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Supreme Court No. (to be set)  
Court of Appeals No. 33373-2-II  
**IN THE SUPREME COURT  
OF THE STATE OF WASHINGTON**

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STATE OF WASHINGTON,  
Respondent,  
vs.

**Richard Sibert**  
Appellant/Petitioner

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Lewis County Superior Court  
Cause No. 04-1-00284-7  
The Honorable Judge

**PETITION FOR REVIEW**

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**I. IDENTITY OF PETITIONER**

Petitioner Richard Sibert, the appellant below, asks this Court to review the decision of Division II of the Court of Appeals referred to in Section II below.

**II. COURT OF APPEALS DECISION**

Richard Sibert seeks review of the Court of Appeals' unpublished opinion entered on October 24, 2006. A copy of the opinion is attached.

**III. ISSUES PRESENTED FOR REVIEW**

**ISSUE 1:** Does the conclusive presumption contained in the standard "knowledge" instruction violate due process?

**ISSUE 2:** Must a "to convict" instruction for delivery of a controlled substance or possession with intent to deliver a controlled substance include the identity of the controlled substance?

**ISSUE 3:** Must the identity of a controlled substance be proved to a jury beyond a reasonable doubt before a trial court may impose a sentence based on the identity of the controlled substance?

**ISSUE 4:** Must prior convictions be proved to a jury beyond a reasonable doubt before they can be used to enhance a sentence?

#### **IV. STATEMENT OF THE CASE**

##### **A. Prior Proceedings**

Richard Sibert was charged with three counts of Delivery of a Controlled Substance (Methamphetamine), two of which carried school zone enhancements. He was also charged with one count of Possession of a Controlled Substance with Intent to Deliver. CP 12-14. Following a jury trial, he was convicted of all four counts and the enhancements. CP 4-11. He appealed, and the Court of Appeals affirmed his conviction and sentence in an unpublished opinion dated October 24, 2006. CP3; Appendix.

##### **B. Statement of Facts**

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.  
CP 47..

None of the four “to convict” instructions included the name of the substance alleged to be delivered. Instructions 11, 12, 13, 20. CP 40-42, 49. 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. CP 20-26.

The jury found Mr. Sibert guilty of all of the charges, including the school zone enhancements. CP 20-26.

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. Mr. Sibert was sentenced to 64 months in prison, and he appealed. CP 4-11, 3. The Court of Appeals affirmed his convictions and sentence in an unpublished opinion dated October 24, 2006. Appendix.

**V. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED**

- A. This Court should accept review of Issue 1 because the Court of Appeals' decision conflicts with a decision of the Supreme Court and with another decision of the Court of Appeals, it involves a significant question of law under the federal constitution, and it raises an issue of substantial public interest that should be determined by the Supreme Court. RAP 13.4(b)(1)-(4).

**Summary of Argument:** Conclusive presumptions violate due process because they undermine the presumption of innocence and invade the province of the jury. The standard WPIC instruction defining "knowledge" contains a conclusive presumption. The trial court's use of this conclusive presumption directed the jury to presume that Mr. Sibert acted with knowledge.

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).

Furthermore, 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).

'Knowledge' is an element of delivery of a controlled substance; to obtain a conviction, the prosecution must prove that the defendant knew that the substance delivered was a controlled substance. *State v. DeVries*, 149 Wn.2d 842 at 850, 72 P.3d 748 (2003). 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."

The court's knowledge instruction (based on WPIC 10.02) included the following (optional) provision:

Acting knowingly or with knowledge also is established if a person acts intentionally.  
CP 47.

Inappropriate use of this provision relieves the prosecution of its burden of establishing the knowledge element, and is reversible error. *State v. Goble*, 131 Wn.App. 194, 126 P.3d 821 (2005). In *Goble*, the accused was charged with assaulting a person whom he knew to be a law enforcement officer.<sup>1</sup> The trial court's "knowledge" instruction included the language quoted above.<sup>2</sup> The Court of Appeals reversed the conviction because this language could be read to mean that an intentional assault established Mr. Goble's knowledge, regardless of whether or not he actually knew the victim's status as a police officer. *Goble*, at 203.

