

COURT OF APPEALS  
DIVISION II

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No. 37130-8-II

STATE OF WASHINGTON  
BY *[Signature]*  
DEPUTY

COURT OF APPEALS, DIVISION II  
OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON,

Respondent,

vs.

**Tammy Ricker,**

Appellant.

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Thurston County Superior Court

Cause No. 06-1-01926-5

The Honorable Judge Anne Hirsch

**Appellant's Opening Brief**

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### **ASSIGNMENTS OF ERROR**

1. Ms. Ricker's conviction was obtained in violation of her constitutional right to due process.
2. Ms. Ricker's conviction was based on insufficient evidence.
3. The trial court erred by giving Instruction No. 11, 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 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 that 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[.]

Court's Instructions to Jury, No. 11, Supp. CP.

4. Ms. Ricker was denied the effective assistance of counsel.
5. The invited error rule should not be applied in this case.

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

1. Under the law of the case, the state was required to prove that Ms. Ricker knew she was delivering Methamphetamine. The state proved (at best) that Ms. Ricker believed she was delivering a controlled substance. Was the evidence insufficient to prove the elements of the offense beyond a reasonable doubt? Assignments of Error Nos. 1-2.
2. A court's instructions must require proof of each essential element beyond a reasonable doubt. The court's "knowledge" instruction relieved the state of its burden to prove that Ms. Ricker knew she was delivering a controlled substance. Did the court's instructions violate Ms. Ricker's constitutional right to due process? Assignments of Error No. 1, 3.

3. An accused is denied the effective assistance of counsel when she is prejudiced by her attorney's deficient performance. In this case, Ms. Ricker was prejudiced by her attorney's submission of an improper instruction defining "knowledge." Was Ms. Ricker denied the effective assistance of counsel? Assignment of Error No. 4.
4. An accused whose conviction was obtained in violation of the constitutional right to due process should be permitted to challenge that conviction on appeal. In certain circumstances, the invited error rule bars all remedies despite clear constitutional violation. Should there be an exception to the invited error rule where the rule's effect is to bar all remedies for a constitutional violation? (Included for preservation of error). Assignment of Error No. 5.

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

Tammy Ricker sent a package by Federal Express to her son in Hawaii. RP31-33, 38-66.<sup>1</sup> Staff became suspicious and opened the package, which contained methamphetamine. RP 48, 99-100.

Ms. Ricker was charged with Unlawful Delivery of a Controlled Substance, with a school zone enhancement.<sup>2</sup> CP 2. The charge contained a knowledge element: that she knowingly delivered methamphetamine. CP 2.

The defense proposed the following instruction, which the court gave:

To convict the defendant, TAMMY BABETTE RICKER, of the crime of Unlawful Delivery of a Controlled Substance – Methamphetamine as charged in Count I, each of the following elements of the crime must be proved beyond a reasonable doubt

- 1) That on or about the 17<sup>th</sup> day of August, 2006, the defendant delivered a controlled substance,
- 2) That the defendant knew that the substance delivered was a controlled substance, to wit methamphetamine, and
- 3) That the acts occurred in the state of Washington.

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<sup>1</sup> Several volumes of Verbatim Report of Proceedings were prepared for this appeal, but the only dates cited in this brief are from November 5 and 6, 2007, which are numbered consecutively.

<sup>2</sup> A companion charge was severed for trial.

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand, if, after weighing all the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.  
Court's Instructions to Jury, No. 8, Supp. CP.

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 that 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[.]  
Court's Instructions to Jury, No. 11, Supp. CP.

The state did not object to these instructions. RP 107-114, 122.

The jury convicted and sentencing followed, as did this timely appeal. CP 3-13, 14.

## ARGUMENT

**I. THE EVIDENCE WAS INSUFFICIENT TO ESTABLISH THAT MS. RICKER KNEW SHE WAS DELIVERING METHAMPHETAMINE, AS REQUIRED UNDER THE LAW OF THE CASE.**

The Due Process Clause of the Fourteenth Amendment requires the state to prove every element of an offense beyond a reasonable doubt. U.S. Const. Amend. XIV; *In re Winship*, 397 U.S. 358 at 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970). This includes elements added under the

“law of the case” doctrine. *See State v. Hickman*, 135 Wn.2d 97, 954 P.2d 900 (1998). An instruction to which no objection is made becomes the “law of the case.” *Hickman, supra*.

Delivery of a Controlled Substance ordinarily requires proof that the accused knew that the substance was a controlled substance. *State v. Nunez-Martinez*, 90 Wn. App. 250, 951 P.2d 823 (1998). When included without objection in the “to convict” instruction, knowledge of the exact identity of the substance delivered becomes an element under the “law of the case” doctrine. *State v. Ong*, 88 Wn. App. 572 at 577, 945 P.2d 749 (1997).

