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COURT OF APPEALS  
DIVISION II

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STATE OF WASHINGTON

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DEPUTY

No. 37130-8-II

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 Reply Brief**

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## ARGUMENT

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

Respondent concedes that the state undertook the burden of proving that Ms. Ricker knew the identity of the substance she delivered. Brief of Respondent, p. 3. The only issue on appeal, therefore, is whether the evidence was sufficient to prove beyond a reasonable doubt that Ms. Ricker knew the package she mailed contained methamphetamine specifically, and not merely a generic controlled substance or other contraband. *State v. Ong*, 88 Wn. App. 572, 945 P.2d 749 (1997).

In *Ong*, the defendant was accused of giving a morphine tablet to a child. To prove that he knew the tablet was morphine, the state presented evidence consisting of “(1) Ong's five felony convictions; (2) Ong's drug paraphernalia (i.e., syringes, a straw, smoking device, cotton); (3) the small numbers marked on the tablets; (4) his testimony that he knew the pills were "pain medication"; (5) his testimony that he stole the pills; (6) and his flight to Bremerton, showing consciousness of guilt.” *Ong*, at 577-578, *footnote omitted*. The Court held that “[N]othing in this evidence points to knowledge that the substance was morphine rather than

any other controlled substance,” and noted that the Uniform Controlled Substances Act lists nearly 240 substances. *Ong*, at 578, n. 8.

In this case, the state presented even less evidence. Nothing in the record showed that Ms. Ricker saw the drugs or was familiar with their appearance, that she knew they belonged to a general category of controlled substances (such as Mr. Ong’s belief that his tablets were pain medication), or that she herself used paraphernalia to ingest drugs. *See RP, generally*. Without citation to the record, Respondent claims the jury “reasonably [inferred] that the person who shipped the package knew what was in it.” Brief of Respondent, p. 5. But this is not a reasonable inference from the evidence. *Ong, supra*.

The evidence is insufficient to prove Ms. Ricker’s personal knowledge that the package contained methamphetamine, and not some other contraband. Accordingly, the conviction must be reversed and the case dismissed with prejudice. *Ong, supra*.

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

Reversal is required whenever jury instructions relieve the state of its burden to prove an element of an offense. *State v. Thomas*, 150 Wn.2d 821, 844, 83 P.3d 970 (2004). An element of delivery is the accused

person's knowledge that she is delivering a controlled substance.<sup>1</sup> RCW 69.50.401. Instruction No. 11 relieved the state of its burden to prove this knowledge, by allowing conviction if the state proved Ms. Ricker was aware of *any* fact "described by law as being *a* crime." Instruction No. 11, CP 50.

Under this instruction, the jury could substitute proof Ms. Ricker knew she was breaking *some* law for proof that she knew she was delivering a controlled substance. For example, if Ms. Ricker mistakenly believed she was transporting stolen currency across state lines in violation of 18 U.S.C. 2314, or illegally shipping firearms in interstate commerce in violation of 18 U.S.C. 922, the jury could conclude from Instruction No. 11 that this was sufficient to establish guilty knowledge and permit conviction.<sup>2</sup>

This is very similar to the problem described in *Roberts* and *Cronin*, where instructions on accomplice liability permitted conviction if the accomplice knew the principal planned to commit "a crime." *See*

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<sup>1</sup> As noted above, in this case, the state undertook the burden of proving the specific substance delivered under the law of the case.

<sup>2</sup> Whether or not the jury in fact "entertained any such idea" is irrelevant. Brief of Respondent, p. 8. The instruction is erroneous if it is not manifestly clear, regardless of how the jury actually interpreted it. *See, e.g., State v. Bland*, 128 Wn. App. 511, 116 P.3d 428 (2005)

Appellant's Opening Brief, Section II, *citing State v. Roberts*, 142 Wn.2d 471, 14 P.3d 713 (2000); *State v. Cronin*, 142 Wn.2d 568, 14 P.3d 752 (2000). Although this case does not deal with accomplice liability, the principle is the same.

The problem is not that the state introduced any evidence of such a mistaken belief; the problem is the lack of evidence that Ms. Ricker had actual knowledge that the package contained a controlled substance as opposed to some other contraband. The jury could reasonably apply Instruction No. 11 to substitute general knowledge of criminal activity ("a fact, circumstance, or result which is described by law as being a crime") for proof that Ms. Ricker specifically knew she was delivering a controlled substance.

If the jury decided that Ms. Ricker must have known she was committing a crime, Instruction No. 11 allowed conviction even if the jury didn't believe she knew the package contained a controlled substance. This is not an unreasonable position for the jury to take; there are plenty of statutes imposing strict liability, where conviction is permitted in the absence of *any* specific knowledge. *See, e.g.*, RCW 69.50.4013 (possession of a controlled substance). But the legislature has not imposed strict liability for delivery of a controlled substance; nor has it imposed liability based on general knowledge of wrongdoing. RCW 69.50.401.

Instruction No. 11 conflicted with the court's "to convict" instruction. The former allowed conviction upon proof that Ms. Ricker knew she was involved in "a crime," while the latter required proof that she knew she was delivering methamphetamine. Instructions Nos. 8, 11, CP 47, 50. This inconsistency is presumed to have misled the jury and prejudiced Ms. Ricker. *State v. Walden*, 131 Wn.2d 469, 478, 932 P.2d 1237 (1997).

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. The state suggests this error is harmless: "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." Brief of Respondent, p. 11.

There are two problems with Respondent's analysis. First, Respondent flips the burden of proof—the state was required to prove Ms. Ricker's knowledge; she was not required to prove that she was "unaware" of the contents. Second, conviction is inappropriate if based on Ms. Ricker's awareness that "the package she was shipping contained contraband," yet this is the result permitted by the instruction. *See* Brief of Respondent, p. 11.

The state did not present any direct evidence proving knowledge that the package contained a controlled substance. The only circumstantial evidence was that Ms. Ricker seemed poor and nervous, would not use an account but instead paid in cash, and repackaged her item. RP 44-47. The error was not harmless beyond a reasonable doubt. *Walden, supra*, at 478.

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

Ms. Ricker stands on the argument presented in the opening brief.

**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).**

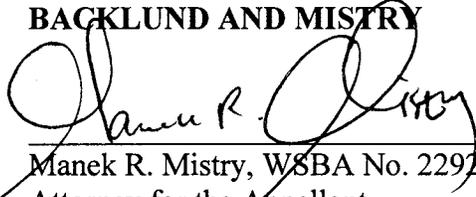
Ms. Ricker stands on the argument presented in the opening brief.

**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 October 17, 2008.

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CERTIFICATE OF MAILING

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

Tammy Ricker  
121 E Falconridge Ct.  
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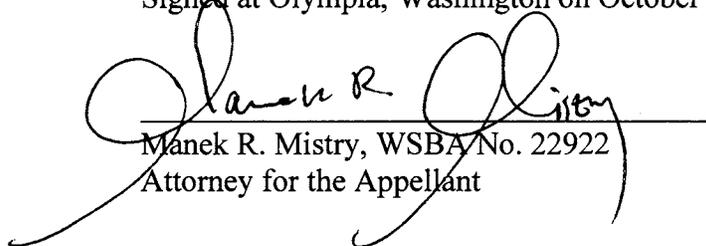
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And that I sent the original and one copy to the Court of Appeals, Division II, for filing;

All postage prepaid, on October 17, 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 October 17, 2008.

  
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