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STATE OF WASHINGTON
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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 Opening Brief

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ASSIGNMENTS OF ERROR

1. Mr. Lian's state constitutional right to a unanimous jury was violated when the state failed to elect a single act for each charge, and the judge failed to give a unanimity instruction.
2. The trial court provided an erroneous definition of knowledge.
3. The trial court erred by giving Instruction No. 5, which reads as follows:

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.

Instruction 5, Court's Instructions to Jury, Supp. CP.

4. The trial court's instruction defining knowledge contained an improper mandatory presumption.
5. The court's instruction defining knowledge impermissibly relieved the state of its burden to establish each element by proof beyond a reasonable doubt.
6. The sentencing judge miscalculated Mr. Lian's offender score.
7. The sentencing judge erred by tripling Mr. Lian's prior convictions for simple possession.
8. The sentencing judge erred by scoring separately two prior convictions that had been determined to be the same criminal conduct.
9. The sentencing judge erred by sentencing Mr. Lian with an offender score of 16.

ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. When evidence of multiple criminal acts is introduced to support a single conviction, either the state must elect one act or the court must give the jury a unanimity instruction. Here, the state introduced evidence of multiple acts to support each conviction, but did not elect a single act for each count, and the trial judge failed to give a unanimity instruction. Did the trial court's failure to give a unanimity instruction violate Mr. Lian's state constitutional right to a unanimous verdict in light of the prosecutor's failure to make the required election?
2. Conviction of Manufacturing Methamphetamine requires proof of an intentional act (manufacturing) combined with knowledge that the product is a controlled substance. The trial court instructed the jury that "[a]cting knowingly or with knowledge... is established if a person acts intentionally," without limiting the intentional acts that could be used as proof of knowledge. Did the trial court's instruction misstate the law and relieve the state of its burden of proof?
3. A jury instruction creates a conclusive presumption whenever a reasonable juror might interpret the presumption as mandatory. The trial judge instructed the jury that "[a]cting knowingly or with knowledge... is established if a person acts intentionally." Did the court's instruction defining knowledge create an unconstitutional mandatory presumption?
4. To calculate Mr. Lian's offender score, the sentencing court was required to score as three points each prior drug offense other than simple possession. Here, the court counted Mr. Lian's prior simple possession charges as three points each. Did the sentencing judge miscalculate Mr. Lian's offender score?
5. The sentencing court was required to score as one point any offenses previously determined to comprise the same criminal conduct. Here, the court counted Mr. Lian's burglary and theft charges separately despite the fact that they'd been found to be the

same criminal conduct. Did the court erroneously sentence Mr. Lian with an inflated offender score?

STATEMENT OF FACTS AND PRIOR PROCEEDINGS

Officers searched the mobile home and shed at Jerre Coleman's property in rural Lewis County. RP (12/16/08) 81-82. They found a methamphetamine lab, including many empty packets of cold medication. RP (12/16/08) 82, 91-92, 122. Mr. Lian was charged with Manufacture of a Controlled Substance (Methamphetamine) with a school zone enhancement, and Possession of Pseudoephedrine with Intent to Manufacture Methamphetamine. CP 25-27.

At trial, the state presented evidence showing that Jerre Coleman, Gennifer Campbell, Richard Lian, and Jeannette Staggs Lian had all purchased legal quantities of cold medicine containing pseudoephedrine from local pharmacies. RP (12/16/08) 159-160, 181; RP (12/17/08) 177, 181, 196-216. Fifteen different purchases were documented. RP (12/16/08) 154-162; RP (12/17/08) 196-216, 246-248. Campbell, who lived at the property where the lab was discovered, was also charged with manufacturing methamphetamine. RP (12/17/08) 173-174. In return for a reduced sentence, she testified that the lab belonged to Mr. Lian, and that the group bought pseudoephedrine medication for him so that he could make them methamphetamine. RP (12/17/08) 175-178, 182, 185-187. The evidence suggested that Mr. Lian and his wife manufactured

methamphetamine on numerous occasions. RP (12/16/08) 78-163; RP (12/17/08) 171-221.

The prosecuting attorney did not elect which purchase of pseudoephedrine formed the basis for the possession with intent to manufacture charge. RP (12/16/08) 5-163; RP (12/17/08) 170-259. Nor did the state elect a particular instance of manufacturing. RP (12/16/08) 5-163; RP (12/17/08) 170-259.

