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DIVISION II

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No. 33373-2-II

STATE OF WASHINGTON

COURT OF APPEALS, DIVISION II  
OF THE STATE OF WASHINGTON

DEPUTY

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STATE OF WASHINGTON,

Respondent,

vs.

**Richard Sibert,**

Appellant.

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Lewis County Superior Court

Cause No. 04-1-00284-2

The Honorable Judge H. John Hall

**Appellant's Opening Brief**

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## ASSIGNMENTS OF ERROR

1. The trial court erred by giving Instruction No. 18, 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 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.

Acting knowingly or with knowledge also is established if a person acts intentionally.  
Supp. CP, Instruction 18.

2. The trial court erred by giving Instruction No. 11, which reads as follows:

To convict the Defendant, Richard Edward Sibert, of the crime of Delivery of a Controlled Substance as charged in Count I, each of the following elements of the crime must be proved beyond a reasonable doubt:

- (1) That on the 16<sup>th</sup> day of March, 2004, the Defendant delivered a controlled substance.
- (2) That the defendant knew that the substance delivered was a controlled substance; and
- (3) That the acts occurred in the State of Washington.

If you find from the evidence that each of these elements have 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 of 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.  
Supp. CP, Instruction 11.

3. The trial court erred by giving Instruction No. 12, which reads as follows:

To convict the Defendant, Richard Edward Sibert, of the crime of Delivery of a Controlled Substance as charged in Count II, each of the following elements of the crime must be proved beyond a reasonable doubt:

- (1) That on the 18<sup>th</sup> day of March, 2004, the Defendant delivered a controlled substance.
- (2) That the defendant knew that the substance delivered was a controlled substance; and
- (3) That the acts occurred in the State of Washington.

If you find from the evidence that each of these elements have 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 of 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.

Supp. CP, Instruction 12.

4. The trial court erred by giving Instruction No. 13, which reads as follows:

To convict the Defendant, Richard Edward Sibert, of the crime of Delivery of a Controlled Substance as charged in Count III, each of the following elements of the crime must be proved beyond a reasonable doubt:

- (1) That on the 30<sup>th</sup> day of March, 2004, the Defendant delivered a controlled substance.
- (2) That the defendant knew that the substance delivered was a controlled substance; and
- (3) That the acts occurred in the State of Washington.

If you find from the evidence that each of these elements have 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 of 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.

Supp. CP, Instruction 13.

5. The trial court erred by giving Instruction No. 20, which reads as follows:

To convict the Defendant, Richard Edward Sibert, of the crime of Possession of a Controlled Substance with Intent to Deliver as charged in Count IV, each of the following elements of the crime must be proved beyond a reasonable doubt:

- (1) That on the 1<sup>st</sup> day of April, 2004, the Defendant delivered a controlled substance.
- (2) That the defendant possessed the substance with the intent to deliver the controlled substance; and
- (3) That the acts occurred in the State of Washington.

If you find from the evidence that each of these elements have 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 of 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.

Supp. CP, Instruction 20.

6. Mr. Sibert was denied his constitutional right to a jury trial because the jury did not determine the identity of the substance delivered or possessed with intent to deliver.

7. Mr. Sibert was denied his constitutional right to a jury trial because the jury did not determine whether or not he had any criminal history.

8. Mr. Sibert was denied his constitutional right to a jury determination of all facts that increased the penalty for his offenses.

9. The trial court erred by sentencing Mr. Sibert to a prison term greater than that permitted by the jury's verdict.

10. The trial court erred by sentencing Mr. Sibert with an offender score of five.

11. The trial court erred by adopting Finding of Fact No. 2.2 of the Judgment and Sentence, which reads as follows:

2.2 CRIMINAL HISTORY (RCW 9.94A.525) Prior convictions constituting criminal history for purposes of calculating the offender score are:

CRIME	DATE OF SENTENCE	SENTENCING CRT (COUNTY & STATE)	DATE OF CRIME	ADULT OR JUVENILE	TYPE OF CRIME
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Possession of an Explosive Device (F)	07/07/2000	Lewis, WA	05/01/2000	A	NV
VUCSA – Possession of a Cont. Subst.: Meth (F)	12/10/1999	Lewis, WA	11/15/1999	A	NV

### ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

Richard Sibert was charged with three counts of Delivery of a Controlled Substance and one count of Possession of a Controlled Substance with Intent to Deliver. Each charge required proof of knowledge. The trial court's definition of knowledge differed from the statutory definition and was difficult to understand.

1. Was the trial court's definition of "knowledge" confusing and misleading? Assignment of Error No. 1.
  
2. Did the erroneous "knowledge" definition violate Mr. Sibert's constitutional right to due process by relieving the prosecution of its burden of proving an essential element of each offense? Assignment of Error No. 1.
  
3. Must Mr. Sibert's convictions be reversed because of the erroneous "knowledge" instruction? Assignment of Error No. 1.

Although the identity of a controlled substance is an essential element of both Delivery and Possession with Intent, each of the court's "to convict" instructions omitted the identity of the substance. Nor did the court's other instructions require the jury to determine the identity of the substance delivered or possessed. The jury did not make a finding as to the identity of the substance in each charge. Despite this, the court sentenced Mr. Sibert to a prison term greater than the lowest standard ranges for Delivery and for Possession with Intent to Deliver.

