No. 79509-6

SANDERS, J. (dissenting)—The jury instructions given in this case relieved the State of its burden to prove every element beyond a reasonable doubt. If the State is relieved of that burden, the defendant's right to a jury trial is violated. *Sullivan v. Louisiana*, 508 U.S. 275, 278, 113 S. Ct. 2078, 124 L. Ed. 2d 182 (1993); *Neder v. United States*, 527 U.S. 1, 12, 119 S. Ct. 1827, 144 L. Ed. 2d 35 (1999). This court has long held that such violation produces a constitutional error requiring automatic reversal. *See State v. Smith*, 131 Wn.2d 258, 265, 930 P.2d 917 (1997). The majority's decision here continues the court's recent and unwarranted departure from our established precedent protecting the right to a jury trial as inviolate, which our state constitution requires. Const. art. I, § 21. I dissent.

A. Omission of an essential element from the "to convict" instructions relieved the State of its burden to prove each element of the crime beyond a reasonable doubt and requires automatic reversal

The majority correctly highlights our holding in *State v. Brown*: "'An instruction that relieves the State of its burden to prove every element of a crime requires automatic reversal.'" Majority at 5 (quoting *State v. Brown*, 147 Wn.2d 330, 339, 58 P.3d 889 (2002)). Automatic reversal is also required when

any essential element is omitted. "If the instructions allowed the jury to convict … without finding *an* essential element of the crime charged, the State has been relieved of its burden of proving all elements of the crime(s) charged beyond a reasonable doubt, and thus the error affected his constitutional right to a fair trial." *State v. Stein*, 144 Wn.2d 236, 241, 27 P.3d 184 (2001) (emphasis added). This protection is imperative in "to convict" instructions, which "serve[ ] as a 'yardstick' by which the jury measures the evidence to determine guilt or innocence." *Smith*, 131 Wn.2d at 263 (quoting *State v. Emmanuel*, 42 Wn.2d 799, 819, 259 P.2d 845 (1953)). However "not every omission or misstatement in a jury instruction relieves the State of its burden." *Brown*, 147 Wn.2d at 339. Therefore the court must "determine whether the error has not relieved the State of its burden to prove each element of the case." *Id.* at 344.

The omission at issue in *Brown* was an accomplice liability instruction. *Id.* at 337. The jury was instructed an accomplice must have knowledge his or her acts will facilitate the commission of "a crime" rather than "the crime." *Id.* at 338. Thus, the jury could have found the defendants guilty as accomplices if the defendants knew their actions would facilitate the commission of any crime, not only the crime charged. *Id.* Where the crimes charged were based on accomplice liability, the jury could have found the defendants guilty of *any* crime and the State was therefore relieved of its burden. *Id.* at 341-43.

Here, unlike *Brown*, the instructions coincided precisely with the charged crimes. The State charged Richard Sibert with three counts of delivery of a controlled substance and one count of possession of a controlled substance with intent to deliver. Clerk's Papers (CP) at 15-17. The "to convict" instructions listed the elements for those same crimes. CP at 40-42, 49. But the instructions omitted an essential element: the identity of the substance.

Underlying the requirement that every essential element must be included in the instructions is the constitutional right to a jury trial. Our state constitution proclaims "[t]he right of trial by jury shall remain inviolate." Const. art. I, § 21.[1] Contained within the right to a jury trial is the right of the defendant to a jury verdict "beyond a reasonable doubt." *Sullivan*, 508 U.S. at 278. This court has long held omission of an essential element from the jury instructions is error because "'[i]t is equivalent to directing the jury that it is not necessary for the state to prove any elements of the offense except those included in the definition given by the court.'" *Emmanuel*, 42 Wn.2d at 821 (quoting *Croft v. State*, 117 Fla. 832, 158 So. 454, 455 (1935)). We have affirmed this underlying principle in numerous decisions over the years. *See*,

[1] This court has found our state constitution provides greater protection for jury trials than its federal counterpart. *State v. Smith*, 150 Wn.2d 135, 156, 75 P.3d 934 (2003); *see also State v. Hicks*, 163 Wn.2d 477, 492, 181 P.3d 831, *cert. denied*, 129 S. Ct. 278 (2008). Moreover, our precedent requiring automatic reversal where the State is relieved of its burden of proof is consistent with our greater constitutional protection. *See Brown*, 147 Wn.2d at 339.

