

COURT OF APPEALS  
DIVISION II

No. 38766-2-II

09 OCT -6 PM 12:16

THE COURT OF APPEALS FOR THE STATE OF WASHINGTON  
DIVISION II

STATE OF WASHINGTON  
DEPUTY

---

**STATE OF WASHINGTON,**

Respondent,

Vs.

RICHARD LIAN,

Appellant.

---

Appeal from the Superior Court of Washington for Lewis County

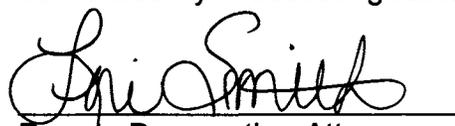
---

**Respondent's Brief**

---

MICHAEL GOLDEN  
Lewis County Prosecuting Attorney

By:



Deputy Prosecuting Attorney  
WSBA No. 27961

Lewis County Prosecutor's Office  
345 W. Main Street, 2nd Floor  
Chehalis, WA 98532-1900  
(360) 740-1240

PM 10-2-09

TABLE OF CONTENTS

TABLE OF AUTHORITIES.....ii

STATEMENT OF THE CASE.....1

ARGUMENT.....1

**I. A UNANIMITY INSTRUCTION WAS NOT  
REQUIRED IN THIS CASE BECAUSE EACH INCIDENT WAS  
PART OF A "CONTINUING COURSE OF CONDUCT INVOLVING  
AN ONGOING ENTERPRISE WITH THE SINGLE OBJECTIVE"  
OF MANUFACTURING METHAMPHETAMINE.....1**

**II. THE JURY INSTRUCTION DEFINING  
"KNOWLEDGE" AS TO THE MANUFACTURE OF  
METHAMPHETAMINE CHARGE WAS PROPER.....7**

**III. THE STATE CONCEDES THAT LIAN'S OFFENDER  
SCORE WAS INCORRECTLY CALCULATED, ALTHOUGH HIS  
STANDARD RANGE WILL NOT CHANGE BECAUSE HIS  
CORRECT OFFENDER SCORE REMAINS ABOVE "9".....11**

CONCLUSION.....14

## TABLE OF AUTHORITIES

### **Cases**

<u>State v. Barnes</u> , 153 Wn.2d 378, 103 P.3d 1219(2005) .....	8
<u>State v. Blade</u> , 126 Wn.App. 174, 107 P.3d 775 (2005) .....	2,5
<u>State v. Deal</u> , 128 Wn.2d 693, 911 P.2d 996 (1996) .....	8
<u>State v. Gerdts</u> , 136 Wn.App. 720, 150 P.3d 627 (2007) .....	9
<u>State v. Goble</u> , 131 Wn.App. 194, 126 P.3d 8221 (2005) .....	7, 8, 9,10, 15
<u>State v. Handran</u> , 113 Wn.2d 11, 775 P.2d 453 (1989).....	2, 6
<u>State v. Keend</u> , 140 Wn.App. 858, 166 P.3d 1268(2007), <i>review denied</i> , 163 Wn.2d 1041, 187 P.3d 270 (2008) .....	10
<u>State v. Logan</u> , 102 Wn.App. 907, 10 P.3d 504 (2000) .....	10
<u>State v. Love</u> , 80 Wn.App. 357, 908 P.2d 395, <i>review denied</i> , 129 Wn.2d 1016 (1996) .....	2, 3
<u>State v. Moles</u> , 130 Wn.App. 461, 123 P.3d 132 (2005) .....	4
<u>State v. Montgomery</u> , 163 Wn.2d 577, 83 P.3d 269 (2008).....	3
<u>State v. Pirtle</u> , 127 Wn.2d 638, 904 P.2d 245 (1995) .....	8
<u>State v. Simonson</u> , 91 Wn.App. 874, 960 P.2d 955 (1998) .....	2, 5
<u>State v. Sims</u> , 119 Wn.2d 138, 829 P.2d 1075 (1992) .....	9, 15
<u>State v. Spring</u> , 128 Wn.App. 398, 115 P.3d 1052 (2005).....	4

## STATEMENT OF THE CASE

Except as otherwise stated in the arguments below, Appellant's statement of the case is adequate for purposes of responding to this appeal.