Here, as in *Goble*, the inclusion of the final sentence was erroneous; it directed the jury to presume that Mr. Sibert knew he'd

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<sup>1</sup> Although not an element of the charged offense, knowledge was included in the "to convict" instruction and thus became an element under the law of the case in *Goble*. *Goble* at 201.

<sup>2</sup> Mr. Sibert's opening brief, which was filed before *Goble* was published, did not emphasize this aspect of the erroneous instruction. However, the assignments of error were sufficient to raise the issue in the Court of Appeals.

delivered a controlled substance if he did *any* intentional act.<sup>3</sup> Under the instruction, a U.S. Postal Service letter carrier would be presumed to know the contents of any packages s/he intentionally delivered, a result forbidden by *State v. Boyer*, 91 Wn.2d 342, 588 P.2d 1151 (1979):

[W]ithout the mental element of knowledge, even a postal carrier would be guilty of the crime were he innocently to deliver a package which in fact contained a forbidden narcotic. Such a result is not intended by the legislature... [G]uilty knowledge is intrinsic to the definition of the crime itself.  
*Boyer*, at 344.

The inclusion of the optional final sentence of the “knowledge” instruction in this case created a conclusive presumption and violated due process. *Goble, supra; Savage, supra*. It directed the jury to presume knowledge from any intentional act, and provided no guidance limiting the predicate acts giving rise to the conclusive presumption. Thus, the jury could find guilty knowledge from intentional delivery (as in the postal carrier example raised in *Boyer*), or from any other intentional act such as

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<sup>3</sup> The instruction was also confusing and misleading; the court told the jury that a person “acts knowingly” when he “is aware of a fact, circumstance or result described by law as being a crime...” This language differed from the statutory language of RCW 9A.08.010(1)(b); 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. 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). The *Goble* court criticized WPIC 10.02 on this basis as well. See *Goble* at 203 (“We agree that the instruction is confusing.”)

walking, talking, or sitting. Because of this, the conviction should have been reversed and the case remanded for a new trial. *Goble, supra*.

Instead of addressing the merits of Mr. Sibert's claim, the Court of Appeals decided that the improper instruction did not raise a manifest error affecting a constitutional right. Opinion, p. 3. This conclusion is incorrect. By instructing the jury to conclusively presume an element of the offense, the court denied Mr. Sibert due process, violated the presumption of innocence, and invaded the province of the jury. *State v. Savage, supra, at 573*. Accordingly, the Court of Appeals' opinion conflicts with this Court's decision in *Savage, supra*, and with *Goble, supra*. Furthermore, the conclusive presumption contained in the standard "knowledge" instruction presents a significant question of law under the federal and state constitutions, and raises an issue of substantial public interest that should be determined by the Supreme Court. For all these reasons, this Court should accept review under RAP 13.4(b)(1)-(4).

- B. This Court should accept review of Issue 2 because the Court of Appeals' decision conflicts with a decision of the Supreme Court, it involves a significant question of law under the federal constitution, and it raises an issue of substantial public interest that should be determined by the Supreme Court. RAP 13.4(b)(1), (3), and (4).

**Summary of Argument:** A "to convict" instruction must include all the elements of an offense. The identity of a controlled substance is an element of delivery of a controlled substance and of possession of a controlled substance with intent to deliver. The

“to convict” instructions in this case omitted the identity of the controlled substance.

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. Instructions 11, 12, 13, 20; CP 40-42, 47. Because of this, the convictions should have been reversed and the case remanded for a new trial. *Smith, supra*.

The court of appeals decided that identity of the controlled substance is not an element of the crime of delivery or possession with intent to deliver. Opinion, p. 4. The Supreme Court reached the opposite

conclusion in *Goodman, supra*. Accordingly, this Court should accept review under RAP 13.4(b)(1), (3), and (4).

