

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON**

**STATE OF WASHINGTON,**

**No. 28951-6-III**

**Respondent,**

**Division Three**

**v.**

**WALLACE VAN HUDSON,**

**UNPUBLISHED OPINION**

**Appellant.**

Siddoway, J. — A conviction for possession of pseudoephedrine with intent to manufacture methamphetamine must be supported by some additional evidence of the defendant's intent to manufacture beyond the mere possession of pseudoephedrine. *State v. Montgomery*, 163 Wn.2d 577, 586, 183 P.3d 267 (2008). Wallace Hudson was convicted of the offense based on evidence that he traveled to Walla Walla from Oregon with a methamphetamine user and purchased six boxes of cold medicine containing pseudoephedrine from four different stores. We agree with Mr. Hudson that insufficient evidence supports the jury's determination that he intended to manufacture

methamphetamine and reverse his conviction of that crime.

#### FACTS AND PROCEDURAL BACKGROUND

Sudafed and similar cold medicines contain pseudoephedrine, a key ingredient in the manufacture of methamphetamine. Under Washington law, medicines containing pseudoephedrine must be kept behind the counter and the purchaser must present identification and sign a log reflecting the purchase. At the time of the conduct at issue, it was a gross misdemeanor to purchase more than 3 grams of pseudoephedrine in a 24-hour period. Former RCW 69.43.110(2) (2005). In Oregon, pharmacists do not sell pseudoephedrine without a prescription.

In March 2009, Debbie Paine drove Wallace Hudson and her nephew, Edward Savage, from Hermiston, Oregon, to Walla Walla. According to Ms. Paine, it was her nephew's and Mr. Hudson's payday and they wanted to go shopping at secondhand stores in Pendleton, Milton-Freewater, and Walla Walla. While in Walla Walla, the group visited several discount variety stores. One of their first stops was a Rite Aid store, where Mr. Hudson purchased one box of 24-hour Sudafed. They next drove to a nearby Shopko store and Mr. Hudson purchased two boxes of 12-hour Sudafed. Detective Gary Bolster happened to be in Shopko at the time and saw him make the purchase.

The detective decided to follow Mr. Hudson from Shopko and next observed Mr. Hudson unsuccessfully attempt to purchase Sudafed from a Walmart pharmacy. The

detective thereafter lost sight of Mr. Hudson but radioed a description to members of his department's drug team, which relocated Mr. Hudson by the time he purchased more Sudafed or its generic equivalent from Walgreens and Safeway.

Shortly thereafter, officers detained Ms. Paine, Mr. Savage, and Mr. Hudson at Ms. Paine's car in a Bi-Mart parking lot and arrested Mr. Hudson for possession of an illegal quantity of pseudoephedrine. A consent search of Ms. Paine's car and a search of Mr. Hudson produced six unopened boxes of Sudafed or the generic equivalent purchased from four different stores, amounting to just over 10 grams of pseudoephedrine. No methamphetamine or drug paraphernalia was found, nor were any other materials commonly used to manufacture the drug.

Mr. Hudson was charged with possessing an illegal quantity of pseudoephedrine, a gross misdemeanor, and possessing pseudoephedrine with intent to manufacture methamphetamine, a class B felony. At trial, Detective Bolster explained that he followed Mr. Hudson because he "looked like an individual . . . that may be somebody involved in methamphetamine" and that he was alone when making the purchases. Report of Proceedings (RP) at 39, 41. Four pharmacists testified that Mr. Hudson purchased pseudoephedrine from their stores on the day of his arrest and that he used his real name and identification when doing so.

Ms. Paine testified that she was unaware Mr. Hudson had been purchasing

pseudoephedrine until around the time the arrest was made, and understood from remarks he made that he had been shopping for a razor. When asked by an officer during her detention in the parking lot why so much pseudoephedrine had been purchased by Mr. Hudson, she replied that it is usually purchased in such quantities to “cook meth.” RP at 116. She testified at trial that her conjecture to the officer had been based on her own drug experience. No evidence was admitted as to drug use by Mr. Hudson or his knowledge of methamphetamine manufacturers.