Here, the court’s “to convict” instruction required the state to prove “(1) That... the defendant delivered a controlled substance, [and] (2) That the defendant *knew that the substance delivered was a controlled substance, to wit: methamphetamine...*” Instruction No. 8, Supp. CP, *emphasis added*. The state did not object to this instruction, and it became the law of the case. RP 107-114, 122; *Ong, supra*. Under Instruction No. 8, the state was required to prove that Ms. Ricker knew the package she delivered contained methamphetamine, and not merely a generic controlled substance. *Ong, supra*.

To the extent the instruction is ambiguous, it must be interpreted in Ms. Ricker’s favor. 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 at 554, 90 P.3d 1133 (2004). Jurors should not have to speculate about the law. *State v. Olmedo*, 112 Wn. App. 525 at 534-535, 49 P.3d 960 (2002). Principles of lenity require any ambiguity to be interpreted in favor of the accused. *See State v. Taylor*, 90 Wn. App. 312 at 317, 950 P.2d 526 (1998), *collecting cases*. Applying these rules to Instruction No. 8, this Court must conclude that the instruction required proof that Ms. Ricker knew the substance delivered was methamphetamine.

The state produced some evidence that Ms. Ricker knew she was shipping contraband by Fed Ex. RP 35, 42-48. However, nothing in the record indicates that she knew she was shipping methamphetamine specifically. RP. Because the evidence was insufficient under the law of the case, her conviction for delivery of methamphetamine must be reversed and her case dismissed. *Hickman, supra*.

## **II. THE COURT'S INSTRUCTIONS ALLOWED CONVICTION WITHOUT PROOF OF ALL ESSENTIAL ELEMENTS OF THE CHARGED CRIME.**

Due Process requires proof of every element beyond a reasonable doubt. U.S. Const. Amend. XIV; *In re Winship, supra*. Jury instructions, taken as a whole, must properly inform the jury 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).

This is true not only for the “to convict” instruction, but also for ancillary instructions. For example, the rule applies to instructions defining accomplice liability. *State v. Roberts*, 142 Wn.2d 471, 14 P.3d 713 (2000); *State v. Cronin*, 142 Wn.2d 568, 14 P.3d 752 (2000). In *Roberts* and *Cronin*, the courts’ instructions allowed conviction upon proof that the accused knew that he or she was aiding in the commission of “a crime,” rather than “the crime” charged. The Supreme Court held that these instructions unconstitutionally excused the state from proving facts required for conviction. *Roberts, supra; Cronin, supra, at 578-579.*

In this case, the court defined knowledge to include awareness of a fact (or possession of information that would lead a reasonable person to believe that facts exist) “described by law as being *a* crime...” Instruction No. 11, Supp. CP, *emphasis added*. By defining knowledge in relation to “a crime” instead of “the crime,” Instruction No. 11 allowed the jury to convict if it found Ms. Ricker knew her package contained contraband, whether or not she knew it contained a controlled substance. But due

process does not permit conviction under these circumstances; conviction may only follow proof of the elements of the crime charged. *Winship, supra*.

The “to convict” instruction did not solve the problem created by Instruction No. 11. Instead, Instruction No. 8 (which required proof that Ms. Ricker “knew that the substance delivered was a controlled substance, to wit: methamphetamine”) was inconsistent with Instruction No. 11.

When jury instructions are inconsistent, a reviewing court must determine whether the jury was misled as to its function and responsibilities. *State v. Walden*, 131 Wn.2d 469 at 478, 932 P.2d 1237 (1997), *citing State v. Wanrow*, 88 Wn.2d 221 at 239, 559 P.2d 548 (1977); *see also State v. Carter*, 127 Wn. App. 713 at 718, 112 P.3d 561 (2005). Where the inconsistency is the result of a clear misstatement of the law, the misstatement is presumed to have misled the jury in a manner prejudicial to the defendant. *Walden, supra*, at 469. In such circumstances, the defendant is entitled to a new trial unless the error can be shown to be harmless beyond a reasonable doubt. *Walden, supra*, at 478. Instructional error is harmless only if it is trivial, formal, or merely academic, and only if it did not prejudice the substantial rights of accused, and in no way affected the final outcome of the case. *Walden*, at 478.

In this case, the inconsistency stemmed from a clear misstatement of the law. By using the phrase “a crime” instead of “the crime,” Instruction No. 11 unconstitutionally created liability for other offenses, in addition to delivery of methamphetamine. This violated Ms. Ricker’s constitutional right to due process. *Winship, supra*. Furthermore, the instruction is inconsistent with the statute defining knowledge:

A person knows or acts knowingly or with knowledge when: (i) he [or she] is aware of a fact, facts, or circumstances or result described by a statute defining an offense; or (ii) he [or she] has information which would lead a reasonable [person] in the same situation to believe that facts exist which facts are described by a statute defining an offense.  
RCW 9A.08.010(1)(b).

