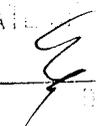


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DIVISION II

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STATE OF WASHINGTON

BY  DEPUTY

No. 34611-7-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

Albert Nickols,

Appellant.

Lewis County Superior Court

Cause No. 05-1-00823-1

The Honorable Judge Richard L. Brosey

Appellant's Opening Brief

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ASSIGNMENTS OF ERROR

1. Mr. Nickols' convictions were based on insufficient evidence.
2. The prosecution failed to produce evidence that the substance delivered was a controlled substance.
3. Mr. Nickols was denied due process of law because the trial court's instructions were constitutionally deficient.
4. The trial court's "knowledge" instruction was erroneous, confusing, and misleading, and permitted conviction without proof of an essential element.
5. The trial court erred by giving Instruction No. 10, which reads as follows:

A person knows or acts knowingly or with knowledge when he or she is aware of a fact, circumstances or result which is 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.

Supp. CP, Instruction No. 10.

6. Mr. Nickols was denied the effective assistance of counsel when his attorney failed to object to the court's erroneous knowledge instruction.
7. The trial court erred by failing to independently determine whether or not Mr. Nickols' prior convictions were the same criminal conduct.
8. The trial court erred by entering Finding of Fact No. 2.2, of the Judgment and Sentence, which reads (in relevant part) as follows:

[X] The court finds that the following prior convictions are one offense for purposes of determining the offender score (RCW 9.94A.525): NONE.
9. The trial court erred by calculating Mr. Nickols' offender score as 7.

10. The trial court erred by entering Finding of Fact No. 2.3 of the Judgment and Sentence, which reads (in relevant part) as follows:

I	7	II	60 to 120 mos.	24 mos. (V)	84-144 mos.	20 yrs.
II	7	II	60 to 120 mos.	24 mos. (V)	84-144 mos.	20 yrs.

CP 6.

ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

Albert Nickols was charged with two counts of delivery of methamphetamine. At trial, the prosecution's expert testified that he tested the substances delivered and determined that they were methamphetamine hydrochloride. There was no testimony that methamphetamine hydrochloride is a salt, isomer, or salt of an isomer of methamphetamine.

1. Did the prosecution fail to establish that the substance allegedly delivered by Mr. Nickols was a controlled substance? Assignment of Error Nos. 1, 2.

2. Must the convictions be reversed and the case dismissed for insufficient evidence? Assignment of Error Nos. 1, 2.

The court instructed the jury that the prosecution was required to prove that Mr. Nickols knew that the substance delivered was a controlled substance. The court also told the jury that "A person knows or acts knowingly or with knowledge when he or she is aware of a fact, circumstances or result which is described by law as being a crime, whether or not the person is aware that the fact, circumstance or result is a crime." Defense counsel did not object to this instruction.

3. Did the trial court's instructions deny Mr. Nickols due process of law? Assignment of Error Nos. 3, 4, 5.

4. Was the trial court's instruction defining "knowledge" erroneous, confusing, and misleading? Assignment of Error Nos. 3, 4, 5.

5. Was Mr. Nickols denied the effective assistance of counsel when his attorney failed to object to the court's erroneous knowledge instruction? Assignment of Error Nos. 5, 6.

At sentencing, the prosecution established that Mr. Nickols had five prior felony convictions with the same offense date. The court did not independently determine whether or not these prior offenses were the same criminal conduct.

6. Must the sentence be vacated and the case remanded for a new sentencing hearing? Assignment of Error Nos. 7 – 10.

7. Did the sentencing court err by failing to independently determine whether or not Mr. Nickols' prior convictions were the same criminal conduct? Assignment of Error Nos. 7 – 6.

STATEMENT OF FACTS AND PRIOR PROCEEDINGS

On October 8, 2005 and October 13, 2005, Rob Sibley, a confidential informant working for the Centralia Police Department, claimed to have purchased methamphetamine from Albert Nickols at his home in Centralia. RP(1/18/06) 11-108; (1/19/06) 7-107. Mr. Nickols was charged with two counts of delivery of methamphetamine, both with school zone enhancements. CP 14-16.

At a jury trial, the state presented the testimony of a forensic chemist who testified that the substance in both cases was methamphetamine hydrochloride. RP (1-19-06) 80. There was no testimony establishing that methamphetamine hydrochloride was a salt, isomer, or salt of an isomer of methamphetamine. RP (1-19-06). The jury was instructed that methamphetamine is a controlled substance. Supp. CP.