The court did not give a unanimity instruction, and did not instruct the jury on accomplice liability. Court's Instructions to the Jury, Supp. CP. The court gave the following definition of knowledge:

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.
Instruction 5, Court's Instructions to Jury, Supp. CP.

In his closing argument, the prosecutor reviewed each purchase of pseudoephedrine, and told the jury that all fifteen purchases established that Mr. Lian possessed pseudoephedrine, intending to use it to make methamphetamine. RP (12/17/08) 246-248. The jury returned guilty

verdicts on both counts, and answered “yes” to the special verdict on the school zone. Verdict Forms A and B, Supp. CP.

At sentencing, the state introduced six judgments to prove Mr. Lian’s criminal history. Sentencing Exhibits 1-6, Supp. CP. These documents established that Mr. Lian had twice been convicted of simple possession. Sentencing Exhibits 4 and 5, Supp. CP. The prosecutor also submitted a statement (including scoring sheets), and counted each simple possession as contributing three points to Mr. Lian’s offender score. Statement of Prosecuting Attorney, Supp. CP.

Mr. Lian had also been convicted of Burglary in the Second Degree and Theft in the First Degree. Sentencing Exhibit 2, Supp. CP. The Judgment and Sentence for these convictions noted that the offenses were the same criminal of conduct. Sentencing Exhibit 2, Supp. CP. The prosecutor’s statement counted these convictions separately. Statement of Prosecuting Attorney, Supp. CP.

Without comment, the sentencing court scored three points for Mr. Lian’s prior simple possession convictions, and counted his burglary and theft charges separately, adopting the state’s contention that Mr. Lian had 16 points. CP 16-17, RP (1/12/09) 3-14; Statement of Prosecuting Attorney, Supp. CP. The court sentenced Mr. Lian to the top of his standard range, and he appealed. CP 4-14.

ARGUMENT

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

An accused person has a state constitutional right to a unanimous jury verdict.¹ Wash. Const. Article I, Section 21; *State v. Elmore*, 155 Wn.2d 758, 771 n. 4, 123 P.3d 72 (2005). Before a criminal defendant can be convicted, jurors must unanimously agree that he or she committed the charged criminal act. *State v. Coleman*, 159 Wn.2d 509, 511, 150 P.3d 1126 (2007). If the prosecution presents evidence of multiple acts to support a particular charge, then either the state must elect a single act or the court must instruct the jury to agree on a specific criminal act to convict the accused person of that particular charge. *Coleman*, at 511. Jurors have a constitutional “responsibility to connect the evidence to the respective counts.” *State v. Vander Houwen*, 163 Wn.2d 25, 39, 177 P.3d 93 (2008).

In the absence of an election, failure to provide a unanimity instruction is presumed to be prejudicial.² *Coleman*, at 512; *see also*

¹ The Federal constitutional guarantee of a unanimous verdict does not apply in state court. *Apodaca v. Oregon*, 406 U.S. 404, 406, 92 S.Ct. 1628, 32 L.Ed.2d 184 (1972).

² Accordingly, the omission of a unanimity instruction is a manifest error affecting a constitutional right, and can be raised for the first time on appeal. RAP 2.5(a); *State v. Greathouse*, 113 Wn.App. 889, 916, 56 P.3d 569 (2002).

Vander Houwen, at 38. Without the election of an appropriate unanimity instruction, each juror's guilty vote might be based on facts that her or his fellow jurors believe were not established. *Coleman*, at 512.

Failure to provide a unanimity instruction requires reversal unless the error is harmless beyond a reasonable doubt. *Coleman*, at 512. The presumption of prejudice is overcome only if no rational juror could have a reasonable doubt about any of the alleged criminal acts. *Coleman*, at 512.

In this case, Mr. Lian and his associates purchased pseudoephedrine on fifteen different occasions. RP (12/16/08) 154-162; RP (12/17/08) 196-216. In closing, the prosecutor argued that Mr. Lian was guilty of possession, and pointed to the fifteen separate transactions. RP (12/17/08) 246-248. The state did not elect a single instance of possession, and the trial court did not give a unanimity instruction. Court's Instructions to the Jury, Supp. CP. In addition, the state produced evidence that Mr. Lian and his wife manufactured methamphetamine on numerous occasions. RP (12/16/08) 78-163; RP (12/17/08) 171-221. The prosecutor did not elect a single instance of manufacturing, and the court did not give a unanimity instruction. Court's Instructions to the Jury, Supp. CP.

These errors are presumed prejudicial. *Coleman, supra*.

