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DIVISION II

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STATE OF WASHINGTON  
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DEPUTY

No. 37130-8-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION TWO

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STATE OF WASHINGTON,

Respondent,

v.

TAMMY RICKER,

Appellant.

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ON APPEAL FROM THE SUPERIOR COURT OF THE  
STATE OF WASHINGTON FOR THURSTON COUNTY

The Honorable Anne Hirsch, Judge  
Cause No. 06-1-01926-5

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BRIEF OF RESPONDENT

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06-01-16 MJD

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## A. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR.

1. Whether sufficient evidence was produced at trial to allow a reasonable trier of fact to find that Ricker knew the substance she was delivering was methamphetamine.

2. Whether Jury Instruction No. 11 correctly defined knowledge.

3. Whether Ricker was denied effective assistance of counsel.

4. Whether the invited error doctrine precludes appeal of Ricker's conviction.

## B. STATEMENT OF THE CASE.

### 1. Substantive facts.

On August 17, 2006, Susan Hare, a FedEx employee in Lacey, Washington, became suspicious of a package being sent by Tammy Ricker to a person in Hawaii, and opened it. RP 49. Inside multiple layers of wrapping, she found four small packages of a white crystalline substance that she believed to be controlled substances. RP 51-52, Exhibits 3-10, 12. Someone at FedEx called the police. RP 59. The substance was later tested in the Washington State Patrol Toxicology Lab and determined to be methamphetamine. RP100.

Hare testified that the FedEx office closes at 6:00 p.m., which is a very busy time, and that overnight packages destined for

Hawaii are picked up by a shuttle at approximately 6:10 p.m. RP 41. For approximately a year, Ricker had come to the FedEx office one to three times a week, RP 43, 64, always just moments before 6:00 p.m., always sending a package to Hawaii, and always paying the \$60 charge in cash, even though she could have saved \$5.00 per shipment by using a FedEx account which she had once set up, but stopped using. RP 43-44. This pattern continued even after FedEx employees asked her to come in earlier so they wouldn't be so rushed to get her package out on the shuttle. RP 43. On occasion Ricker seemed nervous, and although she had already pre-packaged her items, each time she would put that package inside another package before handing it over to the FedEx employees. RP 47. On one occasion, Ricker was accompanied by her son. Ricker had told Hare that her son was going to Hawaii for the summer, and when Hare asked about his trip to Hawaii, he appeared to be unaware of any such trip. RP 49.

Detective Ryan Russell of the Thurston County Narcotics Task Force testified that he investigated the case, but it took some time to locate Ricker and his first contact with her was on October 12, 2006. RP 83-84.

2. Procedural facts.

A First Amended Information charging Ricker with Count I, unlawful delivery of a controlled substance-methamphetamine within 1000 feet of a designated school bus route stop, occurring on August 17, 2006, and Count II, the identical charge occurring on October 12, 2006, was filed on November 1, 2007. CP 2. The two charges were bifurcated and only Count I was tried on November 5 and 6, 2007. 11/01/07 RP 8. The school bus route enhancement was dismissed on the first day of trial. RP 5. Ricker was found guilty of that charge by a jury, RP 153, and sentencing was held on November 27, 2007. CP 3-13.

C. ARGUMENT.

1. Sufficient evidence was produced at trial to allow a rational trier of fact to find beyond a reasonable doubt that Ricker knew the substance she was delivering was methamphetamine.

Ricker correctly argues that the jury instructions are the law of the case and that the State was required to prove that she knew the substance she delivered was methamphetamine. The State did so.

Evidence is sufficient to support a conviction if, viewed in the light most favorable to the prosecution, it permits any rational trier of fact to find the essential elements of the crime beyond a

reasonable doubt. State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992).