- C. This Court should accept review of Issue 3 because the Court of Appeals' decision involves a significant question of law under the federal constitution and raises an issue of substantial public interest that should be determined by the Supreme Court. RAP 13.4(b)(3)-(4).

**Summary of Argument:** Any fact that increases the penalty for a crime must be proved to a jury beyond a reasonable doubt. The identity of a controlled substance determines the penalty for delivery or possession with intent to deliver. In this case, the jury did not make a finding as to the identity of the controlled substance, yet the sentencing court imposed sentence based on a finding that the substance was methamphetamine.

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.

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*, 129 Wn. App. 211, 118 P.3d 419 (2005), *review granted at* 157 Wn.2d 1001 (2005), *overruled in part on other grounds by State v. Cromwell*, 157 Wn.2d 529, 140 P.3d 593 (2006).

Here, the jury did not make a finding as to the identity of the substance. CP 40-42, 47, 20-26. 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 should have been vacated and the case remanded for sentencing within the 6-18 month standard range.

*Blakely, supra.*

The Court of Appeals held that *Blakely* did not apply. Opinion, p. 7. This is incorrect; since the identity of the substance determines the sentence, only the lowest sentence can be imposed without a finding by the jury. This Court should accept review under RAP 13.4(b)(3)-(4), because this case involves a significant question of law under the federal constitution and raises an issue of substantial public interest that should be determined by the Supreme Court.

D. This Court should accept review of Issue 4 because it involves a significant question of law under the federal constitution and raises an issue of substantial public interest that should be determined by the Supreme Court. RAP 13.4(b)(3)-(4).

**Summary of Argument:** Since a prior conviction increases the penalty for a crime, its existence must be proved to a jury beyond a reasonable doubt. In this case, the sentencing judge found by a preponderance of the evidence that Mr. Sibert had prior convictions, and used those priors to enhance his sentence.

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*, 130 Wn. App. 219 at 220 n. 9, 122 P.3d 745 (2005), quoting Justice Thomas' observation in *Shepard v. United States*, 544 U.S. 13, 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>4</sup> This makes sense, since the existence of a prior conviction is a historical fact of the kind juries are designed to determine. There is no logical reason to distinguish between prior convictions and other historical facts.

Here, Mr. Sibert's prior convictions were not submitted to the jury. CP 40-42, 47, 20-26. Instead, the trial court, using a preponderance standard, found that Mr. Sibert had two prior felony convictions.<sup>5</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 should have been vacated, and the case remanded for sentencing with no criminal history.

The Court of Appeals, relying on *dicta* in *Blakely*, refused to vacate the sentence. Opinion, p. 7-10. This Court should accept review to determine whether prior convictions are facts that should be proved to a jury beyond a reasonable doubt before a sentence may be enhanced. This

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<sup>4</sup> But see *State v. Rivers*, 130 Wn. App. 689 at 692, 128 P.3d 608 (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*.)

<sup>5</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).

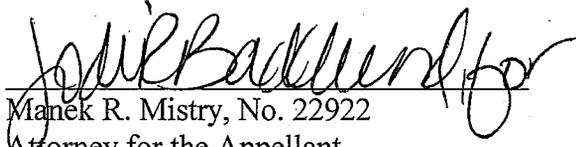
case involves a significant question of law under the federal constitution, and raises an issue of substantial public interest that should be determined by the Supreme Court. RAP 13.4(b)(3)-(4)

**VI. CONCLUSION**

The Court of Appeals opinion conflicts with decisions of this Court, and with other decisions of the Courts of Appeals. Furthermore, this case presents significant questions of law under the federal constitution. Finally, the issues raised here will impact a large number of criminal cases and are therefore of substantial public interest. This Court should accept review pursuant to RAP 13.4(b)(1)-(4).

Respectfully submitted November 16, 2006.

**BACKLUND AND MISTRY**

  
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CERTIFICATE OF MAILING

I certify that I mailed a copy of the Petition for Review, postage pre-paid, to:

Richard Sibert, DOC #800328  
Airway Heights Correctional Center  
PO Box 2139  
Airway Heights, WA 99001-2139

and to

Lewis County Prosecuting Attorney  
360 NW North Street  
Chehalis, WA 98532-1925

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

All postage prepaid, on November 16, 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 November 16, 2006.