e.g., *State v. Johnson*, 100 Wn.2d 607, 623, 674 P.2d 145 (1983) ("[J]ury instructions must define every element of the offense charged.") (citing *Emmanuel*, 42 Wn.2d at 821), *overruled on other grounds by State v. Bergeron*, 105 Wn.2d 1, 4, 711 P.2d 1000 (1985); *State v. Allen*, 101 Wn.2d 355, 358, 678 P.2d 798 (1984) ("It is clear that the trial court must instruct the jury on every element of the crime.") (citing *Emmanuel*, 42 Wn.2d at 819). The appropriate remedy for an error that relieves the State of its burden to prove each element of a crime beyond a reasonable doubt is automatic reversal. *Smith*, 131 Wn.2d at 265.

Manifest constitutional error results when a trial court's "to convict" instruction relieves the State of its burden to prove each and every element of a crime. *See Stein*, 144 Wn.2d at 240-41 ("Failure to instruct on an element of the offense is thus error of constitutional magnitude."). Of course a "violation of a defendant's constitutional rights is presumed to be prejudicial." *State v. Stephens*, 93 Wn.2d 186, 190-91, 607 P.2d 304 (1980).

Washington courts have inconsistently and confusingly applied our rule requiring automatic reversal for failure to prove each and every element in "to convict" instructions. Most consistently, though, we have required automatic reversal when the trial court omits even a single essential element of the crime. *See, e.g., Smith*, 131 Wn.2d at 263, 265 ("It cannot be said that a defendant has

had a fair trial if the jury must guess at the meaning of an essential element of a crime or if the jury might assume that an essential element need not be proved," and "failure to instruct on an element of an offense is automatic reversible error."); *State v. Byrd*, 125 Wn.2d 707, 713-14, 887 P.2d 396 (1995) ("The State must prove every essential element of a crime beyond a reasonable doubt for a conviction to be upheld. It is reversible error to instruct the jury in a manner that would relieve the State of this burden." (citations omitted)); *State v. Summers*, 107 Wn. App. 373, 381, 28 P.3d 780 (2001) ("Under the current case law in Washington, when a trial court fails to include an essential element in a 'to convict' instruction, it is a manifest constitutional error that requires automatic reversal."), *modified on recons. on other grounds*, 43 P.3d 526 (2002).

We confused this straightforward and commonsense approach to jury instructions in *State v. Brown*, 147 Wn.2d 330, 58 P.3d 889 (2002). In *Brown* we stated an "instruction that relieves the State of its burden to prove every element of a crime requires automatic reversal." *Id*. at 339. This is literally true; however, this should not be read to mean failure to instruct on a single essential element is not also cause for automatic reversal. The term "every" in *Brown* was clearly intended to mean "an" element. In fact the *Brown* majority cited *Smith* and *Byrd* for that very proposition. Unfortunately later opinions

ignored this solid foundation and, instead, misconstrued the term "every" to require automatic reversal only when the State fails to prove *all* essential elements in "to convict" instructions.[2] *See, e.g., State v. DeRyke*, 149 Wn.2d 906, 912, 73 P.3d 1000 (2003).

Our constitution and precedent favor the pre-*Brown* paradigm. Automatic reversal is required when the State fails to prove beyond a reasonable doubt *any* element of the crime charged. This approach follows logically. If a jury must find all essential elements of a crime in order to convict, omitting even a single essential element opens the door to constitutional error. How can it be harmless for the State to omit an element that *must* be proved to find guilt?

Omitting even a single essential element from "to convict" instructions is immune from harmless error analysis. The United States Supreme Court has determined a jury instruction that relieves the State of its burden to prove an element of the crime is subject to harmless error and does not require automatic reversal. *Neder*, 527 U.S. at 9. We incorrectly embraced *Neder*'s harmless

[2] The majority and the dissent by Alexander, J., incorrectly adhere to this latter view. The majority claims "only the total omission of essential elements" can relieve the State's burden of proof. Majority at 5. Justice Alexander's dissent states, "Sibert, thus, would be entitled to an automatic reversal of his conviction only if the trial court failed to instruct the jurors on all the elements . . . ." Dissent at 3 (Alexander, J.). As explained above, this approach does not make sense because omission of a single essential element has the same effect as omitting all essential elements.

