inside Hubbard's tent indicated the second stage of methamphetamine manufacture: Methamphetamine manufacturers use dry ice to make anhydrous ammonia, which they add to ground pseudoephedrine pills and lithium strips from batteries to cause the chemical reaction necessary to make methamphetamine. The green jug outside Hubbard's tent contained a gas-creating acid used during the final stage of the manufacturing process to crystallize the methamphetamine base. Hubbard did not object to the photograph of his campsite or the green jug.

Hickman testified that when he first approached, he could see through the tent's screen that Hubbard "was leaning over a metal pot with red pills in it." RP (Jan. 22, 2009) at 186. Inside Hubbard's tent, Hickman found a small Ziploc bag of white powder and a spoon and pliers coated in white residue. Washington State Patrol Crime Laboratory forensic scientist Frank Boshears testified that the 46 red pills from the metal pot in Hubbard's tent tested positive as pseudoephedrine, the white powder in the Ziploc bag tested positive as 10.6 grams of ground

pseudoephedrine, and the crystalline residue in the small baggie tested positive as methamphetamine.

In closing, the State argued, "[Hubbard] has pseudoephedrine. Why does he have it? It's the main ingredient to produce methamphetamine. . . . What's he going to do with it? He's going to manufacture methamphetamine," RP (Jan. 26, 2009) at 269; and Hubbard "possessed that pseudoephedrine with one purpose only, and that was to make methamphetamine." RP (Jan. 26, 2009) at 279. The State also argued that the items found in Hubbard's tent, including the baggie containing finished methamphetamine (crystalline residue), indicated that Hubbard "was doing one of these processes, if not several of these processes." RP (Jan. 26, 2009) at 271-73. Based on this evidence, the State argued that "all the elements of Count I, Unlawful Manufacture of a Controlled Substance have been proved beyond a reasonable doubt." RP (Jan. 26, 2009) at 275. Hubbard voiced no objection during the State's closing argument.

The jury found Hubbard guilty on both counts. Hubbard's existing offender score was based on two previous felony convictions. He filed a sentencing memorandum, arguing that (1) his two new convictions should merge for double jeopardy purposes because they involved the same act and (2) therefore, the two convictions should add one point to his offender score, rather than two. The State countered that because Hubbard's two convictions required different levels of intent, they "cannot be the same criminal conduct as a matter of law" under RCW 69.50.440, CP at 122, added two points to Hubbard's offender score, and calculated four as his total score.

Conceding that Divisions One and Two of our court have "ruled that they don't merge," Hubbard responded that, "with regard to the merger or double jeopardy issue," his two

convictions "should be punished as the same conduct" because "the evidence was identical for both charges." RP (Feb. 13, 2009) at 306-07. Based on the appellate court cases, the trial court concluded that the offenses were separate;[6] it accepted the State's calculation of Hubbard's offender score of four and the corresponding standard range sentence of 68-100 months of confinement. Over the State's objection, the trial court granted Hubbard's request for a Drug Offender Sentencing Alternative (DOSA)[7] and sentenced him to 42 months of confinement and 42 months of DOSA community custody for each count, to run concurrently.

Hubbard appeals his sentence.[8]

ANALYSIS

I. Offender Score

Hubbard first argues that the trial court miscalculated his offender score and standard sentencing range because his two convictions involved the "same criminal conduct" for sentencing

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[6] More specifically, the trial court reasoned:

> I don't see the facts in this case at all distinguishable from the two Court of Appeals cases, and it's clearly been ruled on. And I have to follow Division I, even if Division II hadn't come up with this decision in the last week. So I'm going to rule that they're two separate offenses. I don't think that I have any choice about that.

RP (Feb. 13, 2009) at 307-08.

[7] Under a DOSA, a defendant serves one half of his sentence in prison and the other half in a substance abuse treatment program while on community custody. *In re Albritton*, 143 Wn. App. 584, 587, 180 P.3d 790 (2008).

[8] Hubbard does not challenge his convictions in his appellate counsel's brief. Nor does he ask us to reverse his convictions in his Statement of Additional Grounds (SAG). To the extent that his SAG arguments implicate such a challenge, we address the issue in the Analysis portion of this opinion. *See* Rules of Appellate Procedure (RAP) 10.10(c) (appellate court will not consider a defendant/appellant's statement of additional grounds for review if it does not inform the court of the nature and occurrence of alleged errors).

purposes and, thus, should count as one point, rather than two, in calculating his offender score. Br. of App. at 1. He does not dispute that his two crimes occurred at the same time and place and against the same victim, the public. Instead, he notes, "The crucial inquiry is whether [he] had a singular intent during the commission of both crimes." Br. of App. at 6. He contends that his possessing pseudoephedrine pills "furthered his scheme of manufacturing methamphetamine," Br. of App. at 7, and that the State's closing argument demonstrated that he "had a singular objective intent" in committing both crimes. Br. of App. at 6-7. The State counters that these two convictions were not the "same criminal conduct" under RCW 9.94A.589(1)(a) because "the charges had different intents and were not part of the same criminal conduct." Br. of Resp. at 7. We agree with the State.