Mr. Hudson was convicted of both charges by a jury and sentenced to 12 months on count one (illegal quantity of pseudoephedrine) and to 51 months on count two (intent to manufacture), to run concurrently. He timely appealed.

## ANALYSIS

### I

Mr. Hudson challenges his conviction for possession of pseudoephedrine with intent to manufacture methamphetamine, arguing that the evidence presented at trial was insufficient to establish the requisite specific intent.

In deciding a defendant’s challenge to the sufficiency of the evidence we view the evidence in the light most favorable to the State and determine whether any rational trier of fact could have found the elements of the charged crime beyond a reasonable doubt. *State v. Brown*, 162 Wn.2d 422, 428, 173 P.3d 245 (2007). “A claim of insufficiency

admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom." *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). In determining whether the necessary quantum of proof exists, we need not be convinced of the defendant's guilt beyond a reasonable doubt, but only that substantial evidence supports the State's case. *State v. Galisia*, 63 Wn. App. 833, 838, 822 P.2d 303, *review denied*, 119 Wn.2d 1003 (1992). The State must present enough evidence to allow the jury to find each element beyond a reasonable doubt. *State v. Green*, 94 Wn.2d 216, 220-22, 616 P.2d 628 (1980). When assessing whether substantial evidence is present, we cannot rely on guess, speculation, or conjecture. *State v. Prestegard*, 108 Wn. App. 14, 23, 28 P.3d 817 (2001).

To establish that Mr. Hudson possessed pseudoephedrine with intent to manufacture methamphetamine, the State had to prove that he both (1) possessed pseudoephedrine and (2) intended to use the pseudoephedrine to manufacture methamphetamine. RCW 69.50.440; *State v. Moles*, 130 Wn. App. 461, 465, 123 P.3d 132 (2005), *review denied*, 157 Wn.2d 1019 (2006). Only the second element is at issue here. "Manufacture" means "the production, preparation, propagation, compounding, conversion, or processing of a controlled substance, either directly or indirectly." RCW 69.50.101(p); *State v. Davis*, 117 Wn. App. 702, 708, 72 P.3d 1134 (2003), *review denied*, 151 Wn.2d 1007 (2004). A person acts with intent when he acts with the objective or

purpose to accomplish a result that constitutes a crime. RCW 9A.08.010(1)(a).

Washington courts have consistently held that mere possession of pseudoephedrine is not enough to support a conviction for intent to manufacture; at least one additional factor suggestive of the required intent must be present. *Montgomery*, 163 Wn.2d at 586; *State v. Brockob*, 159 Wn.2d 311, 337, 150 P.3d 59 (2006); *Moles*, 130 Wn. App. at 466.

Evidence that the defendant possessed an additional component of the manufacturing process is sufficient to establish an intent to manufacture methamphetamine. *See State v. Missieur*, 140 Wn. App. 181, 187-88, 165 P.3d 381 (2007) (finding sufficient evidence of intent where the defendant possessed pseudoephedrine and lithium batteries, both components of the manufacturing process); *Moles*, 130 Wn. App. at 466 (finding sufficient evidence where the defendant possessed pseudoephedrine pills in addition to a coffee filter with methamphetamine residue). Other factors that may be sufficient to establish the intent include showing that the defendant acted in concert with others to collectively purchase greater amounts of pseudoephedrine from multiple stores and that the pseudoephedrine pills themselves had been removed from the blister packs. *Brockob*, 159 Wn.2d at 340 (citing *Moles*, 130 Wn. App. at 466).

Conversely, evidence that a defendant attempted to shoplift several boxes of pseudoephedrine or possessed an excessive amount of the drug does not demonstrate an intent to manufacture. *See State v. Whalen*, 131 Wn. App. 58, 64-66, 126 P.3d 55 (2005)

(concluding that evidence of the defendant's attempt to steal 7 boxes of pseudoephedrine, without more, did not demonstrate an intent to manufacture); *Brockob*, 159 Wn.2d at 338 (recognizing that removing blister packs of Sudafed from retail boxes while in a store did not evidence an intent to manufacture); *Missieur*, 140 Wn. App. at 187 (agreeing that possession of 78 stolen boxes of pseudoephedrine alone would likely not be enough to sustain an intent to manufacture conviction). Accordingly, the additional evidence of intent must be peculiarly suggestive of the defendant's specific intent to manufacture methamphetamine; it cannot simply reflect a general improper purpose.

The State offers the following evidence that it argues suffices as additional factors demonstrating an intent to manufacture: First, it claims that Mr. Hudson acted in concert with methamphetamine users to secure the pseudoephedrine (evidence was offered that both Ms. Paine and her nephew were, or had been, methamphetamine users) (RP at 111); second, Mr. Hudson's "secretive manner" of purchase by traveling to Walla Walla and misrepresenting his reasons for going from store to store to Ms. Paine (Br. of Resp't at 12); and third, that he purchased close to the 3-gram limit at four different stores.

The evidence does not support action in concert; rather, all of the evidence suggests that Mr. Hudson acted alone in purchasing the Sudafed. Unlike the defendant in *Moles*, Mr. Hudson was the only person in the group who purchased pseudoephedrine. Ms. Paine never even observed his purchases, and the evidence presented was that she

and Mr. Savage remained unaware of them until around the time of arrest.

While Mr. Hudson did not disclose his purchases to Ms. Paine and her nephew, they were not otherwise secretive. Mr. Hudson used his real name and identification when making the purchases and did not falsify information on store log books. Moreover, *Whalen* and *Brockob* establish that intent to manufacture methamphetamine cannot be inferred from a defendant's efforts to conceal the acquisition of pseudoephedrine, so the evidence that Mr. Hudson misled his companions about his intentions does not suffice as evidence of an additional factor. From this evidence one could just as easily infer that he intended to retain or sell the Sudafed instead of use it to manufacture methamphetamine, since pseudoephedrine is more difficult to obtain in Oregon; to infer the specific intent to manufacture from this evidence is to speculate.

Finally, and as discussed above, it is settled law that possession of an illegal amount of pseudoephedrine alone is not evidence of an intent to manufacture. *Missieur*, 140 Wn. App. at 187. Whether one obtains 10 boxes of pseudoephedrine from 1 store or 1 box from 10 stores makes no difference for purposes of finding an intent to manufacture—neither scenario, without more, is sufficient.<sup>1</sup>

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<sup>1</sup> The State also argues that the evidence demonstrated that Mr. Hudson had knowledge of methamphetamine production and that Ms. Paine's testimony established his intent to manufacture. But here, its recollection of the record is simply incorrect. The jury was presented with no evidence that Mr. Hudson had ever used methamphetamine or knew persons capable of cooking methamphetamine. Ms. Paine testified only to her own knowledge of methamphetamine production.



In sum, even when viewed most favorably to the State, its evidence was insufficient to convince a rational jury that Mr. Hudson intended to manufacture methamphetamine.

## II

Mr. Hudson also argues that the State engaged in prosecutorial misconduct and asks, “Alternatively,” that we order a new trial. Br. of Appellant at 26. The statements of the prosecutor relied upon by Mr. Hudson were overwhelmingly, if not exclusively, with a view to persuading the jury of Mr. Hudson’s guilt on the second, felony manufacture, count. It appears that Mr. Hudson’s alternative argument is only with a view to securing a new trial on that count, should we reject his challenge to the sufficiency of the evidence. *See Reply Br. of Appellant at 6.*

Since it is not entirely clear that the relief requested is that limited and Mr. Hudson’s brief could be read to request a new trial on both counts, we reject his challenge based on prosecutorial misconduct. Even if we were to assume misconduct and that it violated a constitutional right, the error would be harmless beyond a reasonable doubt with respect to the first count. The untainted evidence of Mr. Hudson’s possession of an illegal quantity of pseudoephedrine was so overwhelming as to necessarily lead to a finding of guilt. *State v. Easter*, 130 Wn.2d 228, 242, 922 P.2d 1285 (1996).

We dismiss the conviction for possession with intent to manufacture and remand

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for resentencing on Mr. Hudson's remaining conviction for possession of an illegal quantity of pseudoephedrine.

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

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Siddoway, J.

WE CONCUR:

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Kulik, C.J.

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Korsmo, J.