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COURT OF APPEALS

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No. 34037-2-II

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Clerk

COURT OF APPEALS, DIVISION II  
OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON,

Respondent,

vs.

**David Cain,**

Appellant.

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Grays Harbor Superior Court

Cause No. 05-1-00410-2

The Honorable Judge David E. Foscue

**Appellant's Opening Brief**

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## ASSIGNMENTS OF ERROR

1. Mr. Cain was denied due process of law.
2. The trial court's instruction defining recklessness contained an improper mandatory presumption.
3. The trial court's instruction defining recklessness impermissibly relieved the state of its burden of establishing an element of the offense by proof beyond a reasonable doubt.
4. The trial court erred by giving Instruction No. 5, which reads as follows:

A person is reckless or acts recklessly when he or she knows of and disregards a substantial risk that a wrongful act may occur and the disregard of such substantial risk is a gross deviation from conduct that a reasonable person would exercise in the same situation.

Recklessness also is established if a person acts knowingly.  
Supp CP, Instruction No. 5

5. The trial court's "knowledge" instruction was erroneous, confusing, and misleading.
6. The erroneous "knowledge" instruction compounded the problem caused by the court's instruction defining recklessness.
7. The trial court erred by giving Instruction No. 6, 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. 6.

## **ISSUES PERTAINING TO ASSIGNMENTS OF ERROR**

David Cain was charged with trafficking in stolen property in the second degree. To obtain a conviction, the prosecution was required to prove that Mr. Cain acted recklessly.

The court defined recklessness in accordance with the statute, and instructed the jury that "Recklessness is also established if a person acts knowingly;" however, the court did not tell the jury what knowledge would trigger this mandatory presumption. In addition, the court's "knowledge" instruction included the following language: "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..."

1. Was Mr. Cain denied due process of law because the court's instructions impermissibly relieved the state of its burden to prove each element beyond a reasonable doubt? Assignments of Error Nos. 1-7.
  
2. Did the trial court's instruction defining recklessness contain an impermissible mandatory presumption? Assignments of Error Nos. 1-7.
  
3. Did the trial court's "knowledge" instruction misstate the law and mislead the jury, compounding the problem with the instruction on recklessness? Assignments of Error Nos. 1-7.

## **STATEMENT OF FACTS AND PRIOR PROCEEDINGS**

On July 21, 2005 Mr. David Cain was charged with Trafficking in Stolen Property in the Second Degree. CP 1. The matter was tried to a jury commencing on October 11, 2005. RP 9. The state alleged that he sold aluminum belonging to the Department of Fish and Wildlife. RP 16-55. At trial, the court gave the following instructions:

A person is reckless or acts recklessly when he or she knows of and disregards a substantial risk that a wrongful act may occur and the disregard of such substantial risk is a gross deviation from conduct that a reasonable person would exercise in the same situation.

Recklessness also is established if a person acts knowingly. Supp CP, Instruction No. 5.

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. 6.

Mr. Cain was found guilty and sentenced. CP 3-10. This timely appeal followed. CP 11-12.

## ARGUMENT

### THE TRIAL COURT'S ERRONEOUS INSTRUCTIONS DEFINING "RECKLESSNESS" AND "KNOWLEDGE" VIOLATED DUE PROCESS BY RELIEVING THE PROSECUTION OF ITS BURDEN TO ESTABLISH EACH ELEMENT BY PROOF BEYOND A REASONABLE DOUBT.

The Due Process Clause of the Fourteenth Amendment requires proof beyond a reasonable doubt of every element of the charged offense. *In re Winship*, 397 U.S. 358 at 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970). 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).

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 at 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); see also *Carella v. California*, 491 U.S. 263 at 265, 109 S.Ct. 2419 (1989).

Here, “recklessness” was defined by Instruction No. 5, which included the following optional language: “Recklessness is also established if a person acts knowingly.” Instruction No. 5, Supp. CP. This language allowed the jury to presume that Mr. Cain acted recklessly if he acted knowingly, but did not give any guidance as to what knowing act could trigger the mandatory presumption. For example, if the jury concluded that Mr. Cain knowingly sold property, they could presume (under Instruction No. 5) that he recklessly trafficked in stolen property. Accordingly, the prosecution was relieved of establishing knowledge by proof beyond a reasonable doubt. See, e.g., *State v. Goble*, 131 Wn.App. 194, 126 P.3d 821 (2005) (conviction reversed because knowledge was presumed from any intentional act, without guidance as to what intentional act could trigger mandatory presumption).

The problem was compounded by an error in the knowledge instruction. 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.”

“Knowledge” was defined by Instruction No. 6. The court instructed the jury that a person “acts knowingly” when he “is aware of a fact, circumstance or result *described by law as being a crime...*” Instruction No. 6, Supp. CP. As can be seen, this language differed from the statutory language. Under Instruction No. 6, the information at issue—the “fact, circumstances or result”—must itself be described by law as a crime. This is nonsensical. The instruction misstated the law. *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). It was also confusing and misleading. The end result was that the jury was unable to determine what was meant by knowledge, but was permitted to use Mr. Cain’s knowledge to determine whether or not he was acting recklessly.

The erroneous instruction defining recklessness (with its unlawful mandatory presumption) combined with the erroneous knowledge instruction 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; Carella, supra.*

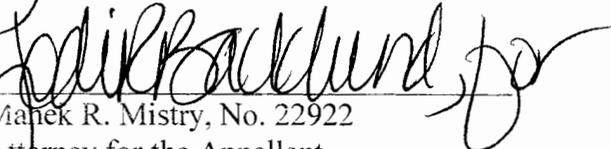
**CONCLUSION**

For the foregoing reasons, the conviction must be reversed and the case remanded for a new trial.

Respectfully submitted on June 15, 2006.

**BACKLUND AND MISTRY**

  
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CERTIFICATE OF MAILING

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

David Cain, DOC# 745667  
Stafford Creek Correctional Center  
191 Constantine Way  
Aberdeen, WA 98520

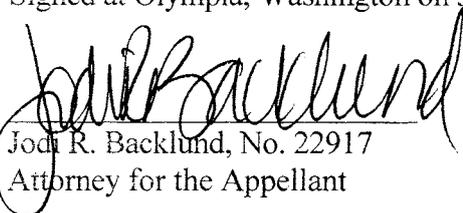
and to the Grays Harbor Prosecuting Attorney.

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

All postage prepaid, on June 15, 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 June 15, 2006.

  
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BY  J. R. BACKLUND

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