

Supreme Court No. 79509-6

Court of Appeals No. 33373-2-II

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent.

vs.

RICHARD SIBERT
Appellant/Petitioner

CLERK

Lewis County Superior Court Cause No. 04-1-00284-7
Honorable Judge H. John Hall

BY RONALD R. CARPENTER

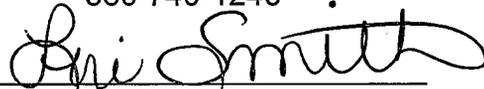
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SUPREME COURT
STATE OF WASHINGTON

RESPONDENT'S SUPPLEMENTAL BRIEF

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TABLE OF CONTENTS

ISSUES.....1

 1. Whether the "knowledge" instruction given in this case, which mirrors WPIC 10.02, was proper.....1

 2. Whether, in a controlled substance prosecution, where the identity of the only controlled substance at issue and the maximum sentence therefore was stated in the Information, the "to convict" instruction also must list the identity of the controlled substance in order to increase the maximum sentence from five to ten years.....1

 3. Whether the failure to list the identity of the controlled substance in the "to convict" instruction is harmless error, where the identity of the only controlled substance was stated in the charging document along with the maximum sentence therefore, and where another instruction identified the controlled substance at issue.....1

 4. Whether the fact of prior convictions must be found by a jury before the court may sentence a defendant based upon those prior convictions.....1

STATEMENT OF FACTS.....2

ARGUMENT.....2

A. THE JURY INSTRUCTION DEFINING KNOWLEDGE WAS PROPER.....2

B. THE "TO CONVICT" INSTRUCTION CONTAINED ALL ESSENTIAL ELEMENTS OF THE CRIME OF DELIVERY OF AND POSSESSION OF A CONTROLLED SUBSTANCE. ALTERNATIVELY, ANY ERROR IN THE INSTRUCTION WAS HARMLESS.....5

C. THE JURY WAS NOT REQUIRED TO MAKE A FINDING AS TO THE IDENTITY OF THE CONTROLLED SUBSTANCE UNDER THE FACTS OF THIS CASE.12

D. THE EXISTENCE OF A PRIOR CONVICTION USED FOR SENTENCING PURPOSES DOES NOT NEED TO BE PROVEN TO A JURY BEYOND A REASONABLE DOUBT SO THERE IS NO *BLAKELY* VIOLATION.....14

E. CONCLUSION.....15

TABLE OF AUTHORITIES

Federal Cases

Apprendi v. New Jersey, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000).....14,15

Blakely v. Washington, 542 U.S. 296, 124 S. Ct. 2531, 159 L.Ed. 2d 403 (2004).....12,13,14,15

Neder v. United States, 527 U.S. 1, 119 S.Ct. 1827, 144 L.Ed.2d 35 (19989).....11

State Cases

Donner v. Donner, 46 Wn.2d 130, 278 P.2d 780 (1955).....6

State v. Barrington, 52 Wn.App. 478, 761 P.2d 632 (1988), *review denied*, 111 Wn.2d 1033 (1989).....4

State v. Boyer, 91 Wn.2d 342, 588 P.2d 1151 (1979).....7

State v. Brown, 147 Wn.2d 330, 58 P.3d 889 (2002).....6,11

State v. Cromwell, 157 Wn.2d 529, 140 P.3d 593 (2006).....13

State v. Davis, 39 Wn.App. 916, 696 P.2d 627 (1985).4

State v. Evans, 129 Wn. App. 211, 118 P.3d 419 (2005), *reversed*,State v. Evans, 159 Wn.2d 402, 150 P.3d 105 (2007)....13