Accordingly, reversal is required, and the case must be remanded for a new trial. On retrial, the state must either elect a single act to pursue for each charge, or the court must give the jury a unanimity instruction.

Coleman, supra.

II. THE COURT'S INSTRUCTIONS VIOLATED MR. LIAN'S FOURTEENTH AMENDMENT RIGHT TO DUE PROCESS BY ALLOWING CONVICTION WITHOUT PROOF THAT HE KNEW THE SUBSTANCE MANUFACTURED WAS A CONTROLLED SUBSTANCE.

Under the Fourteenth Amendment's Due Process Clause, criminal defendants are presumed innocent, and the government must prove guilt beyond a reasonable doubt. U.S. Const. Amend. XIV; *In re Winship*, 397 U.S. 358, 362, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970). An omission or misstatement of the law in a jury instruction that relieves the state of its burden to prove every element of an offense violates due process. *State v. Thomas*, 150 Wn.2d 821, 844, 83 P.3d 970 (2004); *State v. Randhawa*, 133 Wn.2d 67, 76, 941 P.2d 661 (1997).

A jury instruction that misstates an element of an offense is not harmless unless it can be shown beyond a reasonable doubt that the error did not contribute to the verdict. *State v. Brown*, 147 Wn.2d 330, 341, 58 P.3d 889 (2002). Jury instructions must be "manifestly clear," since juries

lack the tools of statutory construction available to courts. *See, e.g., State v. Harris*, 122 Wn.App. 547, 554, 90 P.3d 1133 (2004).

Furthermore, due process prohibits the use of conclusive presumptions in jury instructions. Such presumptions conflict with the presumption of innocence and invade the factfinding function of the jury. *State v. Savage*, 94 Wn.2d 569, 573, 618 P.2d 82 (1980), *citing Sandstrom v. Montana*, 442 U.S. 510, 99 S.Ct. 2450, 61 L.Ed.2d 39 (1979) and *Morissette v. United States*, 342 U.S. 246, 72 S.Ct. 240, 96 L.Ed. 288 (1952). A conclusive presumption is one that requires the jury to find the existence of an elemental fact upon proof of the predicate fact(s). *Seattle v. Gellein*, 112 Wn.2d 58, 63, 768 P.2d 470 (1989). An instruction creates a conclusive presumption whenever “a reasonable juror might interpret the presumption as mandatory.” *State v. Deal*, 128 Wn.2d 693, 701, 911 P.2d 996 (1996). The Washington Supreme Court has “unequivocally rejected the [use of] any conclusive presumption to find an element of a crime,” because conclusive presumptions conflict with the presumption of innocence and invade the province of the jury. *State v. Mertens*, 148 Wn.2d 820, 834, 64 P.3d 633 (2003). Conclusive presumptions are unconstitutional, whether they are judicially created or derived from statute. *Mertens*, at 834.

RCW 9A.08.010 (“General requirements of culpability”) defines the mental states used in the criminal code. Under certain circumstances, proof of one mental state can substitute for proof of a lesser mental state. Thus, “[w]hen acting knowingly suffices to establish an element, such element also is established if a person acts intentionally.” RCW 9A.08.010(2).

If applied improperly, the substitution allowed under RCW 9A.08.010(2) requires reversal. *See, e.g., State v. Goble*, 131 Wn.App. 194, 126 P.3d 821 (2005). In *Goble*, the accused was charged with assaulting a person whom he knew to be a law enforcement officer.³ The trial court’s “knowledge” instruction informed the jury that “[a]cting knowingly or with knowledge also is established if a person acts intentionally.” *Goble*, at 202. This language was found to be ambiguous, in that the jury could believe an intentional assault established Mr. Goble’s knowledge, regardless of whether or not he actually knew the victim’s status as a police officer. *Goble*, at 203.⁴

³ Although not a statutory element of Assault in the Third Degree, knowledge that the victim was a law enforcement officer performing official duties was included in the “to convict” instruction and thus became an element under the law of the case in *Goble*. *Goble*, at 201.

⁴ The rule set forth in *Goble* has been limited to crimes that include more than one *mens rea* as an element in the “to convict” instruction. *State v. Gerdtz*, 136 Wn. App. 720, 150 P.3d 627 (2007). Furthermore, the problem created by the ambiguous language can be

In this case, the prosecution was required to establish that Mr. Lian manufactured a controlled substance (requiring proof of an intentional act), and that he knew the substance was a controlled substance (methamphetamine). Instruction No. 10, Supp. CP. The court instructed the jury that “[a]cting knowingly or with knowledge... is established if a person acts intentionally,” but did not provide any guidance as to what intentional acts establish knowledge. Instruction No. 5, Supp. CP.

Under the court’s instructions, a reasonable juror could have believed that proof of any intentional act (i.e. that Mr. Lian intentionally mixed chemicals) established beyond a reasonable doubt his guilty knowledge (that mixing the chemicals would produce a controlled substance—specifically methamphetamine.) This interpretation would allow conviction even absent proof that Mr. Lian knew the substance manufactured was methamphetamine. *See* Instruction No. 10, Supp. CP.

Without some guidance from the court, the flawed knowledge instruction created a mandatory presumption and relieved the state of its burden to prove Mr. Lian’s guilty knowledge. Accordingly, Mr. Lian’s

corrected by instructions that are “clear, accurate, and separately listed [sic].” *State v. Keend*, 140 Wn. App. 858, 868, 166 P.3d 1268 (2007). The instructions upheld in *Keend* did not differ significantly from those in *Goble*, which led this Court to reverse. *Compare Goble*, at 200-202 with *Keend*, at 863-864, 867. Thus *Keend* appears to have overruled *Goble sub silentio*.

conviction for Manufacture of Methamphetamine must be reversed, and the case remanded for a new trial.⁵ *Goble, supra*.

III. THE TRIAL COURT MISCALCULATED MR. LIAN'S OFFENDER SCORE.

At sentencing, the prosecutor produced six prior judgments to establish Mr. Lian's criminal history. Sentencing Exhibits 1-6, Supp. CP. The court found that Mr. Lian had one prior manufacturing charge, one prior sex offense, a burglary and theft (where were previously determined to comprise the same criminal conduct), a bail jumping, and two prior drug possession charges. CP 16; Sentencing Exhibits 1-6, Supp. CP. His offender score should have been 11 points; however, the sentencing judge erroneously sentenced him with an offender score of 16. The court made two errors, which were based on errors set forth in the Statement of Prosecuting Attorney. Statement of Prosecuting Attorney, Supp. CP.

First, the trial judge erroneously tripled Mr. Lian's possession charges. When sentencing Mr. Lian for manufacturing, the trial court was required to count three points for each prior "drug offense." RCW 9.94A.525(13). A "drug offense" is any felony violation of RCW 69.50

⁵ The Supreme Court has accepted review of this issue. *State v. Sibert, review granted* at 163 Wn.2d 1059, 187 P.3d 753 (2008). Argument has been held, and the case is pending decision.

“except possession of a controlled substance...” RCW 9.94A.030(24). Instead of excluding Mr. Lian’s prior possessions from this calculation, the trial judge tripled them. This added four points to his offender score on each charge.

Second, the sentencing judge erroneously counted Mr. Lian’s burglary and theft charges separately, despite the fact that they had previously been determined to be the same criminal conduct. Sentencing Exhibit 2, Supp. CP. RCW 9.94A.525(5)(a) reads as follows:

In the case of multiple prior convictions, for the purpose of computing the offender score, count all convictions separately, except: (i) Prior offenses which were found, under RCW 9.94A.589(1)(a), to encompass the same criminal conduct, shall be counted as one offense...

RCW 9.94A.525(5)(a). Under this provision, the sentencing judge should have scored the burglary and theft convictions as one point. His failure to do so added an extra point to Mr. Lian’s offender score.

Because Mr. Lian was erroneously sentenced with an offender score of 16, his sentence must be vacated and the case remanded for a new sentencing hearing.

CONCLUSION

For the foregoing reasons, 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.

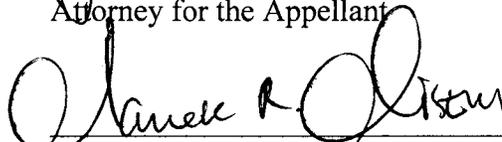
Respectfully submitted on June 19, 2009.

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CERTIFICATE OF MAILING

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

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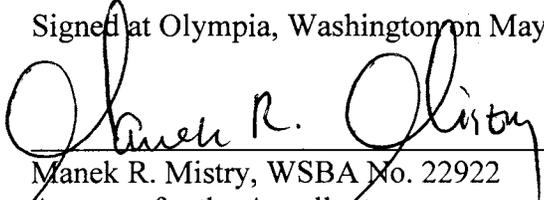
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And that I sent the original and one copy to the Court of Appeals, Division II, for filing;

All postage prepaid, on June 19, 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 May 29, 2009.



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