“[T]he critical inquiry on review of the sufficiency of the evidence to support a criminal conviction must be not simply to determine whether the jury was properly instructed, but to determine whether the record evidence could reasonably support a finding of guilt beyond a reasonable doubt.” (Cite omitted.) This inquiry does not require a reviewing court to determine whether *it* believes the evidence at trial established guilt beyond a reasonable doubt. “Instead, the relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, *any rational trier of fact* could have found the essential elements of the crime *beyond a reasonable doubt*. (Cite omitted, emphasis in original.)

State v. Green, 94 Wn.2d 216, 221, 616 P.2d 628 (1980).

“A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom.” Salinas, *supra*, at 201. Circumstantial evidence and direct evidence are equally reliable, and criminal intent may be inferred from conduct where “plainly indicated as a matter of logical probability.” State v. Delmarter, 94 Wn.2d 634, 638, 618 P.2d 99 (1980).

Credibility determinations are for the trier of fact and are not subject to review. State v. Camarillo, 115 Wn.2d 60, 71, 794 P.2d

850 (1990). This court must defer to the trier of fact on issues of conflicting testimony, credibility of witnesses, and the persuasiveness of the evidence. State v. Walton, 64 Wn. App. 410, 415-16, 824 P.2d 533 (1992). It is the function of the fact finder, not the appellate court, to discount theories which are determined to be unreasonable in light of the evidence. State v. Bencivenga, 137 Wn.2d 703, 709, 974 P.2d 832 (1999).

Here, the jury heard evidence that, as Ricker concedes, proved Ricker knew she was shipping a controlled substance. Appellant's Brief, page 6. It heard evidence that the substance was methamphetamine. RP 100. There was no evidence of any other substance being present and no evidence that she did not know, or that she had any reason to lack the knowledge, that it was methamphetamine. Hypothesizing that Ricker knew she was mailing contraband but not that it was methamphetamine is pure speculation.

Construing the evidence most favorably to the State, the jury could, and did, reasonably infer that the person who shipped the package knew what was in it.

Ricker argues that “principles of lenity” require that any ambiguity be interpreted in favor of the accused. Appellant’s Brief, page 6. It is unclear how that applies in this case.

Under the rule of lenity, any ambiguity in the meaning of a criminal statute must be resolved in favor of the defendant. In re Pers. Restraint of Hopkins, 137 Wn.2d 897, 901, 976 P.2d 616 (1999). A jury instruction is not a statute, and the rule of lenity does not apply. In any event, Instruction No. 8 does not appear to be ambiguous in any way. The issue is whether the State produced sufficient evidence that, applying the to-convict instruction, the jury could have found her guilty beyond a reasonable doubt. It did.

2. Instruction No. 11, defining knowledge, was correctly given.

Jury instructions are adequate if they allow the parties to argue their theories of the case, they are not misleading, and when read as a whole, they properly inform the jury of the applicable law. State v. Schneider, 36 Wn. App. 237, 242, 673 P.2d 200 (1983). An instruction is not misleading if it is readily understood by the ordinary mind. Tacoma v. Nekeferoff, 10 Wn. App. 101, 105, 516 P.2d 1048 (1973).

State v. Noel, 51 Wn. App. 436, 439-40, 753 P.2d 1017 (1988)

Ricker essentially argues that because the Washington Supreme Court, in State v. Roberts, 142 Wn.2d 471, 14 P.3d 713

(2000) and State v. Cronin, 142 Wn.2d 568, 14 P.3d 752 (2000), held that the accomplice liability instruction incorrectly used the language “a crime” instead of “the crime”, any instruction that uses the term “a crime”, such as WPIC 10.02, given in this case as Instruction 11, CP 50, is per se wrong, confusing, prejudicial, and inconsistent. She cites to no case applying the Roberts and Cronin rationale to WPIC 10.02, and this court can assume that “counsel, after diligent search, has found none.” State v. Logan, 102 Wn. App. 907, 911 fn. 1, 10 P.3d 504 (2000). Nor has the State. This is a case of first impression for this court.

Instruction No. 11, as proposed by the defense and given by the court, reads as follows:

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

CP 30, 50. The State argued at trial for inclusion of optional language that knowledge is also established by intentional action,

but Ricker objected and the court did not add that language to the instruction. RP 108-111.