State v. Gerdts, 136 Wn.App. 720, 150 P.3d 627 (2007).....3,4

State v. Gogolin, 45 Wn.App. 640, 727 P.2d 683 (1986).....4

State v. Goodman, 150 Wn.2d 774, 83 P.3d 410 (2004).....6,9

State v. Johnson, 119 Wn.2d 167, 829 P.2d 1082 (1992).....4

State v. Kees, 48 Wn.App. 76, 737 P.2d 1038 (1987).....4

<u>State v. Leech</u> , 114 Wn.2d 700, 790 P.2d 160 (1990).....	4
<u>State v. Mills</u> , 154 Wn.2d 1, 109 P.3d 415 (2005).....	5
<u>State v. Nunez-Martinez</u> , 90 Wn.App.250, 951 P.2d 823 (1998).....	7
<u>State v. Rivas</u> , 49 Wn.App. 677, 746 P.2d 312 (1987).....	4
<u>State v. Savage</u> , 94 Wn.2d 569, 618 P.2d 82 (1980).....	3
<u>State v. Scott</u> , 110 Wn.2d 682, 757 P.2d 492 (1988).....	6
<u>State v. Sims</u> , 119 Wn.2d 138, 829 P.2d 1075 (1992).....	7,8
<u>State v. Smith</u> , 131 Wn.2d 258, 930 P.2d 917 (1997).....	6
<u>State v. Vanoli</u> , 86 Wn.App. 643, 937 P.2d 1166, <i>review denied</i> , 133 Wn.2d 1022 (1997).	4
<u>State v. Wren</u> , 115 Wn.App. 922, 65 P.3d , <i>review denied</i> , 150 Wn.2d 1006, 77 P.3d 651 (2003).....	11

Other References

WPIC 10.02.....	4
11 WPIC: Criminal 50.06.....	6

I. ISSUES

1. Whether the "knowledge" instruction given in this case, which mirrors WPIC 10.02, was proper.
2. Whether, in a controlled substance prosecution, where the identity of the only controlled substance at issue and the maximum sentence therefore was stated in the Information, the "to convict" instruction also must list the identity of the controlled substance in order to increase the maximum sentence from five to ten years.
3. Whether the failure to list the identity of the controlled substance in the "to convict" instruction is harmless error, where the identity of the only controlled substance was stated in the charging document along with the maximum sentence therefore, and where another instruction identified the controlled substance at issue.
4. Whether the fact of prior convictions must be found by a jury before the court may sentence a defendant based upon those prior convictions.

II. STATEMENT OF FACTS

With the exception of the following, Sibert's statement of the facts is adequate for purposes of this supplemental briefing. The State adds the following facts:

Sibert was charged by Information with three counts of Delivery of a Controlled Substance, "to wit: methamphetamine" and one count of Possession of a Controlled Substance, "to wit: methamphetamine." CP 12-14. In other words, the charging document in this case identifies the controlled substance in each count as "methamphetamine." Id. Additionally, the maximum penalty for all of the charges is also stated in the charging document. Id.

III. ARGUMENT

A. THE JURY INSTRUCTION DEFINING KNOWLEDGE WAS PROPER.

Sibert argues that the "knowledge" instruction given in this case violates due process because it allegedly contains a "conclusive presumption." Petition for Review 8. This is not correct.

Sibert did not object to the knowledge instruction below. Nor is there anything in the record to indicate that the jury here was "confused" by the "knowledge" instruction. Furthermore, as noted

by the Court of Appeals below, this instruction did not involve a manifest error affecting a constitutional right. Opinion p. 3. Indeed, Sibert still has not explained how this instruction is a "manifest error" which had practical consequences on the outcome of this case --rather than something that is merely abstract or theoretical. (Is there any reason to think that the jury convicted the defendant because he intentionally did some innocent act?) In his petition for review Sibert merely calls the Court of Appeals conclusion incorrect and then states in conclusory fashion that the "knowledge" instruction was a manifest error because it instructed "the jury to conclusively presume an element of the offense, [thereby denying] Mr. Sibert due process, violated the presumption of innocence, and invaded the province of the jury." Petition for Review, 8 (citing State v. Savage, 94 Wn.2d 569, 573, 618 P.2d 82 (1980)).

Notably, after Sibert's Petition for review was filed but before Sibert filed a supplemental brief in this case, the Court of Appeals addressed these same arguments regarding the "knowledge" instruction, and found these arguments to be without merit. See, e.g., State v. Gerdtz, 136 Wn.App. 720, 150 P.3d 627 (2007) (finding the mandatory presumption argument to have "no merit," distinguishing Goble, and characterizing appellant's same

"nonsensical" argument about the knowledge instruction as "convoluted" and finding that the instruction properly informed the jury of the law).