  
\_\_\_\_\_  
Jodi R. Backlund, WSBA No. 22917  
Attorney for the Appellant

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**APPENDIX:**

**Decision of Court of Appeals**

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**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON**  
**DIVISION II**

STATE OF WASHINGTON,

Respondent,

v.

RICHARD EDWARD SIBERT,

Appellant.

No. 33373-2-II

UNPUBLISHED OPINION

BRIDGEWATER, P.J. — Richard Edward Sibert appeals his convictions of: (1) three counts of unlawful delivery of methamphetamine; and (2) one count of unlawful possession of methamphetamine, with intent to deliver. We affirm.

After working with a confidential informant, law enforcement officers searched Sibert's house in Centralia, Washington, and found evidence of methamphetamine and other drug paraphernalia. The State then charged Sibert with: (1) three counts of unlawful delivery of a controlled substance, to wit: methamphetamine, in violation of former RCW 69.50.401(a) (2002); and (2) one count of unlawful possession of a controlled substance, to wit: methamphetamine, with intent to deliver, in violation of former RCW 69.50.401(a). For two of

the counts, the State accused Sibert of being within 1000 feet of the perimeter of a school bus route stop when he violated former RCW 69.50.401(a).

A jury found Sibert guilty on all charges, including enhancements. Thereafter, the trial court sentenced Sibert to a standard range sentence of 64 months, based on his offender score, the seriousness level of the crimes, and the school bus route stop enhancements.

#### I. "KNOWLEDGE" INSTRUCTION

Sibert argues that the trial court erred in giving jury instruction 18 because it inaccurately defined "knowledge." Br. of Appellant at 2-3. This instruction, taken verbatim from 11 WASHINGTON PRACTICE: WASHINGTON PATTERN JURY INSTRUCTIONS: CRIMINAL 10.02, at 150 (2d ed. 1994), stated:

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.

Acting knowingly or with knowledge also is established if a person acts intentionally.

Clerk's Papers (CP) at 47 (emphasis added). This instruction is based on RCW 9A.08.010(1)(b),

which states:

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 a statute defining an offense*.

(Emphasis added.)

We hold that Sibert's argument is meritless:

(1) He failed to raise this issue at trial and he has not shown how the instruction actually affected his rights. RAP 2.5(a)(3); *see State v. McFarland*, 127 Wn.2d 322, 333, 899 P.2d 1251 (1995) (citing *State v. Scott*, 110 Wn.2d 682, 688, 757 P.2d 492 (1988); *State v. Lynn*, 67 Wn. App. 339, 346, 835 P.2d 251 (1992)). Thus, the alleged error is not a "manifest error affecting a constitutional right." RAP 2.5(a)(3); *State v. Riley*, 121 Wn.2d 22, 31, 846 P.2d 1365 (1993).<sup>1</sup>

(2) The "knowledge" instruction does not redefine the element of knowledge.<sup>2</sup> *Contra State v. Shipp*, 93 Wn.2d 510, 515-16, 610 P.2d 1322 (1980). And the trial court's failure to include the exact wording of RCW 9A.08.010(1)(b) is not an error of constitutional import.<sup>3</sup>

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<sup>1</sup> As Division One of this court explained:

Limiting the constitutional claims that may be raised for the first time on appeal places responsibility on trial counsel to properly prepare their cases and will reduce claims that are discovered solely for purposes of appeal. An expansive reading of manifest sends a message to trial counsel not to worry about overlooking constitutional claims, since such claims can always be asserted on appeal.

*Lynn*, 67 Wn. App. at 343.

<sup>2</sup> In its current form, the "knowledge" instruction has repeatedly withstood constitutional challenges. *State v. Vanoli*, 86 Wn. App. 643, 937 P.2d 1166, *review denied*, 133 Wn.2d 1022 (1997).