4. Did the “to convict” instructions omit an essential element of each crime? Assignments of Error Nos. 2, 3, 4, 5, 6.

5. Does the lack of a jury finding as to the identity of the substance delivered preclude a sentence above the lowest standard range for each crime? Assignments of Error Nos. 2, 3, 4, 5, 6, 8, 9, 10.

6. Was Mr. Sibert denied his constitutional right to a jury trial when the trial court imposed a prison term above the standard range authorized by the jury’s verdict? Assignments of Error Nos. 2, 3, 4, 5, 6, 8, 9, 10, 11.

The jury was not asked to determine Mr. Sibert’s criminal history. Despite this, the trial court adopted a finding that Mr. Sibert had two prior felony convictions, and included these convictions in calculating his offender score.

7. Was Mr. Sibert denied his constitutional right to a jury trial by the absence of a jury determination of his criminal history? Assignments of Error Nos. 7, 8, 9, 10, 11.

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

On March 16, 18, and 30, 2004, Rebecca Bridges, working with police, alleged that she purchased methamphetamine from Richard Sibert. RP 3-39, 41-73. The police searched Mr. Sibert's home on April 1, 2005, and found methamphetamine and other paraphernalia. RP 58-53, 106-127. Mr. Sibert was charged with three counts of Delivery of a Controlled Substance, two of which also carried a school zone enhancement, and one count of Possession of a Controlled Substance with intent to Deliver. CP 12-14.

At trial, the court gave the jury the following definition of "knowledge":

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

Acting knowingly or with knowledge also is established if a person acts intentionally.  
Supp. CP, Instruction 18.

None of the four "to convict" instructions included the name of the substance alleged to be delivered. Supp. CP, Instructions 11, 12, 13, 20.

No special verdict was submitted to the jury regarding the nature of the substance in each of the charges, nor were they asked to determine Mr. Sibert's criminal history. Supp. CP, Verdict Forms.

The jury found Mr. Sibert guilty of all of the charges, including the school zone enhancements. Supp. CP, Jury Verdicts.

At sentencing, the court calculated the standard range (without enhancements) as 20 to 60 months, using the standard ranges under Drug Offense Seriousness Level II. CP 5. The range was based on the court's finding that Mr. Sibert had criminal history of Possession of an Explosive Device and Possession of Methamphetamine. CP 5, RP (sentencing) 8-9. This timely appeal followed. CP 3.

## ARGUMENT

### **I. THE COURT'S "KNOWLEDGE" INSTRUCTION VIOLATED DUE PROCESS BECAUSE IT MISSTATED THE LAW AND MISLED THE JURY REGARDING AN ESSENTIAL ELEMENT OF EACH OFFENSE.**

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."

Here, ‘knowledge’ was defined by Instruction No. 18 (which was based on WPIC 10.02). 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. 18, Supp. CP. As can be seen, this language differed from the statutory language. Under Instruction No. 18, 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 the knowledge element of the charged offenses. The 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.

**II. THE COURT’S “TO CONVICT” INSTRUCTIONS OMITTED AN ESSENTIAL ELEMENT OF EACH CRIME.**

A “to convict” instruction must contain all the elements of the crime, because it serves as a “yardstick” by which the jury measures the evidence to determine guilt or innocence. *State v. Lorenz*, 152 Wn.2d 22 at 31, 93 P.3d 133 (2004). The jury has the right to regard the “to convict”

instruction as a complete statement of the law. Any conviction based on an incomplete “to convict” instruction must be reversed. *State v. Smith*, 131 Wn.2d 258 at 263, 930 P.2d 917 (1997). The adequacy of a “to convict” instruction is reviewed *de novo*. *State v. Deryke*, 149 Wn.2d 906 at 910, 73 P.3d 1000 (2003). The identity of a controlled substance is an element of the crime of delivery. *State v. Goodman*, 150 Wn.2d 774 at 785-786, 83 P.3d 410 (2004).

Here, the “to convict” instructions omitted the identity of the substances delivered (Counts I-III) and possessed (Count IV) by Mr. Sibert. Supp. CP, Instructions 11, 12, 13, 20. Because of this, the convictions must be reversed and the case remanded for a new trial.

*Smith, supra.*

**III. THE TRIAL COURT VIOLATED MR. SIBERT’S CONSTITUTIONAL RIGHT TO A JURY TRIAL IN VIOLATION OF *BLAKELY V. WASHINGTON* BY IMPOSING AN AGGRAVATED SENTENCE WITHOUT A JURY FINDING AS TO THE IDENTITY OF THE SUBSTANCE DELIVERED OR POSSESSED WITH INTENT TO DELIVER.**

The Sixth Amendment to the U.S. Constitution guarantees a criminal defendant the right to a trial by jury. U.S. Const. Amend. VI. Under *Blakely v. Washington*, 542 U.S. 296, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004), any fact which increases the penalty for a crime must be found by a jury by proof beyond a reasonable doubt. *Blakely* violations can

never be harmless error. *State v. Hughes*, 154 Wn.2d 118, 110 P.3d 192 (2005).