## ARGUMENT

### **I. A UNANIMITY INSTRUCTION WAS NOT REQUIRED IN THIS CASE BECAUSE EACH INCIDENT WAS PART OF A "CONTINUING COURSE OF CONDUCT INVOLVING AN ONGOING ENTERPRISE WITH THE SINGLE OBJECTIVE" OF MANUFACTURING METHAMPHETAMINE.**

Lian argues that a unanimity instruction was required as to both counts because the State presented evidence that Lian and his associates made multiple purchases of pseudoephedrine that formed the basis of the possession of pseudoephedrine with intent to manufacture methamphetamine charge. Similarly, Lian also argues as to the manufacture of methamphetamine charge, such instruction was required because the State also "produced evidence that Mr. Lian and his wife manufactured methamphetamine on numerous occasions." Brief of Appellant 8. Lian thus claims that because the State did not elect a single purchase of pseudoephedrine or a single instance of manufacturing, a unanimity instruction was required, and failure to so instruct was reversible error. Id. The State disagrees.

There are exceptions to the requirement for a unanimity instruction. One such exception is where the multiple acts constitute a "continuing course of conduct involving an ongoing enterprise with a single objective." State v. Love, 80 Wn.App. 357, 363, 908 P.2d 395, *review denied*, 129 Wn.2d 1016 (1996); State v. Simonson, 91 Wn.App. 874, 884, 960 P.2d 955 (1998)(no unanimity instruction needed where evidence showed defendant and girlfriend committed a single continuous methamphetamine manufacturing offense during a six-week period); State v. Blade, 126 Wn.App. 174, 181, 107 P.3d 775 (2005)(no unanimity instruction required because the incidents of manufacturing comprised a continuing course of conduct). Furthermore, the failure to give a unanimity instruction is harmless error if a rational trier of fact could have found each incident proved beyond a reasonable doubt. State v. Handran, 113 Wn.2d 11, 17, 775 P.2d 453 (1989). That is true here.

In the present case, it is clear that all of the individuals who purchased pseudoephedrine tablets on multiple days from multiple pharmacies were doing so in order to turn the tablets over to Lian for the purpose of manufacturing methamphetamine. RP 91,92, 175. Lian then gave some of that finished product to the persons

who helped gather the pills for him. RP 175, 181. In this way, the multiple purchases of pseudoephedrine by several individuals on different days can be seen as "multiple acts constitute a continuing course of conduct involving an ongoing enterprise with a single objective:" to collect enough pseudoephedrine tablets so that Lian could manufacture methamphetamine from those tablets. Love, supra. Indeed, it is common for defendants in these cases to enlist the help of others to purchase pseudoephedrine tablets from several different stores in order to legally obtain enough of the tablets to make methamphetamine; that is because single, large purchases of pseudoephedrine are no longer legal. RCW 69.43.110;<sup>1</sup> see also State v. Montgomery, 163 Wn.2d 577, 584-586, 183 P.3d 269 (2008)(defendant and an accomplice worked in concert to separately purchase seven boxes of pseudoephedrine tablets from two different Target stores, and two different grocery

---

<sup>1</sup> RCW 69.43.110 states, in pertinent part:

(1) It is unlawful for a pharmacy licensed by, or shopkeeper or itinerant vendor registered with, the department of health under chapter 18.64 RCW, or an employee thereof, or a practitioner as defined in RCW 18.64.011, knowingly to sell, transfer, or to otherwise furnish, in a single transaction:

(a) More than two packages of one or more products that he or she knows to contain ephedrine, pseudoephedrine, or phenylpropanolamine, their salts, isomers, or salts of isomers; or

(b) A single package of any product that he or she knows to contain more than three grams of ephedrine, pseudoephedrine, or phenylpropanolamine, their salts, isomers, or salts of isomers, or a combination of any of these substances.

stores); State v. Moles, 130 Wn.App. 461, 463-464, 123 P.3d 132 (2005)(three males acting in concert to purchase maximum allowable amount of pseudoephedrine tablets from various stores over a short period of time); State v. Spring, 128 Wn.App. 398, 115 P.3d 1052 (2005)(purchasing pseudoephedrine tablets from several stores). The same methods were used by Lian here. Jennifer Campbell testified that she and Steve German purchased pseudoephedrine tablets at different locations to give to Lian to make methamphetamine. RP 172-178; 181. Additionally, multiple purchases of pseudoephedrine from different pharmacies in July, August and September of 2008, were carried out by Lian himself, by Jennette Staggs, and by Jennifer Carlson and Steven German--with Staggs and Lian making the greatest number of separate purchases of pseudoephedrine tablets. Lian purchased pseudoephedrine tablets at K-Mart Pharmacy on 7/17/08, 8/1/08, 9/5/08, and 9/26/08 (RP 214); from Wal Mart Pharmacy on 7/16/08, 7/31/08, and 9/25/08 (RP 206); from Rite Aid pharmacy on 9/5/08 (RP 209); from Halls Pharmacy on 9/5/08, and 9/26/08 (RP 201); and from Safeway Pharmacy on 7/3/08 (RP 204). Jennette Staggs purchased pseudoephedrine tablets for Lian from Walgreens on 7/16/08, 8/1/08, 9/5/08, and 9/26/08 (RP 160, 201); from Rite Aid