The court's "to convict" instructions required the prosecution to establish that Mr. Nickols acted with knowledge that the substance delivered was a controlled substance. Supp. CP. Without objection, the court also instructed the jury that

A person knows or acts knowingly or with knowledge when he or she is aware of a fact, circumstances or result which is 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.

Supp. CP, Instruction No. 10.

The jury returned verdicts of guilty on both counts and endorsed the school zone enhancements. CP 4-5. At sentencing, the state introduced into evidence a Judgment and Sentence from a 2005 case, showing that Mr. Nickols had five prior felonies, committed on April 29, 2005. Supp. CP, Ex. 1. The court did not independently determine whether or not the five prior felonies were the same criminal conduct. Instead, the court calculated Mr. Nickols' offender score as seven (adding a point to reflect the jury's finding that that he was on community custody at the time of the offenses). The court sentenced Mr. Nickols to 120 months. CP 4-13. This timely appeal followed. CP 3.

ARGUMENT

I. THE CONVICTION WAS BASED ON INSUFFICIENT EVIDENCE BECAUSE THE PROSECUTION FAILED TO ESTABLISH THAT THE SUBSTANCE DELIVERED WAS A CONTROLLED SUBSTANCE.

The Due Process Clause of the Fourteenth Amendment requires proof beyond a reasonable doubt of every element of the charged offense. U.S. Const. Amend. XIV; *In re Winship*, 397 U.S. 358 at 364, 90 S.Ct.

1068, 25 L.Ed.2d 368 (1970). *State v. Smith*, 155 Wn.2d 496 at 502, 120 P.3d 559 (2005). Because this is a constitutional requirement, a challenge to the sufficiency of the evidence may be raised for the first time on appeal. *State v. Colquitt*, 133 Wn. App. 789; 137 P.3d 892 (2006). Evidence is sufficient if, after reviewing the evidence in the light most favorable to the prosecution, any rational trier of fact could find the essential elements beyond a reasonable doubt. A reviewing court draws all reasonable inferences in favor of the State. *State v. G.S.*, 104 Wn.App. 643 at 651, 17 P.3d 1221 (2001). If a reviewing court finds insufficient evidence to prove an element of a crime, reversal is required; retrial following reversal for insufficient evidence is unequivocally prohibited and dismissal is the remedy. *Smith, supra*, at 504-505.

Under RCW 69.50.401, “it is unlawful for any person to manufacture, deliver, or possess with intent to manufacture or deliver, a controlled substance.” The section under which Mr. Nickols was charged provides that a person who delivers “methamphetamine, including its salts, isomers, and salts of isomers, is guilty of a class B felony...” RCW 69.50.401(2)(b); CP 14. The statute does not separately list what substances are salts, isomers, or salts of isomers of methamphetamine. Accordingly, whether or not a particular substance is a salt of methamphetamine is a question of fact.

The expert testimony in this case established that the substance delivered in each count was “methamphetamine hydrochloride.” RP (1/19/06) 80. But nowhere in the statute is methamphetamine hydrochloride specifically declared to be a controlled substance. RCW 69.50. Furthermore, there was no testimony proving beyond a reasonable doubt that methamphetamine hydrochloride is a salt, isomer, or salt of an isomer of methamphetamine (as opposed to some other methamphetamine-containing compound). RP (1/18/06) 11-108; RP (1/19/06) 7-107. Without such testimony, the prosecution was unable to meet its burden of proving that Mr. Nickols delivered a controlled substance.¹ In the absence of any evidence on this issue, no rational jury could have found that this element had been met by proof beyond a reasonable doubt.² Accordingly, the convictions must be reversed and the case dismissed with prejudice. *Smith, supra*.

¹ The trial court instructed the jury that “Methamphetamine is a controlled substance,” but did not give any instruction relating to methamphetamine hydrochloride. Instruction No. 9, Supp. CP.

² In other cases dealing with the difference between methamphetamine and methamphetamine hydrochloride, there has been expert testimony on the subject. *See, e.g., State v. Cromwell*, 2006 Wash. LEXIS 610 (2006); *State v. Morris*, 123 Wn.App. 467 at 471, 98 P.3d 513 (2004), reversed in part by *Cromwell*.

II. THE COURT’S “KNOWLEDGE” INSTRUCTION VIOLATED DUE PROCESS BECAUSE IT MISSTATED THE LAW AND MISLED THE JURY REGARDING AN ESSENTIAL ELEMENT OF EACH CHARGE.