A. Standard of Review

In reviewing a sentence under the Sentencing Reform Act of 1981 (SRA), we generally defer to the sentencing court's discretion. *State v. Haddock*, 141 Wn.2d 103, 110, 3 P.3d 733 (2000). We will not disturb on appeal a sentencing court's determination of whether two or more crimes constitute the "same criminal conduct" for purposes of calculating a defendant's offender score absent a clear abuse of discretion or misapplication of the law. *State v. Knutson*, 64 Wn. App. 76, 82, 823 P.2d 513 (1991) (citing *State v. Burns*, 114 Wn.2d 314, 318, 788 P.2d 531 (1990)); *Haddock*, 141 Wn.2d at 110. We construe the concept of "same criminal conduct" narrowly to disallow most assertions. *State v. Porter*, 133 Wn.2d 177, 181, 942 P.2d 974 (1997).

B. Different Intents; Not "Same Criminal Conduct"

A defendant's offender score is computed from his or her criminal history, including prior

and current convictions. *State v. Dunaway*, 109 Wn.2d 207, 212-13, 743 P.2d 1237 (1987) (*order supplemented by* 749 P.2d 160, (1988)). Under the Sentencing Reform Act (SRA), a trial court may consider current convictions involving the "same criminal conduct" as one crime for sentencing purposes. RCW 9.94A.589(1)(a). Two or more crimes constitute the "same criminal conduct" for sentencing purposes when they require the same criminal intent, occur at the same place and time, and involve the same victim. RCW 9.94A.589(1)(a); *State v. Torngren*, 147 Wn. App. 556, 563-64, 196 P.3d 742 (2008). Offenses do not constitute the "same criminal conduct" if any element of one crime is missing from the other. *Torngren*, 147 Wn. App. at 564 (citing *State v. Maxfield*, 125 Wn.2d 378, 402, 886 P.2d 123 (1994)).

In deciding whether crimes encompass the "same criminal conduct," trial courts focus on the extent to which the requisite criminal intent, viewed objectively, changed from one crime to the next; this analysis often includes the related issues of whether one crime furthered the other and whether the time and place of these crimes remained the same. *Dunaway*, 109 Wn.2d at 215. Offenses committed as part of a common scheme or plan, with no substantial change in the nature of the criminal objective, demonstrate a single intent. *State v. Lewis*, 115 Wn.2d 294, 302, 797 P.2d 1141 (1990). Here, however, the objective criminal intent is not the same for Hubbard's two convictions.

For the crime of possession with intent to manufacture, RCW 69.50.440(1) provides that it is unlawful

> to possess ephedrine or any of its salts or isomers or salts of isomers, pseudoephedrine or any of its salts or isomers or salts of isomers, pressurized ammonia gas, or pressurized ammonia gas solution with intent to manufacture methamphetamine, including its salts, isomers, and salts of isomers.

In contrast, for the crime of manufacturing, RCW 69.50.401(1)(2)(b), provides that it is unlawful

> to manufacture, deliver, or possess with intent to manufacture or deliver, a controlled substance [such as] amphetamine, including its salts, isomers, and salts of isomers, or methamphetamine, including its salts, isomers, and salts of isomers.

First, there is a temporal distinction between the intent requirements in these two crimes. Hubbard's two convictions did not contain the same element of intent because possession of the solvent and partially ground and un-ground pseudoephedrine pills established his intent to manufacture methamphetamine in the future: Hubbard's putting the pseudoephedrine pills into the metal pot and beginning to crush them was evidence that he was preparing for the first stage of manufacturing methamphetamine, "ephedrine extraction"; this preparatory step demonstrated his intent to manufacture. RP (Jan. 22, 2009) at 95. In contrast, manufacturing requires no future intent because this crime is being committed in the present or was completed in the recent past. The baggie of finished methamphetamine residue and the utensils coated with methamphetamine residue were evidence that Hubbard had manufactured methamphetamine.