on 7/17/08, 9/5/08, and 9/25/08 (RP 210); from WalMart on 7/3/08, 8/1/08, and 9/25/08 (RP 207); from Safeway Pharmacy on 7/3/08 (RP 204); from Hall's Pharmacy on 9/5/08, and 9/26/08 (RP 201); and from K-Mart Pharmacy on 7/17/08 and 9/26/08 (RP 214,215). Gennifer Campbell purchased cold tablets from Halls Pharmacy on 8/1/08 (RP 181, 204)., and Steve German purchased cold tablets from Walgreens on 8/1/08 (RP 198). Lian also went into a Safeway pharmacy and inquired about getting tincture of iodine--a product used in making methamphetamine. RP 86-89, 217, 218. All of the fifteen purchases of pseudoephedrine pills from different pharmacies in July, August, and September 2008, showed a "continuing course of conduct" for Lian's "ongoing enterprise" of gathering enough pseudoephedrine tablets to manufacture methamphetamine. Love, supra. Accordingly, no unanimity instruction was required. State v. Blade, supra; State v. Simonson, supra.

Lian seems to be suggesting that State should have charged fifteen separate counts of possession of pseudoephedrine with intent to manufacture methamphetamine for each purchase of pseudoephedrine tablets. This is ridiculous. Does anyone seriously believe that one single purchase of the legally-allowed

number of pseudoephedrine tablets would show that the tablets were possessed "with intent to manufacture methamphetamine?" The State thinks not. However, many separate purchases by several individuals at different pharmacies would (along with the inquiry about obtaining tincture of iodine), and the State surely is allowed to aggregate those purchases for purposes of proving possession of the tablets with the intent to manufacture. Lian does not cite any authority that stands for his proposition that a unanimity instruction is required under the circumstances presented here regarding possession of pseudoephedrine with intent, or manufacturing methamphetamine for that matter. This Court should find that a unanimity instruction was not required for these charges under the facts presented here.

Furthermore, any error regarding the unanimity instruction issue as it pertains to the crimes charged here should be held harmless. Handran, supra. First of all, every single purchases of pseudoephedrine tablets was established beyond any doubt in this case: records of each purchase were produced, together with testimony that each purchaser presented identification in order to purchase the pills and the records showed the dates of every purchase and who made the purchase--at approximately seven

different pharmacies. RP 196-216. And there was Lian's inquiry at the Safeway pharmacy about tincture of iodine, plus the pictures showing empty bottles of tincture of iodine found at the site of the meth lab. RP 86-89, 217,218. As to the manufacture of methamphetamine charge, several officers documented the existence of Lian's meth-making operation and Gennifer Campbell provided testimony that methamphetamine was manufactured by Lian on several occasions. RP 176, 177-179, 181. In sum, because a rational trier of fact could find that each criminal act was proven beyond a reasonable doubt, any error regarding the unanimity instruction issue should be deemed harmless. Handran, supra. Because Lian's arguments to the contrary are not persuasive, his convictions should be affirmed.

**II. THE JURY INSTRUCTION DEFINING "KNOWLEDGE" AS TO THE MANUFACTURE OF METHAMPHETAMINE CHARGE WAS PROPER.**

Lian relies on State v. Goble, 131 Wn.App. 194, 126 P.3d 8221 (2005) to support his argument that the knowledge instruction given in this case--like the one in Goble--created a "mandatory presumption and relieved the state of its burden to prove Mr. Lian's guilty knowledge." Brief of Appellant 12. Again, the State disagrees.

Alleged errors of law in jury instructions are reviewed *de novo*. State v. Barnes, 153 Wn.2d 378, 382, 103 P.3d 1219(2005). Proper jury instructions allow the parties to argue their theories of the case, are not misleading, and correctly inform the jury of the applicable law. Barnes, 153 Wn.2d at 382. Challenged jury instructions are analyzed by considering the instructions as a whole and reading the the challenged portions in context. State v. Plrtle, 127 Wn.2d 638, 656-657, 904 P.2d 245 (1995). Lian did not object to the allegedly improper instruction below. However, because Lian now alleges that the knowledge instruction created a mandatory presumption that relieved the State its burden of proof, this issue is of constitutional magnitude and can thus be raised for the first time on appeal. State v. Goble, 131 Wn.App. at 203; State v. Deal, 128 Wn.2d 693, 699, 911 P.2d 996 (1996)(mandatory presumptions violate due process if they relieve the State of its burden of proving an element of the offense).