Thus, under the statute, knowledge is an awareness of a fact, circumstance, or result.<sup>3</sup> The particular fact, circumstance, or result is to be found in a statute defining an offense—the offense with which the defendant is charged. RCW 9A.08.010(1)(b).

By contrast, Instruction No. 11—although containing similar words—has a different meaning. Under the instruction, the “fact, circumstance or result” must itself *be* a crime. The relevant language in the instruction defines knowledge as awareness “of a fact, circumstance or

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<sup>3</sup> Or, in the alternative, possession of information that would lead a reasonable person to believe that certain facts exist.

result which is described by law as *being* a crime...” Instruction No. 11, Supp. CP, *emphasis added*. This different meaning is further emphasized by the last clause of the first paragraph: “whether or not the person is aware that the fact, circumstance, or result *is* a crime.” Instruction No. 11, Supp. CP, *emphasis added*.

Because Instruction No. 11 includes a clear misstatement of the law, the inconsistency between it and Instruction No. 8 is presumed to have misled the jury and prejudiced Ms. Ricker. *Walden*.

The state cannot show that this error is harmless beyond a reasonable doubt. First, the state’s proof of Ms. Ricker’s knowledge was weak, consisting only of the testimony of the FedEx clerk that Ms. Ricker seemed poor and nervous, would not use an account but instead paid in cash, and repackaged her item. RP 44-47. Second, Ms. Ricker’s defense rested on the jury finding a reasonable doubt as to her mental state. RP 132-137. If the jury believed Ms. Ricker should have known she was committing *a* crime (for example by shipping contraband that was not necessarily a controlled substance), the instruction permitted them to convict.

Because the court’s instructions were inconsistent, misstated the law, and permitted the jury to convict in the absence of proof of all elements beyond a reasonable doubt, the conviction violated due process.

*In re Winship, supra.* The conviction must be reversed and the case remanded to the trial court for a new trial.

**III. MS. RICKER WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL WHEN HER ATTORNEY PROPOSED A DEFECTIVE INSTRUCTION.**

The Sixth Amendment provides that “[i]n all criminal prosecutions, the accused shall enjoy the right... to have the Assistance of Counsel for his defense.” U.S. Const. Amend. VI. This provision is applicable to the states through the Fourteenth Amendment. U.S. Const. Amend. XIV; *Gideon v. Wainwright*, 372 U.S. 335, 342, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963). Likewise, Article I, Section 22 of the Washington Constitution provides, “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 “one of the most fundamental and cherished rights guaranteed by the Constitution.” *U.S. v. Salemo*, 61 F.3d 214 at 221-222 (3<sup>rd</sup> Cir. 1995).

An ineffective assistance claim presents a mixed question of law and fact, requiring *de novo* review. *In re Fleming*, 142 Wn.2d 853 at 865, 16 P.3d 610 (2001); *State v. Horton*, 136 Wn. App. 29, 146 P.3d 1227 (2006). An appellant claiming ineffective assistance must show (1) that defense counsel’s conduct was deficient, meaning that it fell below an objective standard of reasonableness; and (2) that the deficient

performance resulted in prejudice, meaning “a reasonable possibility that, but for the deficient conduct, the outcome of the proceeding would have differed.” *State v. Reichenbach*, 153 Wn.2d 126 at 130, 101 P.3d 80 (2004), citing *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); see also *State v. Pittman*, 134 Wn. App. 376 at 383, 166 P.3d 720 (2006).

An attorney’s misunderstanding of applicable law can constitute ineffective assistance: “[r]easonable attorney conduct includes a duty to investigate the relevant law.” *State v. Woods*, 138 Wn. App. 191, 156 P.3d 309 (2007). See also *United States v. Spence*, 450 F.3d 691 at 694-695 (7th Cir. 2006), citing *Williams v. Taylor*, 529 U.S. 362, 120 S. Ct. 1495, 146 L. Ed. 2d 389 (2000); *Smith v. Dretke*, 417 F.3d 438 at 442 (5th Cir. 2005).

In this case, defense counsel offered the erroneous knowledge instruction. This was deficient performance that prejudiced Ms. Ricker. First, counsel should have realized that by referring to “a crime,” Instruction No. 11 permitted conviction if Ms. Ricker knew the package contained any contraband, whether drugs or not. See *Cronin, supra*; *Roberts, supra*.

Second, counsel should have realized that the instruction was inconsistent with RCW 9A.08.010, the statute defining “knowledge.”

