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STATE OF WASHINGTON

No. 33751-7-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

BY

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STATE OF WASHINGTON,

Respondent,

vs.

Garen Mark Gerds,

Appellant.

Lewis County Superior Court

Cause No. 05-1-00387-6

The Honorable Judge Richard L. Brosey

Appellant's Reply Brief

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ARGUMENT

I. THE MANDATORY PRESUMPTION IN INSTRUCTION NO. 6 REQUIRES REVERSAL.

Respondent argues that *State v. Goble*, 131 Wn.App. 194, 126 P.3d 821 (2005) should be narrowly interpreted, and should not be applied to this case. Brief of Respondent, p. 4-6. According to Respondent, *Goble*'s assessment of the standard "knowledge" instruction should only be applied under the "unusual" facts of that case. Brief of Respondent, p. 6.

Respondent's argument is incorrect for two reasons. First, the Supreme Court has disallowed the use of mandatory presumptions, regardless of how reasonable they might seem. *State v. Deal*, 128 Wn.2d 693, 911 P.2d 996 (1996). Second, the Instruction No. 6 provides no guidance as to what intentional act gives rise to the mandatory presumption. As the Supreme Court has noted:

The standard for clarity in a jury instruction is higher than for a statute; while we have been able to resolve [ambiguous wording] via statutory construction, a jury lacks such interpretive tools and thus requires a manifestly clear instruction.
State v. Lefaber, 128 Wn.2d 896 at 902, 913 P.2d 369 (1996).

The instruction here was not manifestly clear. The jury could have concluded that by proving Mr. Gerdt's intentionally walked past the van, the state met its burden of proving that Mr. Gerdt acted knowingly with

respect to the charge. Respondent's speculation about the jury's state of mind is inappropriate.

The conviction must be reversed and the case remanded for a new trial. *State v. Goble, supra.*

II. DEFENSE COUNSEL WAS INEFFECTIVE FOR FAILING TO OBJECT TO THE COURT'S "KNOWLEDGE" INSTRUCTION.

Mr. Gerdts stands on his opening brief.

III. THE PROSECUTOR COMMITTED MISCONDUCT REQUIRING REVERSAL.

Respondent downplays the prosecutor's misconduct, conceding that it was "perhaps ill-advised," but contends that it was not prejudicial in the context of the entire record. Brief of Respondent, pp. 11-12.

First, Mr. Gerdts did object to the questions (although the objection came late), thus he need not meet the higher showing of prejudice required when no objection is made. RP (8/4/05) 52.

Second, the misconduct was extremely prejudicial in this case, because Mr. Gerdts' testimony directly contradicted that of Officer Gonzalez. RP (8/4/05) 52. Furthermore, the allegation that Mr. Gerdts brought up the van first amounted to an admission of guilt, and was tantamount to a confession. Asking Mr. Gerdts to comment on the officer's credibility was misconduct that was both flagrant and ill-

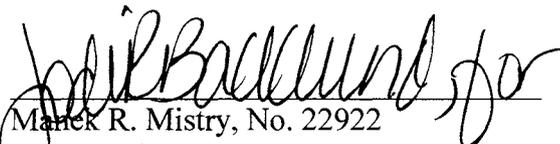
intentioned, and the conviction must be reversed. *State v. Boehning*, 127 Wn.App. 511, 525, 111 P.3d 899 (2005); *State v. Suarez-Bravo*, 72 Wn.App. 359 at 366, 864 P.2d 426 (1994), quoting *State v. Casteneda-Perez*, 61 Wn. App. 354 at 362, 810 P.2d 74, review denied, 118 Wn.2d 1007 (1991).

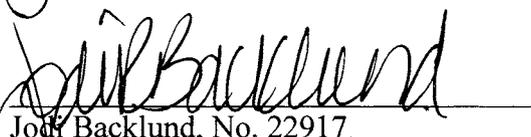
CONCLUSION

For the foregoing reasons, the conviction must be reversed and the case remanded to the superior court for a new trial.

Respectfully submitted on August 30, 2006.

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CERTIFICATE OF MAILING

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

Garen Gerdtz
1731 SW Kelly Ave
Chehalis, WA 98532

And to the office of the Lewis County Prosecutor,

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

All postage prepaid, on August 30, 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 August 30, 2006.



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