<sup>3</sup> Our Supreme Court noted:

Examples of "manifest" constitutional errors in jury instructions are: directing a verdict; shifting the burden of proof to the defendant; failing to define the "beyond a reasonable doubt" standard; failing to require a unanimous verdict; and omitting an element of the crime charged. Instructional errors that do not fall within the scope of RAP 2.5(a)(3) include failure to instruct on a lesser included offense; and failure to define individual terms.

(3) Instructions 11, 12, and 13 clearly explained that, in order to convict, the jury had to find beyond a reasonable doubt that Sibert “delivered a controlled substance” and that Sibert “knew that the substance delivered was a controlled substance.” CP at 40-42. Instruction 18’s lack of a verbatim recitation of the statutory definition of knowledge did not relieve the State of its burden to prove these elements. Because the error alleged by Sibert is not “truly of constitutional magnitude,” we decline to consider it. *Scott*, 110 Wn.2d at 688.

## II. “TO CONVICT” INSTRUCTIONS

Sibert claims that the “to convict” instructions omitted an essential element of the crime, namely, that he knew the controlled substance was specifically methamphetamine. Br. of Appellant at 3-4. We disagree.

Although Sibert assigns error, cites authority, and makes an argument, it appears that he is raising this issue for the first time on appeal. He has not cited to any relevant parts of either the report of proceedings or the clerk’s papers. Nevertheless, because the error appears to be “truly of constitutional magnitude,” we review the alleged error. *See Scott*, 110 Wn.2d at 688; *Lynn*, 67 Wn. App. at 345-46.

We review a challenged jury instruction de novo. *State v. Pirtle*, 127 Wn.2d 628, 656, 904 P.2d 245 (1995), *cert. denied*, 518 U.S. 1026 (1996). The “to convict” instructions must contain all the elements of the crime because it serves as the “yardstick” by which the jury measures the evidence to determine guilt or innocence. *State v. Lorenz*, 152 Wn.2d 22, 31, 93 P.3d 133 (2004). Moreover, we may not rely on other instructions to supply the missing element from the “to convict” instruction. *State v. Smith*, 131 Wn.2d 258, 262-63, 930 P.2d 917 (1997).

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*Scott*, 110 Wn.2d at 688 n.5 (citations omitted).

While Sibert claims that the identity of the controlled substance is an essential element of the "to convict" instructions, Washington courts have not agreed. First, we have found that the elements of the crime of unlawful delivery of a controlled substance are simply: (1) delivery; and (2) "guilty knowledge." *State v. Nunez-Martinez*, 90 Wn. App. 250, 253, 951 P.2d 823 (1998) (citing former RCW 69.50.401(a); *State v. Boyer*, 91 Wn.2d 342, 344, 588 P.2d 1151 (1979)). In our view, "the guilty knowledge . . . is knowledge that the substance being delivered is a controlled substance. It is not knowledge of the substance's exact chemical or street name." *Nunez-Martinez*, 90 Wn. App. at 254. Thus, the State is required to allege and prove that Sibert knew he was delivering a controlled substance. *See Nunez-Martinez*, 90 Wn. App. at 255. It is not required to allege or prove that he knew he was delivering methamphetamine. *See Nunez-Martinez*, 90 Wn. App. at 256.

Here, instructions 11, 12, and 13 required the State to prove that Sibert "delivered a controlled substance" and that Sibert "knew that the substance delivered was a controlled substance." CP at 40-42. These instructions are consistent with the elements of the crime charged. Former RCW 69.50.401(a); *Boyer*, 90 Wn.2d at 344; *Nunez-Martinez*, 90 Wn. App. at 253.

Second, our Supreme Court has found that the elements of the crime of unlawful possession of a controlled substance with intent to deliver are simply: (1) possession; (2) with intent to deliver; (3) a controlled substance. *State v. Sims*, 119 Wn.2d 138, 141-42, 829 P.2d 1075 (1992) (citing former RCW 69.50.401(a)). The statutory elements of this crime already

include the requisite mental state, i.e., the *intent* to deliver a controlled substance.<sup>4</sup> *Sims*, 119 Wn.2d at 142. “Therefore, there is no need for an additional mental element of guilty knowledge.” *Sims*, 119 Wn.2d at 142.