Third, although the instruction was a pattern instruction, this should not negate Ms. Ricker's ineffective assistance claim. *See State v. Studd*, 137 Wn.2d 533 at 551, 973 P.2d 1049 (1999) ("counsel can hardly be faulted for requesting a jury instruction based upon a then-unquestioned WPIC..."). The *Cronin* and *Roberts* decisions lay the groundwork for a challenge to the standard "knowledge" instruction. After *Cronin* and *Roberts*, any instruction that includes the phrase "a crime" should be closely examined, to determine whether or not the phrase "the crime" must be substituted. Furthermore, the WPIC's divergence from the statutory language should have prompted counsel to consider whether a nonstandard instruction was more appropriate. This is especially true given that Ms. Ricker's entire defense rested on the jury's assessment of her state of mind.

Because defense counsel proposed a defective instruction, his performance fell below an objective standard of reasonableness. *Reichenbach, supra*.

Counsel's deficient performance prejudiced Ms. Ricker. Her defense rested on the jury's assessment of her mental state. The evidence showing she knew the package held drugs was weak. Instruction No. 11 permitted the jury to convict even if it believed from the circumstantial

evidence that Ms. Ricker only knew that the package contained contraband, without knowing that it contained drugs.

Because counsel's deficient performance prejudiced Ms. Ricker, her conviction must be vacated. *Reichenbach, supra*. The case must be remanded to the trial court for a new trial. *Reichenbach*.

**IV. IF *STATE V. STUDD* BARS MS. RICKER'S INEFFECTIVE ASSISTANCE CLAIM, DUE PROCESS PROHIBITS APPLICATION OF THE INVITED ERROR DOCTRINE (INCLUDED FOR PRESERVATION OF ERROR).**

Under the invited error doctrine, a party may not request an instruction and later complain on appeal that the court gave the instruction. *State v. Vander Houwen*, 163 Wn.2d 25 at 36-37, 177 P.3d 93 (2008). Our Supreme Court has observed only one exception to the invited error rule: where the trial court refuses a defendant's proposed instruction, the defendant will not be penalized on appeal for offering a flawed instruction. *Vander Houwen*, at 37.

Where *State v. Studd* eliminates an ineffective assistance claim, the invited error rule allows the court to affirm convictions obtained in violation of the constitution. *See Studd, supra*, at 555 *et seq.* (Sanders, J., dissenting); *State v. Henderson*, 114 Wn.2d 867 at 871 *et seq.*, 792 P.2d 514 (1990) (Utter, J., dissenting); *In re Griffith*, 102 Wn.2d 100 at 103 *et seq.*, 683 P.2d 194 (1984).

If an instruction unconstitutionally relieves the state of its burden to prove the elements of a criminal case, convictions based on that instruction should be reversed. *In re Winship, supra*. The sole exception should be for cases in which the error is harmless beyond a reasonable doubt. *Walden, supra*. If *State v. Studd* and the invited error rule bar Ms. Ricker's appeal, she'll be left without a remedy despite prejudicial violation of her constitutional rights.

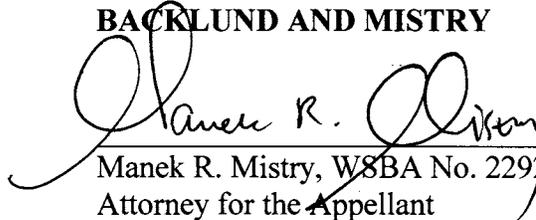
The invited error rule should not be applied in circumstances such as these. It is fundamentally unfair for a conviction obtained in violation of the accused's constitutional right to due process to be allowed to stand.

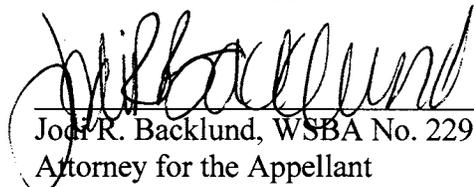
### **CONCLUSION**

For the foregoing reasons, Ms. Ricker's conviction must be reversed and the case dismissed with prejudice. In the alternative, the case should be remanded to the trial court for a new trial.

Respectfully submitted on July 21, 2008.

### **BACKLUND AND MISTRY**

  
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CERTIFICATE OF MAILING

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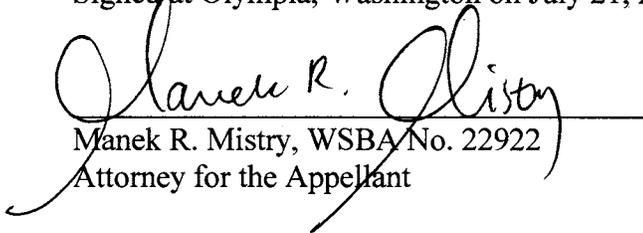
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And that I sent the original and one copy to the Court of Appeals, Division II, for filing;

All postage prepaid, on July 21, 2008.

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 July 21, 2008.

  
Manek R. Mistry, WSBA No. 22922  
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DIVISION II