Second, unlike Hubbard's manufacturing conviction, his conviction for possession with intent to manufacture includes an element of "specific intent." As we held in *State v. Hernandez*, "Where one crime has a statutory intent element and the other does not, the two crimes, as a matter of law, cannot constitute the same criminal conduct." 95 Wn. App. 480, 485, 976 P.2d 165 (1999).[9] Under *Hernandez*, the trial court did not abuse its discretion in counting Hubbard's

[9] "That one crime has a statutory intent element, which the other crime lacks, is tantamount to the two crimes having different statutory intents; therefore, the two crimes cannot constitute the same criminal conduct." *State v. Hernandez*, 95 Wn. App. 480, 486, 976 P.2d 165 (1999).

two convictions separately as two points for his offender score.[10]

Although the officers discovered both crimes at the same time, the evidence demonstrated both that Hubbard had completed the manufacture of one quantity of methamphetamine in the past and that he intended to manufacture another quantity in the future. Accordingly, Hubbard's manufacturing and possession of ingredients with intent to manufacture are not the "same criminal conduct"[11] for offender score and sentencing purposes.[12]

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[10] On appeal, Hubbard does not challenge the trial court's calculation of his offender score based on his trial counsel's double jeopardy analysis. Therefore, we do not address that issue.

[11] *See State v. Maxfield,* 125 Wn.2d 378, 402-03, 886 P.2d 123 (1994) (manufacturing marijuana involved past and present intent, but possession of packaged marijuana involved future intent to deliver); *State v. Burns,* 114 Wn.2d 314, 319, 788 P.2d 531 (1990) (possession of large quantity of drugs found in van, following defendant's arrest for delivery, established future intent to sell drugs, separate conduct because delivery that led to arrest was complete).

[12] Hubbard's case is distinguishable from our recent decision in *State v. Bickle*, in which we held that the trial court did not abuse its discretion in determining that manufacturing marijuana and possessing marijuana do not comprise same criminal conduct for offender score calculation purposes. 153 Wn. App. 222, 231, 222 P.3d 113 (2009). In reaching this decision, we reasoned:

> Bickle's acts of possessing and manufacturing marijuana make up a recognizable scheme in which one crime furthered the other. Bickle needed to possess marijuana in order to manufacture more of it; and by manufacturing more, he then possessed more. Manufacture and possession lie within the same continuum, sharing the same criminal objective.

Bickle, 153 Wn. App. at 118.

As we noted in *Bickle*, manufacturing methamphetamine is fundamentally different from manufacturing marijuana. Manufacturing marijuana begins with marijuana seeds and, thus, includes controlled substance marijuana (seed) possession as a prerequisite to manufacturing controlled substance marijuana. *Bickle*, 153 Wn. App. at 232 (citing RCW 69.50.101(q)). In contrast, methamphetamine manufacturing is a synthetic process that chemically combines otherwise legal materials to produce the methamphetamine product. *Bickle*, 153 Wn. App. at 232. Thus, unlike Bickle's manufacture of marijuana, Hubbard did not need to possess methamphetamine in order to manufacture it; rather, he possessed non-controlled substance ingredients from which he manufactured controlled substance methamphetamine.

Moreover, unlike Bickle, Hubbard was convicted, not of simple possession of the controlled substance, but of possession of ingredients with intent to manufacture the controlled

II. Ineffective Assistance of Counsel

Next, Hubbard argues that "defense counsel's failure to cite the proper cases analyzing same criminal conduct at sentencing denied [him] his right to effective representation." Br. of App. at 8. He contends that, although defense counsel argued his two convictions should be scored as one point for sentencing purposes, she "presented the issue solely as a double jeopardy argument, as opposed to same criminal conduct," which precluded the trial court's "meaningful analysis" of the issue. Br. of App. at 9. This argument fails.

We review claims of ineffective assistance of counsel de novo. To establish ineffective assistance, a defendant must show that "counsel's representation fell below an objective standard of reasonableness based on consideration of all the circumstances." *State v. Thomas*, 109 Wn.2d 222, 226, 743 P.2d 816 (1987) (*citing Strickland v. Washington*, 466 U.S. 668, 688, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)). To demonstrate prejudice, a defendant must show a reasonable probability that but for defense counsel's unprofessional errors, the result of the proceedings would have differed. *Thomas*, 109 Wn.2d at 226. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Thomas*, 109 Wn.2d at 226. There is a strong presumption that counsel's performance was adequate, and we give "exceptional

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substance. As Fry and Hickman testified, the pseudoephedrine pills and white residue in the metal pot indicated that Hubbard was preparing to manufacture methamphetamine; but the finished methamphetamine powder in Hubbard's tent indicated his prior completed manufacture. Thus, Hubbard's possession and manufacturing convictions represent two separate actions; unlike Bickle's two crimes, Hubbard's are not part of the same continuum. Furthermore, as we discuss above, unlike Bickle's conviction for simple possession, Hubbard's conviction for possession with intent to manufacture includes a statutory element of "specific intent." *See Hernandez*, 95 Wn. App. at 485-86.

deference" to counsel's strategic decisions. *In re Elmore*, 162 Wn.2d 236, 257, 172 P.3d 335 (2007) (citing *Strickland*, 466 U.S. at 689).