Jury instructions, when taken as a whole, must properly inform the trier of fact of the applicable law. *State v. Douglas*, 128 Wn.App. 555 at 562, 116 P.3d 1012 (2005). An omission or misstatement of the law in a jury instruction that relieves the state of its burden to prove every element of the crime charged is erroneous and violates due process. *State v. Thomas*, 150 Wn.2d 821 at 844, 83 P.3d 970 (2004); *State v. Randhawa*, 133 Wn.2d 67 at 76, 941 P.2d 661 (1997). Jury instructions are reviewed *de novo*. *Joyce v. Dept. of Corrections*, 155 Wn.2d 306 at 323, 119 P.3d 825 (2005). A jury instruction which 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 at 341, 58 P.3d 889 (2002).

‘Knowledge’ is an element of delivery of a controlled substance; to obtain a conviction, the prosecution must prove that the defendant knew that the substance delivered was a controlled substance. *State v. DeVries*, 149 Wn.2d 842 at 850, 72 P.3d 748 (2003). Under RCW 9A.08.010(1)(b), “A person knows or acts knowingly or with knowledge when (i) he is aware of a fact, facts, or circumstances or result described by a statute defining an offense; or (ii) he has information which would lead a

reasonable man in the same situation to believe that facts exist which facts are described by a statute defining an offense.”

The court’s knowledge instruction provided that

A person knows or acts knowingly or with knowledge when he or she is aware of a fact, circumstances or result which is described by law as being a crime, whether or not the person is aware that the fact, circumstance or result is a crime.

Instruction No. 10, Supp. CP.

This language differed from the statutory language; under Instruction No. 10, the information at issue—the “fact, circumstances or result”—must itself be described by law as a crime. *See* RCW 9A.08.010 (which requires that the fact be described by a criminal statute, not that the fact itself be described as a crime). Division II has found this language to be confusing and misleading. *State v. Goble*, 131 Wn.App. 194 at 203, 126 P.3d 821 (2005).

The erroneous instruction defining knowledge relieved the prosecution of its obligation to prove each element of the offense beyond a reasonable doubt. The convictions must be reversed and the case remanded for a new trial. *Goble, supra*.

III. DEFENSE COUNSEL WAS INEFFECTIVE FOR FAILING TO OBJECT TO THE COURT’S “KNOWLEDGE” INSTRUCTION.

The Sixth Amendment to the United States Constitution guarantees that “In all criminal prosecutions, the accused shall enjoy the Right... to

have the Assistance of Counsel for his defense.” U.S. Const. Amend. VI. Similarly, Article I, Section 22 of the Washington State Constitution declares that “In criminal prosecutions the accused shall have the right to appear and defend in person, or by counsel...” Wash. Const. Article I, Section 22. The right to counsel is the right to the effective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668, 686, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984) (quoting *McMann v. Richardson*, 397 U.S. 759, 771 n. 14, 90 S.Ct. 1441, 25 L.Ed.2d 763 (1970)).

Defense counsel must employ “such skill and knowledge as will render the trial a reliable adversarial testing process.” *State v. Lopez*, 107 Wn.App. 270 at 275, 27 P.3d 237 (2001). Counsel’s performance is evaluated against the entire record. *Lopez*, at 275.

The test for ineffective assistance of counsel consists of two prongs: (1) whether defense counsel’s performance was deficient, and (2) whether this deficiency prejudiced the defendant. *State v. Holm*, 91 Wn.App. 429, 957 P.2d 1278 (1998), citing *Strickland*, *supra*. The defendant must show a reasonable probability that, but for counsel’s errors, the result of the proceeding would have been different. *Holm*, *supra*, at 1281. Finally, a reviewing court is not required to address both prongs of the test if the defendant makes an insufficient showing on either prong.

To establish deficient performance, a defendant must demonstrate that counsel's representation fell below an objective standard of reasonableness based on consideration of all the circumstances. *State v. Bradley*, 141 Wn.2d 731, 10 P.3d 358 (2000). To prevail on the prejudice prong of the test for ineffective assistance of counsel, an appellant must show that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceedings would have been different." *State v. Saunders*, 91 Wn.App. 575 at 578, 958 P.2d 364 (1998). A reasonable probability is a probability sufficient to undermine confidence in the outcome. *In re Fleming*, 142 Wn.2d 853 at 866, 16 P.3d 610 (2001). A claim of ineffective assistance is reviewed *de novo*. *State v. S.M.*, 100 Wn.App. 401 at 409, 996 P.2d 1111 (2000).