error approach in *Brown*, 147 Wn.2d at 340. It does not apply. Our state constitution provides greater protection than its federal analog. *State v. Smith*, 150 Wn.2d 135, 156, 75 P.3d 934 (2003); *State v. Hicks*, 163 Wn.2d 477, 492, 181 P.3d 831, *cert. denied*, 129 S. Ct. 273 (2008). The mandate requiring automatic reversal in *Smith* and its progeny controls. *See, e.g., State v. Pope*, 100 Wn. App. 624, 630, 999 P.2d 51 (2000) ("A harmless error analysis is never applicable to the omission of an essential element of the crime in the 'to convict' instruction. Reversal is required."). *Brown*'s embrace of federal harmless error analysis for violations of federal law has no place in our well-established requirement of automatic reversal.[3] Omission of the identity of the controlled substance in Sibert's "to convict" instructions requires automatic reversal.

Automatic reversal is consistent with our state constitution's command that the right to a jury trial remain inviolate. *See* Const. art I, § 21. As the dissent by Alexander, J., at 7, points out, we have previously relied on *Webster's Dictionary* when interpreting "inviolate": "'free from change or

[3] Even if harmless error applied here, it would not save the State's argument because it allows courts to subject constitutional guaranties to a guessing game—one that impermissibly relieves the State of its burden to prove each element of the crime beyond a reasonable doubt. Harmless error does not apply to omissions of essential elements in "to convict" instructions because a court cannot properly conclude beyond a reasonable doubt that manifest constitutional errors in no way affected the outcome of the case. *See, e.g., Stephens,* 93 Wn.2d at 191; *State v. Aumick,* 126 Wn.2d 422, 430-31, 894 P.2d 1325 (1995). Infirm "to convict" instructions result in an inherently unreliable prosecution.

blemish **:** PURE, UNBROKEN . . . free from assault or trespass **:** UNTOUCHES, INTACE.'" *Smith*, 150 Wn.2d at 150 (alteration in original) (quoting Webster's Third New International Dictionary 1190 (1993)). Anything less cannot be said to leave our jury trial right "free from blemish," "unbroken," and "intact."

Additionally, the majority wrongly asserts "to convict" instructions can properly "incorporat[e] by reference" an essential element of the crime.[4] Majority at 8. Given the importance of "to convict" instructions, it should be clear our constitution does not permit the "implied[ ]" incorporation by reference of an essential element, as the majority asserts. Majority at 6. This notion of implied incorporation by reference assumes too much, particularly with the stakes so high. The court's holding today flies in the face of our established precedent, justice, and common sense. The majority gives the State a free pass to omit essential elements from instructions and, in the process, dilutes the State's burden to prove all elements of the crime beyond a reasonable doubt. For these reasons I would reverse, as our jurisprudence demands.

B. The knowledge instruction relieved the State of its burden to prove every element of the crime beyond a reasonable doubt and requires reversal

[4] Tellingly the majority cites no authority supporting this invented theory.

The majority also errs in its analysis of the knowledge instruction. In *State v. Goble* the Court of Appeals held instructions relieve the State of its burden of proof where separate intent and knowledge elements required under the "to convict" instructions were conflated into a single element. 131 Wn. App. 194, 203, 126 P.3d 821 (2005). The crux of the knowledge instruction issue is thus whether the jury could have conflated two mens rea elements. If the answer is yes, then the instructions relieved the State of its burden of proof and automatic reversal is required.

The "to convict" instructions for delivery of a controlled substance required the jury to find three elements:

> To convict the Defendant, Richard Edward Sibert, . . . each of the following elements of the crime must be proved beyond a reasonable doubt:
>
> (1) That on [a certain date] 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.

CP at 40-42. The knowledge instruction read: "Acting knowingly or with knowledge also is established if a person acts intentionally." CP at 47. The same knowledge instruction was held to relieve the State of its burden of proof in *Goble*. *Goble*, 131 Wn. App. at 203. In *Goble* the "to convict" instructions required the jury to find beyond a reasonable doubt:

> "(1) That . . . the defendant assaulted [the] Deputy . . .;

> "(2) That at the time of the assault [the] Deputy . . . was a law enforcement officer who was performing his official duties; and
>
> "(3) That the defendant knew at the time of the assault that [the] Deputy . . . was a law enforcement officer or other employee of a law enforcement agency who was performing his or her official duties; and
>
> "(4) That the acts occurred in Lewis County, Washington."