Here, instruction 20 required the State to prove that Sibert “possessed a controlled substance” and that Sibert “inten[d] to deliver the controlled substance.” CP at 49. This instruction is consistent with the elements of the crime charged. Former RCW 69.50.401(a); *Sims*, 119 Wn.2d at 142.

Therefore, the trial court did not err in giving the “to convict” instructions to the jury.<sup>5</sup>

### III. ALLEGED *BLAKELY* ERROR WHERE JURY DID NOT IDENTIFY CONTROLLED SUBSTANCE

Sibert next claims that the trial court erroneously sentenced him under former RCW 69.50.401(a)(1)(ii)<sup>6</sup> because the verdict did not specifically identify the controlled substance.

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<sup>4</sup> “It is impossible for a person to intend to manufacture or deliver a controlled substance without knowing what he or she is doing. By intending to manufacture or deliver a controlled substance, one necessarily knows what controlled substance one possesses as one who acts intentionally acts knowingly.” *Sims*, 119 Wn.2d at 142.

<sup>5</sup> The better course for the trial court would have been to include the term “methamphetamine” in the “to convict” instructions or in a special interrogatory. But because methamphetamine was the only controlled substance referred to in the information, the testimony, and the instructions, there was no error.

<sup>6</sup> Former RCW 69.50.401 provided in relevant part:

(a) Except as authorized by this chapter, it is unlawful for any person to manufacture, deliver, or possess with intent to manufacture or deliver, a controlled substance.

(1) Any person who violates this subsection with respect to:

.....  
(ii) amphetamine or methamphetamine, is guilty of a crime and upon conviction may be imprisoned for not more than ten years . . . .

Because the trial court imposed a sentence without a jury finding as to the identity of the controlled substance, he claims that the trial court violated his right to a jury trial under *Blakely v. Washington*, 542 U.S. 296, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004). Br. of Appellant at 4-5. But *Blakely* simply is not implicated here.

In *Apprendi v. New Jersey*, 530 U.S. 466, 490, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000), the Supreme Court held that “[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum<sup>[7]</sup> must be submitted to a jury, and proved beyond a reasonable doubt.” Relying on this statement, our Supreme Court announced, “It is clear under *Apprendi* the identity of the controlled substance is an element of the offense where it aggravates the maximum sentence with which the court may sentence a defendant.” *State v. Goodman*, 150 Wn.2d 774, 785-86, 83 P.3d 410 (2004).

But *Goodman* is inapposite to Sibert’s argument. In *Goodman*, the defendant did not know from the face of the information what maximum sentence he faced. Here, Sibert knew from the face of the information what maximum sentence he faced. The State charged Sibert with: (1) three counts of delivery of a controlled substance, to wit: methamphetamine, in violation of former RCW 69.50.401(a); and (2) one count of possession of a controlled substance, to wit: methamphetamine, with intent to deliver, in violation of former RCW 69.50.401(a). Furthermore, the State specifically noted that the maximum penalty for each

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(iii) any other controlled substance classified in Schedule I, II, or III, is guilty of a crime and upon conviction may be imprisoned for not more than five years.

<sup>7</sup> The statutory maximum is “the maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant.*” *Blakely*, 542 U.S. at 303.

violation was “10 years in prison and a \$25,000 fine.”<sup>8</sup> CP at 12-14. This penalty conforms exactly to that listed in former RCW 69.50.401(a)(ii), the penalty for any person who violates the subsection with respect to methamphetamine.

And Sibert knew from the evidence what maximum sentence he faced. Through the testimony of Katherine Dunn, a forensic scientist with the Washington State Patrol crime laboratory, the State sought to prove the specific identity of the substances as only methamphetamine.<sup>9</sup> It did not introduce any evidence of any other controlled substance. And the only definition of a controlled substance submitted to the jury was instruction 15, which stated, “Methamphetamine is a controlled substance.” CP at 44. Therefore, we can discern that the jury premised the convictions solely on the evidence of the methamphetamine.