Ricker argues that the language of Instruction No. 11 permitted the jury to convict even if it found that she knew only that the package contained contraband but not the nature of the contraband. There is absolutely no evidence in the record that would lead to the conclusion that the jury entertained any such idea. The charge in the Information was unlawful delivery of a controlled substance-methamphetamine. CP 2. There was no evidence of any substance but methamphetamine. The prosecutor did not argue in closing or rebuttal that the substance was anything other than methamphetamine, *e.g.*, RP 124-125, 130, 144. The verdict of the jury was a finding of guilt of "unlawful delivery of a controlled substance, methamphetamine, as charged." RP 153. Even if it were possible, under other facts, for the jury to be confused about what crime a defendant had knowledge of, that possibility does not exist in Ricker's case. There were no "facts, circumstances or result" that pointed to any conclusion but that Ricker knew the substance she was shipping was methamphetamine.

Ricker claims that Instruction No. 11 is inconsistent with Instruction No. 8, the “to-convict” instruction, presumably because Instruction No. 8 required the jury to find that she knew the substance she was delivering was methamphetamine, but that conclusion does not follow. It is entirely consistent. Ricker cites to State v. Walden, 131 Wn.2d 469, 932 P.2d 1237 (1997), for the proposition that when there is an inconsistency that results in a clear misstatement of the law, there is a presumption that the jury is misled and the defendant prejudiced. Walden, however, was a case where self-defense was an issue, where the definition of great personal injury given to the jury was incorrect and conflicted with another instruction using the term great bodily harm. That is not the case here. The definition of knowledge does not conflict with the element that Ricker knew the substance she was delivering was methamphetamine.

Ricker claims that Instruction No. 11 is inconsistent with the statute defining knowledge;

KNOWLEDGE. 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 statute as defining an offense.

RCW 9A.08.010(b).

In State v. Gerdtz, 136 Wn. App. 720, 150 P.3d 627 (2007), the defendant also argued that the language of the jury instruction, which was identical to Instruction No. 11 in this case, did not use the language prescribed by the statute. This court held that it was not significantly different, misleading, or confusing. Id., at 729. It is not at all clear how the language “described by a statute as defining an offense”, as used in the statute, is substantively different from “being a crime” as used in the jury instruction. If there is a distinction, it is not likely to be apparent to the average juror, and has apparently not caused any concern to the appellate courts.

a. Even if Instruction No. 11 was erroneous, it was harmless error.

It is a fundamental precept of criminal law that the prosecution must prove every element of the crime charged beyond a reasonable doubt. . . . An instruction that relieves the State of its burden to prove every element of a crime requires automatic reversal . . . . However, not every omission or misstatement in a jury instruction relieves the State of its burden. . . . [E]ven in cases where there are multiple crimes charged and multiple defendants as to some charges, the use of an erroneous instruction may be harmless. . . . [The test for] determining whether a constitutional error is harmless: “Whether it appears ‘beyond a reasonable doubt that the error

complained of did not contribute to the verdict obtained.” . . . . In order to hold the error harmless, we must “conclude beyond a reasonable doubt that the jury verdict would have been the same absent the error. . .

State v. Brown, 147 Wn.2d 330, 339-41, 58 P.3d 889 (2002), (cites omitted).

Applying this test to Ricker’s case, it is impossible to see how the verdict would have been different had the knowledge instruction used the words “the crime” instead of “a crime.” Absent any iota of evidence that Ricker was unaware that the package she was shipping contained contraband, or that the contents were methamphetamine, any error in the instruction is harmless. “We will not reverse a conviction based on instructional error even on direct review if we are convinced beyond a reasonable doubt that the error was harmless.” State v. Brown, *supra*, at 340 (quoting Neder v. United States, 527 U.S. 1, 9, 119 S. Ct. 1827, 144 L. Ed. 2d 35 (1999)).

3. Ricker was not denied effective assistance of counsel. Because she raises this issue, invited error does not preclude review.