As noted by the Gerdts Court, the "knowledge" instruction given in the instant case--worded exactly like WPIC 10.02-- is an accurate statement of the law. Gerdts, 136 Wn.App. at 729, 730. Indeed, the constitutionality of this instruction has been upheld repeatedly. Gerdts, supra; State v. Vanoli, 86 Wn.App. 643, 937 P.2d 1166, *review denied*, 133 Wn.2d 1022 (1997); State v. Johnson, 119 Wn.2d 167, 174-75, 829 P.2d 1082 (1992); State v. Leech, 114 Wn.2d 700, 790 P.2d 160 (1990); State v. Barrington, 52 Wn.App. 478, 761 P.2d 632 (1988), *review denied*, 111 Wn.2d 1033 (1989); State v. Rivas, 49 Wn.App. 677, 689-90, 746 P.2d 312 (1987); State v. Kees, 48 Wn.App. 76, 82, 737 P.2d 1038 (1987); State v. Gogolin, 45 Wn.App. 640, 647, 727 P.2d 683 (1986); State v. Davis, 39 Wn.App. 916, 696 P.2d 627 (1985). In sum, the same arguments made by the appellant pertaining to the identical "knowledge" instruction patterned after WPIC 10.02, were found to be without merit in State v. Gerdts, 136 Wn.App. 720, 150 P.3d. 627 (2007). This Court should likewise find that WPIC 10.02, as submitted in this case, is an accurate statement of the law, and

should find that Goble, relied upon by Sibert, does not apply to the facts here. There was no error in the "knowledge" instruction submitted to the jury in this case, and this Court should so find.

B. THE "TO CONVICT" INSTRUCTION CONTAINED ALL ESSENTIAL ELEMENTS OF THE CRIME OF DELIVERY OF AND POSSESSION OF A CONTROLLED SUBSTANCE. ALTERNATIVELY, ANY ERROR IN THE INSTRUCTION WAS HARMLESS.

Sibert argues that the "to convict" instruction omitted an essential element of the crime when it did not expressly state the identity of the controlled substance. Petition for Review 17. This argument is misplaced because in this case methamphetamine was the *only* controlled substance charged, proven and instructed upon. However, even if it was error to fail to include the identity of the controlled substance in the "to convict" instruction, in this case any error was harmless.

Claims of erroneous jury instructions are reviewed *de novo*. State v. Mills, 154 Wn.2d 1, 7, 109 P.3d 415 (2005). The question is whether they are supported by the evidence, allow the parties to argue their theories of the case, are not misleading to the jury, and properly set forth the applicable law. Id. The absence of an essential element of a crime in a jury instruction violates due process by relieving the State of its burden to prove every element.

State v. Scott, 110 Wn.2d 682, 690, 757 P.2d 492 (1988). An instruction purporting to contain all the elements must in fact contain them all. Donner v. Donner, 46 Wn.2d 130, 134, 278 P.2d 780 (1955). A to-convict instruction "must contain all of 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. Smith, 131 Wn.2d 258, 263, 930 P.2d 917 (1997). Jurors are not required to supply a missing element by referring to other jury instructions. Smith, 131 Wn.2d at 263-64.

The identity of a controlled substance is an essential element if it increases the maximum sentence. State v. Goodman, 150 Wn.2d 774, 785-86, 83 P.3d 410 (2004). But an omission or misstatement in a jury instruction is reversible only if it relieves the State of the burden to prove every element beyond a reasonable doubt. State v. Brown, 147 Wn.2d 330, 339, 58 P.3d 889 (2002). Washington Pattern Jury Instructions (WPIC) allow the court the option to use the generic term "controlled substance" or to name the specific substance. 11 WPIC: Criminal 50.06, at 644 (2nd ed. 1994). One Court has held that the State is not required to prove that the defendant knew the identity of the controlled substance,

only that it was a controlled substance. State v. Nunez-Martinez, 90 Wn.App. 250, 255-56, 951 P.2d 823 (1998).