Thus, the principles of *Blakely* are inapplicable because: (1) the trial court instructed the jury on only one controlled substance; and (2) after our Supreme Court’s ruling in *State v. Cromwell*, 157 Wn.2d 529, \_\_\_ P.3d \_\_\_ (2006), whether the controlled substance was methamphetamine base or methamphetamine hydrochloride is no longer an issue. In other words, the jury was not required to identify the particular substance underlying the convictions. *Contra Goodman*, 150 Wn.2d at 785-86; *State v. Evans*, 129 Wn. App. 211, 229, 118 P.3d 419, review granted, 157 Wn.2d 1001 (2006). And consequently, the identity of the substances in this

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<sup>8</sup> For two of the violations, the maximum penalty was actually 20 years in prison and a \$50,000 fine, after including the school bus route stop enhancements.

<sup>9</sup> Kenneth Johnson, defense counsel for co-defendant Teri Lane, argued that the State actually introduced evidence of methamphetamine *hydrochloride*. But after our Supreme Court’s ruling in *State v. Cromwell*, 157 Wn.2d 529, 535, \_\_\_ P.3d \_\_\_ (2006), the word “methamphetamine” in former RCW 69.50.401(a)(1)(ii) is broad enough to include all forms of the substance.

case did not become an element of the offenses. *Contra Goodman*, 150 Wn.2d at 785-86. The trial court did not err.<sup>10</sup>

IV. ALLEGED *BLAKELY* ERROR WHERE TRIAL COURT  
FOUND THE FACTS OF PRIOR CONVICTIONS

Sibert argues that the trial court erroneously sentenced him when it did not submit the fact of his prior convictions to the jury. We disagree.

First, as the State correctly notes, the fact of prior convictions does not have to be submitted to a jury. The Supreme Court has consistently stated, “*Other than the fact of a prior conviction*, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.” *Apprendi*, 530 U.S. at 490 (emphasis added). And although Sibert speculates about the continuing vitality of this doctrine, neither federal nor state case law requires that we retreat from the authority holding that a right to a trial by jury does not exist for the fact of prior convictions.

Second, as the State correctly notes, Sibert and his counsel agreed with the State’s statement of criminal history. At the sentencing hearing, Sibert’s counsel admitted, “My client has two priors, one’s a controlled substance from 1999, and the other possession of explosive device.” RP (May 25, 2005) at 8. *Blakely* and *Apprendi* are not implicated when there is an admission. *Blakely*, 542 U.S. at 310.

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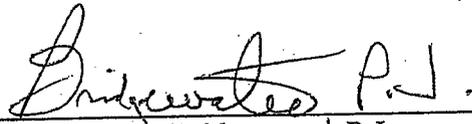
<sup>10</sup> Even assuming, without deciding, that the trial court violated Sibert’s *Blakely* rights, we would hold that the error was harmless beyond a reasonable doubt. See *Washington v. Recuenco*, \_\_\_ U.S. \_\_\_, 126 S. Ct. 2546, 165 L. Ed. 2d 466 (2006).

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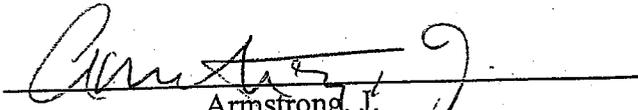
Thus, the trial court did not err.

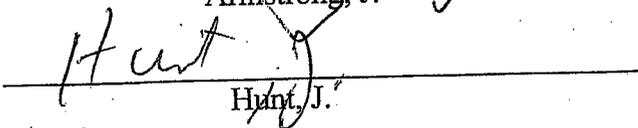
Affirmed.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record pursuant to RCW 2.06.040, it is so ordered.

  
\_\_\_\_\_  
Bridgewater, P.J.

We concur:

  
\_\_\_\_\_  
Armstrong, J.

  
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Hunt, J.