Where the standard range is based on the identity of the substance delivered, the prosecution must establish the identity of the substance by proof beyond a reasonable doubt, and the jury verdict must reflect a finding on the identity of the substance. *See, e.g., State v. Evans*, \_\_\_ Wn.App. \_\_\_, 118 P.3d 419 (2005).

Here, the jury did not make a finding as to the identity of the substance. Supp. CP, Instructions 11, 12, 13, 20 and Jury Verdicts. Because of this, the court was permitted to impose only the minimum sentence available for delivery (Counts I-III) and for possession with intent to deliver (Count IV), which is 6-18 months. *See* RCW 9.94A.517. The court's imposition of prison terms in excess of this range was error; the sentences must be vacated and the case remanded for sentencing within the 6-18 month standard range. *Blakely, supra; Hughes, supra.*

**IV. THE TRIAL COURT VIOLATED MR. SIBERT'S CONSTITUTIONAL RIGHT TO A JURY TRIAL IN VIOLATION OF *BLAKELY V. WASHINGTON* BY IMPOSING AN AGGRAVATED SENTENCE WITHOUT A JURY DETERMINATION OF HIS PRIOR CONVICTIONS.**

In *Blakely*, the Supreme Court left intact an exception for prior convictions; however, the continuing validity of that exception is in doubt. *See, e.g., State v. Mounts*, \_\_\_ Wn.App. \_\_\_, 122 P.3d 745 at 746, n. 10

(2005), quoting Justice Thomas' observation in *Shepard v. United States*, - -- U.S. ----, 125 S.Ct. 1254 at p. 1264, 161 L.Ed.2d 205 (2005) that *Almendarez-Torres v. United States*, 523 U.S. 224, 118 S.Ct. 1219, 140 L.Ed.2d 350 (1998), which underlies the exception for prior convictions, "has been eroded by this Court's subsequent Sixth Amendment jurisprudence, and a majority of the Court now recognizes that *Almendarez-Torres* was wrongly decided."

It now appears that five members of the U.S. Supreme Court (Justices Scalia, Stevens, Souter, and Ginsberg, all of whom dissented from *Almendarez-Torres*, and Justice Thomas, who authored a concurring opinion urging a broader rule in *Apprendi v. New Jersey*, 530 U.S. 466, 120 S.Ct. 2348 (2000)) believe that prior convictions which enhance the penalties for a crime must be proved to a jury beyond a reasonable doubt.<sup>1</sup>

Here, Mr. Sibert's prior convictions were not submitted to the jury. Supp. CP, Instructions 11, 12, 13, 20 and Jury Verdicts. Instead, the trial court, using a preponderance standard, found that Mr. Sibert had two prior

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<sup>1</sup> But see *State v. Rivers*, \_\_\_ Wn.App. \_\_\_, \_\_\_ P.3d \_\_\_, 2005 WL 3147870 (2005) ("Despite speculation about the continued validity of *Almendarez-Torres v. United States*, the United States Supreme Court has not reconsidered that case," footnote omitted.)

felony convictions.<sup>2</sup> CP 5. This violated Mr. Sibert's constitutional right to a jury trial under the Sixth Amendment, and the resulting sentence was improper. The aggravated sentence must be vacated, and the case remanded for sentencing with no criminal history.

### CONCLUSION

Mr. Sibert's convictions were based on a confusing and misleading "knowledge" instruction, which relieved the prosecution of its burden of proving each element beyond a reasonable doubt. Furthermore, the court's "to convict" instructions omitted an essential element of each charge. Both of these errors require reversal of the conviction and remand for a new trial.

Mr. Sibert's sentence was also erroneous. The trial court imposed a greater prison term than authorized by the jury's verdict, since the jury did not determine the identity of the substance involved in each charge. In addition, the jury did not determine Mr. Sibert's criminal history; yet his history was used to impose a higher sentence than authorized by the jury's

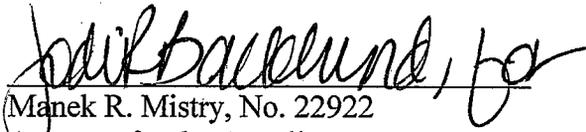
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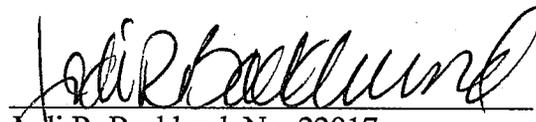
<sup>2</sup> Mr. Sibert's attorney agreed with the prosecutor's statement of criminal history. RP (sentencing) 8-9. However, there is no indication in the record that Mr. Sibert knowingly, intelligently, and voluntarily waived his constitutional right to a jury trial. RP (sentencing) 1-2. Such a waiver must be made in writing or done orally on the record. *State v. Treat*, 109 Wn.App. 419 at 427-428, 35 P.3d 1192 (2001).

verdict. For all these reasons, the sentence must be vacated and the case remanded for a new sentencing hearing.

Respectfully submitted on December 15, 2005.

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