Here, the charging document identified the only controlled substance involved in this case: methamphetamine; the charging document here also gave notice of the maximum penalty for each crime. CP 12-14. And here, the court's "to convict" instructions required that the State prove Sibert delivered a "controlled substance" (Counts I-III) and possessed a "controlled substance" (Count IV) and a separate instruction stated that "methamphetamine is a controlled substance." Instruction 15. 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); State v. Boyer, 91 Wn.2d 342, 344, 588 P.2d 1151 (1979). Nunez-Martinez, 90 Wn.App. at 253. Moreover, our Supreme Court has held that the elements of the crime of unlawful possession of a controlled substance with intent to deliver are: (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 69.50.501(a)). As pointed

out by the Sims Court, the statutory elements of this crime already include the required mental state--the *intent* to deliver a controlled substance: "[i]t 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. Here, instruction 20 is consistent with the elements of the crime charged. Former RCW 69.50.401(a). Instruction 20 required the State to prove that Sibert "possessed a controlled substance" and that Sibert "inten[ded] to deliver the controlled substance." CP at 49. Accordingly, the trial court did not err in submitting the "to convict" instructions to the jury.

Although the better practice may be to include the identity of the controlled substance in the to-convict instruction, failure to do so here was not error because the only controlled substance charged, tested, discussed and instructed upon in this case was methamphetamine. CP 40-42, 44. One way of looking at the instructions is that here the jury did find that the defendant delivered methamphetamine because the jury found that Sibert delivered a "controlled substance," and the instructions further

defined "controlled substance" in the context of this case as "methamphetamine." And again, methamphetamine was the *only* controlled substance at issue in this case. Furthermore, by finding that Sibert delivered a controlled substance "*as charged*" (thus referring back to the charging document) and the charging document *did* identify the specific controlled substance, it can be said that the jury *did* find that Sibert delivered and possessed methamphetamine. CP 23-26; CP 12-14. The bottom line here is that there could be no confusion in this case as to what substance the defendant was charged with delivering or possessing, since only *one* substance was referred to in the pleadings and at trial, and that was methamphetamine.

The ruling in State v. Goodman, relied upon by Appellant, can be distinguished from this case and should not be applicable here. The Goodman case involved the language in the charging document. In Goodman the defendant did not know from the face of the information what maximum sentence he faced. Here, however, Sibert knew from the face of the information what maximum sentence he faced. Sibert was charged 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). CP 12-14. Additionally, the State expressly noted on the face of the charging document that the maximum penalty for each violation was "ten years in prison and a \$25,000 fine" and, for two of the violations the maximum penalty was "20 years in prison and a \$50,000 fine" after including the school bus route stop enhancements. CP at 12-14. And here Sibert knew from the evidence presented what maximum sentence he faced. The State sought to prove the specific identity of the controlled substance as only methamphetamine through the testimony of Katherine Dunn, a forensic scientist with the Washington State Patrol crime laboratory. The State did not introduce 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. All of this shows that the jury convicted Sibert "as charged" and solely on the evidence of the methamphetamine.

Alternatively, any error in the "to convict" instruction should be deemed harmless beyond a reasonable doubt under these facts. Omitting an essential element from the jury instructions is not

necessarily reversible error. State v. Brown, 147 Wn.2d 330, 340, 58 P.2d 889 (2002). The inquiry is whether the omission necessarily undermined the fundamental fairness of the trial or confidence in the verdict. Id. (quoting Neder v. United States, 527 U.S. 1, 9, 119 S.Ct. 1827, 144 L.Ed.2d 35 (1998)). A deficient instruction is harmless if a thorough review of the record shows beyond a reasonable doubt that the jury could not have been confused and the verdict is reliable. Brown, 147 Wn.2d at 341, 58 P.3d 889. Additionally, a deficient instruction may be cured in closing argument. State v. Wren, 115 Wn.App. 922, 926, 65 P.3d , review denied, 150 Wn.2d 1006, 77 P.3d 651 (2003) 335 (erroneous accomplice liability instruction).

In the present case, with only one controlled substance at issue, there is no way the jury could have been confused, Additionally, the prosecutor said in closing:

You also have evidence before you that both of the individuals involved here, Mr. Sibert and Ms. Lane, knew what it was they were dealing with. That this substance right here is not detergent, that its not salt, that it's not sugar. That this exhibit, Exhibit No. 15 contained methamphetamine.

RP 261. The prosecutor went on, "[b]oth Mr. Sibert and Ms. Lane were in possession of these baggies. They were in possession of the methamphetamine and it wasn't just for their use." RP 269.

The prosecutor also argued, "this case is . . . about whether delivery has occurred and whether it was actually possessed with intent to deliver. The items here contain methamphetamine." RP 271.