Lian claims that the jury instructions for the manufacture of methamphetamine charge allowed him to be convicted without proof that he knew the substance manufactured was a controlled substance. Brief of Appellant 9. Lian further claims that the "knowledge instruction" submitted to the jury created a mandatory

presumption because "a reasonable juror could have believed that proof of any intentional act . . . established beyond a reasonable doubt his guilty knowledge." Brief of Appellant 12. Lian argues that such an interpretation "would allow conviction even absent proof that . . . [he] knew the substance manufactured was methamphetamine." Id.

But Lian's argument is not persuasive because

[i]t is impossible for a person to intend to manufacture . . . a controlled substance without knowing what he or she is doing." [b]y intending to manufacture . . . 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.

State v. Sims, 119 Wn.2d 138, 142, 829 P.2d 1075 (1992)(citation omitted)(emphasis added). In other words, the crime of manufacture of a controlled substance does not include *two mental states* as discussed in Goble, where the crime was assault in the third degree and the State instructed the jury that it also needed to find that Goble knew it was a police officer that he had assaulted. Goble, 131 Wn.App. at 202,203. Indeed, this Court has limited Goble to cases where more than one mental state is before the jury. State v. Gerdts, 136 Wn.App. 720, 728, 150 P.3d 627 (2007);

see also, State v. Keend, 140 Wn.App. 858, 868, 166 P.3d 1268(2007), *review denied*, 163 Wn.2d 1041, 187 P.3d 270 (2008)(further clarifying that Goble applies to cases where the instructions could confuse the jury). Here, the knowledge instruction did not involve conflating two mental states the way the instruction did in Goble, and Lian's argument to the contrary therefore fails.<sup>2</sup> And Lian cites no authority addressing the knowledge instruction given here as it applies to the specific charge of manufacture of a controlled substance. This Court is "not required to search out authorities, but may assume that counsel, after diligent search, has found none." State v. Logan, 102 Wn.App. 907, 911, 10 P.3d 504 (2000). The knowledge instruction was proper and Lian's convictions should be affirmed.

---

<sup>2</sup> The Washington Supreme Court accepted review of a similar, "conclusive presumption" issue regarding the knowledge instruction (former WPIC 10.02) in a delivery of a controlled substances case (also a Lewis County case). State v. Sibert 135 Wn.App. 1025 (2006), *review granted*, 163 Wn.2d 1059 (2008)(oral argument has occurred).

**III. THE STATE CONCEDES THAT LIAN'S OFFENDER SCORE WAS INCORRECTLY CALCULATED, ALTHOUGH HIS STANDARD RANGE WILL NOT CHANGE BECAUSE HIS CORRECTED OFFENDER SCORE IS STILL ABOVE "9".**

Lian correctly claims that his offender score was miscalculated. While the State concedes the error, it disagrees that Lian's correct offender score is 11--as claimed by Lian.

Rather, the State calculates Lian's corrected offender score at 13. This difference is probably due to the fact that Lian earns an additional point for being on community custody at the time he committed the current offenses, and because Lian counts just one point for the burglary second degree/theft first degree convictions, whereas the State counts those two crimes separately under the burglary anti-merger statute. The State arrived at the corrected offender score of 13 as follows:

Criminal History

- Manufacture of methamphetamine (Drug Offense)
- Possession of Methamphetamine
- Possession of Methamphetamine
- Rape of a Child in the Third Degree (NV Sex)
- Burglary in the Second Degree (B Felony)
- Theft in the First Degree (same violation date as the Burglary conviction)
- Bail Jumping

Ex. 1-6. The State incorrectly calculated both of Lian's prior possession of methamphetamine convictions at 3 points each.

However, only one of Lian's prior convictions (along with his two current convictions) was technically a "drug offenses" (that being the prior Manufacture of Methamphetamine conviction) as defined in the Sentencing Reform Act (SRA)-- that definition *excludes* simple possession convictions from the definition of "drug offense." RCW 9.94A.030. At least Respondent *thinks* that is the rule-- frankly, the offense scoring sheets for manufacture of methamphetamine and possession of pseudoephedrine with intent are not as clear as they could be on this issue.