Id. at 200 (emphasis omitted).

The only discernible difference between the instructions in this case and the instructions in *Goble* is the element that the law enforcement officer was acting in his official capacity at the time of the assault. Otherwise, they are practically indistinguishable for the purposes of a faulty knowledge instruction. Both require an act: assault in *Goble*, delivery here. Both require knowledge of a tangential fact not directly related to the action itself: knowledge of the identity of the officer in *Goble*, knowledge of the identity of a substance here. Just as in *Goble*, the knowledge instruction in this case allowed a jury to conflate the intentionality of an act (delivery) with knowledge of a tangential fact (that the substance delivered was a controlled substance). *See id.* at 202.

The majority claims this case is more like *State v. Gerdts*, 136 Wn. App. 720, 150 P.3d 627 (2007), than *Goble*. Majority at 13 n.7. In *Gerdts* the same argument concerning the same knowledge instruction was raised in a malicious mischief conviction. *Gerdts*, 136 Wn. App. at 725-26. The "to convict"

instructions in *Gerdts*, however, required the jury to find (1) that the defendant caused physical damage to the property of another in an amount exceeding $250 and (2) that the defendant acted knowingly and maliciously.[5] *Id.* at 725. Thus in *Gerdts* the knowledge element was not separate from the act itself. The jury could not have conflated anything because there was no knowledge about a fact separate from an intentional act to conflate. If the jury had been instructed to convict only if it found a third element of knowledge about a fact (if, for example, the jury was required to find the defendant knew the property belonged to another) then *Goble* would have applied. But there was no such element in *Gerdts*. *Id.* There is such an element here: the jury was required to find Sibert knew the substance delivered was a controlled substance. CP at 40-42. This case is governed by *Goble*, not *Gerdts*.

The majority distinguishes *Goble* because there were two mens rea elements in the *Goble* instructions, but only one mens rea element in delivery of a controlled substance. The majority is technically correct. The delivery element does not in itself *require* the State to show any intent. *See State v. Boyer*, 91 Wn.2d 342, 343, 588 P.2d 1151 (1979). But juries are not well versed in the subtleties of criminal mental states. An instruction that tells a jury "[a]cting

[5] These elements, like those cited above, appear to be taken word for word from the *Washington Pattern Jury Instructions*. *See* 11A Washington Practice: Washington Practice Jury Instructions: Criminal 85.06, at 222 (3d ed. 2008).

knowingly or with knowledge also is established if a person acts intentionally" is inherently confusing. *See Goble*, 131 Wn. App. at 203. In a case like *Gerdts* such instruction is without consequence because there was only a single act; even if the jury had found the act of damaging property was intentional, there was no separate knowledge element concerning a separate fact about which the jury could presume anything. *See Gerdts*, 136 Wn. App. at 728. But here, where there *is* an act—delivery—and also a fact of which the defendant must be found to have had knowledge, then the intentional nature of the act, whether proved by the State or not, allows the jury to presume knowledge of the fact based *only* on the intentional act. *See Goble*, 131 Wn. App. at 203. The State was thus relieved of its burden to prove each and every element beyond a reasonable doubt, and automatic reversal is required. *See Brown*, 147 Wn.2d at 339; *Smith* 131 Wn.2d at 265; *Stein*, 144 Wn.2d at 240-41.

C. The "to convict" instructions violated *Blakely*

Finally the majority's dismissal of the *Blakely* violation is improper for the same reasons iterated above: error that relieves the State of its burden to prove every element beyond a reasonable doubt cannot be harmless.

In *Blakely v. Washington* the United States Supreme Court held any fact that can increase the sentence imposed must be proved by the State beyond a reasonable doubt. 542 U.S. 296, 301, 124 S. Ct. 2531, 159 L. Ed. 2d 403

(2004). The majority concedes that the identity of the controlled substance in this case, methamphetamine, is a fact that increases the maximum sentence. Majority at 5. Relying on its incorporation-by-reference theory, the majority dismisses the *Blakely* violation. Majority at 8-9. But the jury in this case never rendered a verdict on methamphetamine; that fact was not found by the jury. CP at 23-26, 40-42, 49. The State was, again, relieved of its burden of proof, and reversal is therefore required.

For the above reasons, I dissent.

AUTHOR:
Justice Richard B. Sanders

WE CONCUR: