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FILED IN
COUNTY OF PULASKI
STATE OF WASHINGTON
BY Ca
DEPUTY

No. 38766-2-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

Richard Lian,

Appellant.

Lewis County Superior Court Cause No. 08-1-00692-6

The Honorable Judges James Lawler and Richard Brosey

Appellant's Reply Brief

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ARGUMENT

I. THE ABSENCE OF A UNANIMITY INSTRUCTION DENIED MR. LIAN HIS RIGHT TO A UNANIMOUS JURY UNDER WASH. CONST. ARTICLE I, SECTION 21.

Mr. Lian rests on the argument set forth in his Opening Brief.

II. THE COURT'S INSTRUCTIONS CREATED AN UNCONSTITUTIONAL MANDATORY PRESUMPTION.

Under the trial court's instructions, the state was relieved of its obligation to prove Mr. Lian's knowledge beyond a reasonable doubt. Mr. Lian's case is controlled by Division II's recent decision in *State v. Hayward*, ___ Wn.App. ___, ___ P.3d ___ (2009).

III. RESPONDENT'S CONCESSION REQUIRES THAT MR. LIAN'S SENTENCE BE VACATED AND THE CASE REMANDED FOR A NEW SENTENCING HEARING.

Respondent concedes that Mr. Lian's offender score was miscalculated. Brief of Respondent, p. 11. However, Respondent erroneously argues that the correct offender score is 13 rather than 11. Brief of Respondent, p. 11, 13. Respondent makes two errors.

First, Respondent incorrectly applies the burglary anti-merger statute to Mr. Lian's prior burglary and theft. Under RCW 9.94A.525(5)(a), multiple prior convictions count separately, except that "[p]rior offenses which were found, under RCW 9.94A.589(1)(a), to encompass the same criminal conduct, shall be counted as one offense, the

offense that yields the highest offender score.” The statute prohibits the current sentencing court from undoing a same criminal conduct finding by the prior sentencing court. In this case, although the prior sentencing court had discretion to punish the burglary and theft separately, it chose not to do so. Sentencing Exhibit 2, CP. Accordingly, the prior burglary and theft score as one point. RCW 9.94A.525(5)(a).

Second, Respondent erroneously adds a point, alleging that “Lian was on community custody when the current crimes were committed...” Brief of Respondent, p. 13. In fact, the court did not make a finding that Mr. Lian was on community custody. *See* Finding No. 2.2, Felony Judgment and Sentence, CP 6.

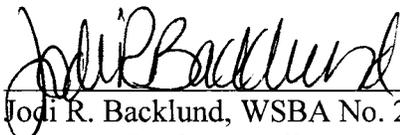
Mr. Lian’s sentence must be vacated and the case remanded for a new sentencing hearing. Although his standard range will not change, it is possible that the trial judge will impose a lower sentence within the range, as a result of the lower offender score.

CONCLUSION

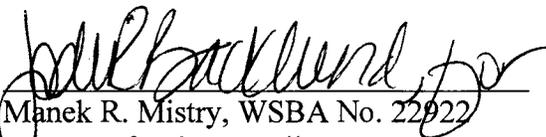
Mr. Lian’s convictions must be reversed and the case remanded for a new trial. In the alternative, Mr. Lian’s sentence must be vacated and the case remanded for a new sentencing hearing with an offender score of 11.

10/15
Respectfully submitted on October 15, 2009.

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CERTIFICATE OF MAILING

I certify that I mailed a copy of Appellant's Reply Brief to:

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Coyote Ridge Corrections Center
P. O. Box 769
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and to:

Lewis County Prosecuting Attorney
MS:pro01
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And that I sent the original and one copy to the Court of Appeals, Division II, for filing;

All postage prepaid, on October 16, 2009.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Olympia, Washington on October 16, 2009.



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