Thus, here the jury could not have been confused about the identity of the one controlled substance that was charged, discussed and proved. This case was about methamphetamine and only methamphetamine. The prosecutor referred to methamphetamine three times in his closing argument. In this case it is obvious that the jury convicted Sibert solely on the evidence of the methamphetamine. Accordingly, if there was error in the "to convict" instruction, it should be deemed harmless.

C. THE JURY WAS NOT REQUIRED TO MAKE A FINDING AS TO THE IDENTITY OF THE CONTROLLED SUBSTANCE UNDER THE FACTS OF THIS CASE.

The Defendant also claims that the issue of the identity of the controlled substance should have been submitted to the jury under the Blakely ruling. Blakely v. Washington, 542 U.S. 296, 124 S. Ct. 2531, 159 L.Ed. 2d 403 (2004). This argument should be rejected because Blakely does not apply to the facts of this case.

The Defendant cites to State v. Evans regarding the issue of having the jury make a finding as to the identify of the controlled

substance. However, Evans is distinguishable from the present case because in Evans, the Blakeley analysis centered around the jury making a finding between two types of controlled substance--methamphetamine *base* and methamphetamine *hydrochloride*. State v. Evans, 129 Wn. App. 211, 229, 118 P.3d 419 (2005), *reversed*, State v. Evans, 159 Wn.2d 402, 150 P.3d 105 (2007); *overruled as to methamphetamine base versus methamphetamine hydrochloride distinction* by State v. Cromwell, 157 Wn.2d 529, 140 P.3d 593 (2006). In other words, in Evans, the jury could have chosen between two different "forms" of methamphetamine. Id. There is no such distinction to be made in the instant case because the only substance alleged to have been possessed was methamphetamine, as properly alleged in the charging document. CP 15.

Thus, the rule set out in Blakeley simply does not apply to this case. The trial court instructed the jury on only one controlled substance: methamphetamine--the same one set out in the charging document--and the jury was not required to identify the *particular* substance in the "to convict" instruction. There could be no confusion in this case as to which controlled substance was involved, since only one controlled substance was charged:

methamphetamine. CP 12-15. Because there could be no confusion by the jury as to what substance Sibert delivered or possessed, as methamphetamine is the only controlled substance charged or discussed at trial and in the instructions, there is no "Blakely" issue here, and this argument should be rejected.

D. THE EXISTENCE OF A PRIOR CONVICTION USED FOR SENTENCING PURPOSES DOES NOT NEED TO BE PROVEN TO A JURY BEYOND A REASONABLE DOUBT SO THERE IS NO *BLAKELY* VIOLATION.

Sibert also claims that the fact of his prior convictions needed to be proved to the jury beyond a reasonable doubt. This is not correct.

The fact of prior convictions does not have to be submitted to a jury. As 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 v. New Jersey, 530 U.S. 466, 490, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000)(emphasis added). Neither federal nor state case law has changed this holding that a right to a trial by jury does not exist for the fact of prior convictions. Moreover, in this case Sibert and his counsel agreed with the State's statement of criminal

history. RP (May 25, 2005) at 8. When there is an admission,
Blakely and Apprendi are not implicated. Blakely v. Washington,
542 U.S. 296, 310, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004).

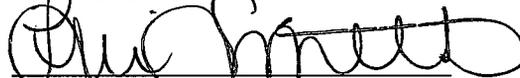
IV. CONCLUSION

The opinion of the Court of Appeals should be affirmed.

RESPECTFULLY SUBMITTED on September 15, 2008.

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LEWIS COUNTY PROSECUTOR

by:



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Deputy Prosecuting Attorney
Attorney for Respondent

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,) NO. 79509-6
Respondent,)
vs.)
RICHARD SIBERT,)
Appellan/Petitioner)
_____) DECLARATION OF
MAILING

LORI SMITH, Deputy Prosecutor for Lewis County,
Washington, declares under penalty of perjury of the laws of the
State of Washington that the following is true and correct: On
September 15, 2008, I mailed a copy of the Respondent's
Supplemental Brief by depositing said document in the United
States Mail, postage pre-paid, to the attorney for the Appellant at
the name and address indicated below:

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DATED this 15 day of September, 2008, at Chehalis,
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