As a general rule, “[A] party may not request an instruction and later complain on appeal that the requested instruction was given.” State v. Studd, 137 Wn.2d 533, 546, 973 P.2d 1049 (1999)

(cite omitted). However, invited error does not preclude appellate review where there is a claim of ineffective assistance of counsel based on that error. Id., at 550-51; see also Gerdts, *supra*, at 630 (“Generally, when there is no objection on the record, we will not consider an alleged instructional error unless the appellant first demonstrates that the error is a ‘manifest error affecting a constitutional right.’ RAP 2.5(a)(3). However, because Gerdts also argues that his trial counsel was ineffective for failing to object to this instruction on these grounds, we will address these arguments in that context regardless of whether they are manifest errors affecting a constitutional right.”) An appellant bears a very high burden of proving ineffective assistance of counsel. The court in Studd, which decided several consolidated cases, said this:

By framing his argument in this way, [the defendant] avoids one thicket only to become entangled in another. We strongly presume that counsel’s representation was effective. . . . A two-prong test must be met to demonstrate ineffective assistance of counsel. . . . [The defendant] must first show that his “counsel’s representation was deficient, i.e., it fell below an objective standard of reasonableness based on consideration of all the circumstances.” . . . However, “deficient performance is *not* shown by matters that go to trial strategy or tactics.” . . . LeFabre had not been decided at the time of [the defendant]’s trial, so his counsel can hardly be faulted for requesting a jury instruction based upon a then-unquestioned WPIC 16.02. Thus we do not even

reach the second part of the test, where [the defendant] would have had to also prove that “defense counsel’s deficient representation prejudiced the defendant, i.e., there is a reasonable probability that, except for counsel’s unprofessional errors, the result of the proceeding would have been different. . .

Studd, *supra*, at 550-51 (cites omitted, emphasis in original).

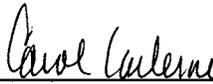
Ricker is claiming ineffective assistance of counsel based upon his request for a jury instruction that has not previously been challenged on this issue. An attorney does have a duty to investigate relevant law, but it is not reasonable to conclude that doing so would have led Ricker’s attorney to propose a different knowledge instruction. For all the reasons discussed above, the instruction is not inconsistent with the statute. The Roberts and Cronin cases were decided in 2000, and in the intervening years, no case has applied their reasoning to WPIC 10.02. To find that Ricker’s counsel was ineffective would be to apply a much higher standard to his performance than the courts have ever applied before.

The court need not reach the second prong of the test, which is prejudice to the defendant, but in any event, as discussed above, the outcome of the trial would not have been different had the jury instruction been as Ricker now urges.

D. CONCLUSION.

This court should affirm Ricker's conviction, not because of invited error, but because it is supported by substantial evidence, the jury instructions were not incorrect, and her attorney was not ineffective.

Respectfully submitted this 18<sup>th</sup> of September, 2008.



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Carol La Verne, WSBA# 19229  
Attorney for Respondent

CERTIFICATE OF SERVICE

I certify that I served a copy of the Response to Personal Restraint Petition, No. 37130-8-II, on all parties or their counsel of record on the date below as follows:

- US Mail Postage Prepaid
- ABC/Legal Messenger
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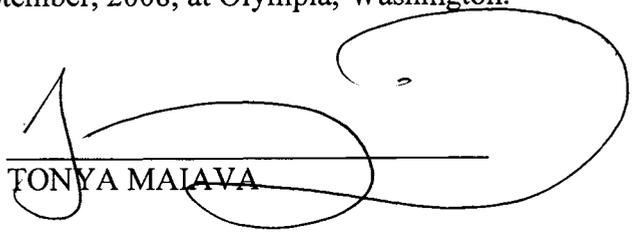
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I certify under penalty of perjury under laws of the State of Washington that the foregoing is true and correct.

Dated this 18<sup>th</sup> day of September, 2008, at Olympia, Washington.

  
\_\_\_\_\_  
TONYA MALAVA