Hubbard fails to demonstrate how defense counsel's conduct prejudiced him. In spite of counsel's focus on double jeopardy in her sentencing memorandum, we have analyzed the offender score issue on appeal based on statutory "same criminal conduct" argument that Hubbard now asks us to consider. And, under his proffered statutory analysis, he loses on appeal just as he lost below.

III. Statement of Additional Grounds

In his statement of additional grounds (SAG), Hubbard argues that (1) he was "denied a forensic scientist to testify in [his] defense," SAG at 1, that "the ephedrine was not extracted," SAG at 4; (2) the trial court erred in failing to subpoena the pharmacy clerk "to testify if whether or not she made a call to police stating that I smelled like chemicals," SAG at 1; (3) law enforcement violated his "Fourth Amendment right to a reasonable expectation of privacy," SAG at 1, and (4) the State failed to include in its discovery materials a photograph of the "jug with smoking liquid" that the trial court admitted in evidence as Exhibit 7. SAG at 1. These arguments also fail.

Although the Rules of Appellate Procedure (RAP) do not require a criminal defendant to include citation to the record or legal authority in a statement of additional grounds, RAP 10.10(c) provides that "the appellate court will not consider [the argument] if it does not inform the court of the nature and occurrence of the alleged errors." In addition, RAP 10.10(c) provides that "the appellate court is not obligated to search the record in support of claims."

Hubbard does not show that the trial court improperly denied his request for a forensic scientist to testify in his defense because the record on appeal contains nothing about such a request. Similarly, the record on appeal contains nothing about a defense request to subpoena the pharmacy clerk who had reported him to the police. Thus, we cannot reach the merits of this argument.[13]

Hubbard next argues that law enforcement violated his Fourth Amendment[14] right to a reasonable expectation of privacy, apparently based on the police officers' searching his tent without a warrant. He contends that Fry and Hickman testified inconsistently about whether they could see him and the pseudoephedrine pills in "plain view" from outside the tent. SAG at 1. The record demonstrates that Hubbard's contention is factually incorrect. Fry's trial testimony was consistent with his CrR 3.6 hearing testimony and Hickman's trial testimony that the officers did see Hubbard inside the tent through a screen, leaning over a metal pot (that he had purchased earlier), which contained red pills and white residue. As the trial court correctly

[13] We further note that the record shows Hubbard did not plan to call any witnesses to testify at trial.

[14] U.S. CONST. amend. IV.

noted, the police officers did not need a warrant to search the tent because the pills, pot, and other items were in "plain view,"[15] and Hubbard had trespassed and unlawfully erected his tent on city property. RP (Jan. 20, 2009) at 55. The record supports the trial court's determination that the search was lawful under the circumstances of this case. *See State v. Cleator*, 71 Wn. App. 217, 221-22, 857 P.2d 306 (1993).

Lastly, Hubbard argues that the State failed to include in its discovery materials a photograph of the green jug, which the trial court admitted as Exhibit 7. But Hubbard failed to object to the admission of this exhibit during trial; therefore, he waived this claimed error on appeal. RAP 2.5(a); *see State v. Stein*, 140 Wn. App. 43, 68, 165 P.3d 16 (2007) (party must specifically object to evidence presented at trial to preserve the matter for appellate review), *review denied*, 163 Wn.2d 1045 (2008).

[15] Although the trial court used the words "plain view," the doctrine referenced is "open view." Under the "open view" doctrine, "observation takes place from a non-intrusive vantage point. The governmental agent is either outside looking outside or outside looking inside to that which is knowingly exposed to the public." *State v. Seagull*, 95 Wn.2d 898, 901-02, 632 P.2d 44 (1981); *see State v. Cleator*, 71 Wn. App. 217, 222, 857 P.2d 306 (1993) (tent occupant could not reasonably expect that a tent erected and occupied on public lands without permission would remain undisturbed).

We affirm.

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.

Hunt, J.

We concur:

Bridgewater, P.J.

Quinn-Brintnall, J.