For example, the offense scoring sheets for manufacture methamphetamine (as well as for the other current drug offense) only reference the SRA definition of "drug offense" under the "other current offenses" section of the form where it says to enter the number of felony drug convictions "as defined by RCW 9.94A.030". In contrast, under the "adult history" section of the form where we are directed to "enter the number of felony drug convictions," it does not specify that those are drug convictions "as defined by RCW 9.94A.030," like it does in the other section of the scoring sheet. CP 37, 38(Statement of Prosecuting Attorney with scoring sheets attached). Thus, Respondent sees how someone could

misunderstand at least part of the instructions on the offense scoring sheets.

Nonetheless, it appears that the only "drug offense" that triple-scores for criminal history purposes when computing Lian's offender score for each of his current "drug offenses," (which themselves count as 3 points against each other) is his prior conviction for manufacture of methamphetamine. Accordingly, Lian's "adult history" contains one prior "drug offense" for manufacture of methamphetamine, which counts as three(3) points. Then we enter the number of prior "other felony convictions" which is six(6), including computing the burglary second degree and theft first degree as separate convictions pursuant to the burglary anti-merger statute. Next we come to the "other current offenses" section of the worksheet (this part of Lian's offender score was computed correctly before) where we are directed to enter the number of other current "drug offenses" (both current offenses are drug convictions) where the defendant has a prior sex offense (which Lian does), and this adds another three(3) points. Then, because Lian was on community custody when the current crimes were committed, we add another point for that. So, Lian's corrected offender score for each of the current offenses is "13" (3+6+3+1)--

not 16. However, because Lian's offender score is still greater than "9," Lian's standard range will not change even after his offender score is corrected, and this remains true *even if* his prior burglary second degree and theft first degree count as one point instead of two (which would give him a score of 12--still the same standard range as before). Accordingly, Lian's convictions should be affirmed, but this case should be remanded for amendment of the judgment and sentence to correct Lian's offender score.

### CONCLUSION

Because the multiple purchases of pseudoephedrine tablets from different pharmacies by Lian and several individuals on Lian's behalf constituted a "continuing course of conduct involving an ongoing enterprise with a single objective" of collecting enough of the tablets to manufacture methamphetamine, there was no need for a unanimity instruction. Likewise, the manufacture of methamphetamine was also an ongoing enterprise, and a unanimity instruction was not required for that charge either. However, even if it was error not to instruct on unanimity, any error should be held harmless because the evidence pertaining to each proven act of wrongdoing was overwhelming and proven beyond a reasonable doubt. Lian's argument that the knowledge instruction

created a mandatory presumption relieving the State of its burden to prove "guilty knowledge" is also without merit pursuant to the reasoning in State v. Sims, supra, and because Goble is distinguishable. However, the State concedes that Lian's offender score was incorrectly calculated. But, because his corrected score remains above "9", Lian's standard range will not change.

Accordingly, Lian's convictions should be affirmed in all respects, with remand necessary only to amend the judgment and sentence to correct the offender score.

DATED THIS 2nd Day of October, 2009.

MICHAEL GOLDEN  
LEWIS COUNTY PROSECUTING ATTORNEY

By:



\_\_\_\_\_  
LORI SMITH, WSBA 27961  
Deputy Prosecuting Attorney  
Lewis County

**COURT OF APPEALS FOR THE STATE OF WASHINGTON  
DIVISION II**

STATE OF WASHINGTON, )  
Respondent, )  
vs. )  
RICHARD LIAN, )  
Appellant. )  
\_\_\_\_\_ )

NO. 38766-2-II

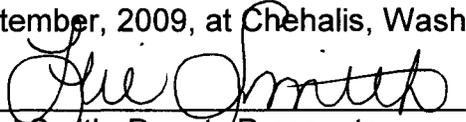
DECLARATION  
MAILING

BY Lori Smith  
DEPUTY  
STATE OF WASHINGTON  
09 OCT -6 PM 12:15  
COURT OF APPEALS  
DIVISION II

The undersigned declares under penalty of perjury under the laws of the State of Washington that a copy of the State's Response Brief was placed in the United States mail, postage prepaid, addressed to appellant's attorney as follows:

Backlund & Mistry  
203 East 4th Avenue, Suite 404  
Olympia, WA 98501

DATED this 3rd DAY OF September, 2009, at Chehalis, Washington.

  
Lori Smith, Deputy Prosecutor  
WSBA No. 27961  
Attorney for the Respondent  
Lewis County Prosecuting Attorney's Office