Here, 'knowledge' was an essential element of the crime charged. Despite this, Mr. Nickols' attorney failed to object to the court's "knowledge" instruction, which was a distortion of the statutory definition found in RCW 9A.08.010(1)(b). RP(1/19/06) 109. This failure to object was deficient performance; a reasonably competent attorney would have been familiar with the statute (and with the *Goble* case), and would have known that the language of the instruction differed from the language of the statute. *See, e.g., State v. Thomas*, 109 Wn.2d 222 at 229, 743 P.2d 816 (1987) ("[a] reasonably competent attorney would have been

sufficiently aware of relevant legal principles to enable him or her to propose an [appropriate] instruction.”)

Mr. Nickols was prejudiced by the error. The “knowledge” instruction was confusing and misleading, and it misstated the law. As a result, the jury would not have been able to properly interpret the “to convict” instructions. Defense counsel’s failure to object to the improper “knowledge” instruction denied Mr. Nickols the effective assistance of counsel. *Strickland*. The conviction must be reversed, and the case remanded for a new trial.

IV. THE TRIAL COURT ERRED BY FAILING TO DETERMINE ON THE RECORD WHETHER OR NOT MR. NICKOLS’ PRIOR CONVICTIONS WERE THE SAME CRIMINAL CONDUCT.

Under RCW 9.94A.525, the sentencing court is required to analyze multiple prior convictions to determine whether or not they should count as one offense:

Prior offenses which were found, under RCW 9.94A.589(1)(a), to encompass the same criminal conduct, shall be counted as one offense... The current sentencing court shall determine with respect to other prior adult offenses for which sentences were served concurrently... whether those offenses shall be counted as one offense or as separate offenses using the “same criminal conduct” analysis found in RCW 9.94A.589 (1)(a)...
RCW 9.94A.525(5)(a)(i)

Under RCW 9.94A.589(1)(a), “same criminal conduct” means two or more crimes that require the same criminal intent, are committed at the

same time and place, and involve the same victim. The sentencing court is not bound by prior determinations, but must exercise its discretion and decide whether multiple prior offenses should count separately or together. *State v. Wright*, 76 Wn.App. 811 at 829, 888 P.2d 1214 (1995), *interpreting former* RCW 9.94A.360(6)(a). Furthermore, the burden is on the State to establish that multiple convictions do not stem from the same criminal conduct. *State v. Dolen*, 83 Wn.App. 361 at 365, 921 P.2d 590 (1996), *review denied at* 131 Wn.2d 1006, 932 P.2d 644 (1997), *citing* RCW 9.94A.110; *State v. Jones*, 110 Wn.2d 74, 750 P.2d 620 (1988) and *State v. Gurrola*, 69 Wn.App. 152, 848 P.2d 1993, *review denied*, 121 Wn.2d 1032, 856 P.2d 383 (1993).

In this case, the prosecutor established that Mr. Nickols had five prior felonies with an offense date of April 29, 2005. CP 5; Sentencing Exhibit 1, Supp. CP. Four of the convictions were for Possession of Stolen Property in the Second Degree; the fifth conviction was for Possession of a Controlled Substance. CP 5. The prosecutor did not argue that the prior offenses were different criminal conduct, and the court did not determine on the record whether or not the prior offenses were the same criminal conduct. RP (3/20/06) 2-14.

Because the court did not independently determine whether or not the prior convictions constituted the same criminal conduct, the sentence must be vacated and the case remanded for resentencing. *Wright, supra.*

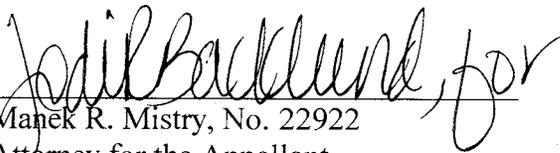
CONCLUSION

For the foregoing reasons, Mr. Nickols' convictions must be reversed and the case dismissed. In the alternative, the case must be remanded for a new trial.

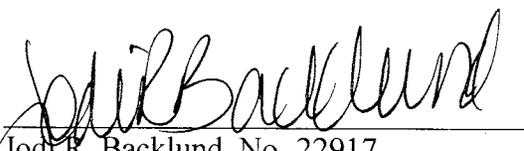
If the convictions are not reversed, the sentences imposed must be vacated and the case remanded for a new sentencing hearing.

Respectfully submitted on August 17, 2006.

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CERTIFICATE OF MAILING

STATE OF WASHINGTON

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

BY  DEPUTY

Albert Leroy Nickols, DOC# 883578
Stafford Creek Correction Center
191 Constantine Way
Aberdeen, WA 98520

and to:

Lewis County Prosecuting Attorney
360 NW North Street
Chehalis, WA 98532

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

All postage prepaid, on August 17, 2006.

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 August 17, 2006.



Jodi R. Backlund, No. 22917
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