

No. 45011-9-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

Stanley Gebarowski,

Appellant.

Clark County Superior Court Cause No. 11-1-00988-2

The Honorable Judge David E. Gregerson

Appellant's Opening Brief

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ISSUES AND ASSIGNMENTS OF ERROR

1. The trial court erred by allowing Officer Goudschaal to opine that Williams had suffered a knife wound.
2. The trial court erred by permitting Officer Goudschaal to provide lay opinion testimony without proper foundation.
3. The trial court erred by permitting Officer Goudschaal to provide expert testimony without proper foundation.

ISSUE 1: Lay opinion testimony is inadmissible unless helpful to the jury, a rationally based on the witness's perception, and not based on scientific, technical, or other specialized knowledge. Here, the trial court improperly permitted Officer Goudschaal to provide a lay opinion (based on his training and experience) that a knife caused Williams' injury. Did the erroneous admission of lay opinion testimony prejudice Mr. Gebarowski by establishing Williams suffered a knife wound rather than a cut caused by a block of wood or the edge of a piece of furniture?

ISSUE 2: ER 701 requires exclusion of expert testimony unless a qualified expert provides a helpful opinion based on a theory generally accepted in the scientific community. Here, the trial court permitted Officer Goudschaal to testify to his opinion that Williams suffered a knife wound rather than a wound from block of wood or the edge of a piece of furniture. Did the state fail to establish a. Goudschaal's qualifications to provide the opinion testimony, b. the general acceptance of a theory upon which the testimony was based, or c. the helpfulness of the testimony?

4. The trial court improperly commented on the evidence in violation of Wash. Const. art. IV, § 16.
5. The trial judge inappropriately communicated his view that the knife in this case was a deadly weapon for purposes the second-degree assault (as charged in count one).
6. The trial court erred by giving Instruction No. 12.

ISSUE 3: A trial judge may not comment on the evidence. Here, the trial court's instructions communicated a belief that the knife in this case qualified as a deadly weapon. Did the trial judge improperly comment on the evidence in violation of Wash. Const. art. IV, § 16?

STATEMENT OF FACTS AND PRIOR PROCEEDINGS

Stanley Gebarowski lived with his brother Anthony Williams in Vancouver. RP 152, 257. They were working together to soundproof their garage. RP 155, 258-260. Mr. Gebarowski hoped to complete the project before a surgery he had scheduled for June 15, 2011. RP 261.

Around 9:30 in the evening of June 14, Mr. Gebarowski asked his brother to get more screws so they could finish. RP 155, 243, 261. Williams refused and they argued. They also scuffled. RP 101, 163-168, 241-242, 264-269.

Mr. Gebarowski had come up the stairs to talk to his brother with his tools still in his hands – a knife for scoring the Styrofoam sheeting, and a block of wood to break it with. RP 100, 158-159, 183, 259. At some point in the scuffle, the knife fell to the ground. RP 123-124, 166, 185. Williams' boyfriend Hao Dang was in the room as they fought, and he became involved in the scuffle. RP 94, 112, 168, 267.

The three witnesses gave different accounts of how it started and what happened. RP 99-115, 155-169, 241-244, 262-270. By the end, Dang had fallen down the stairs, Mr. Gebarowski had fallen down the stairs partway, and Williams called the police. RP 115, 169, 269, 270.

The state charged Mr. Gebarowski with two counts of assault two, and two counts of assault three, one of each regarding Williams and Dang. The assault charges included a deadly weapon enhancement: “to-wit: a metal steak knife.” The state also charged one count of misdemeanor harassment, regarding Williams. CP 1-3.

Williams testified that he did not know he had been hit on his head until the officer pointed it out to him after the incident. RP 170, 187, 230. When asked what caused the injury, he told the jury that it was from the block of wood. RP 171.

At trial, the defense moved to prevent responding officer Goudschaal from giving any opinion about the source of the wound on Williams’ head. RP 34, 198, 213. The court allowed the opinion as a lay opinion, not an expert opinion. RP 202. Goudschall told the jury that, based on his training and experience, the wound on Williams’ head was caused by a knife. RP 229.

The state offered the testimony of the doctor who treated Dang, but not the doctor who saw to Williams’ wound. RP 80-91, 80-247.

The court defined the term “deadly weapon” for the assault charges:

Deadly weapon means any weapon, device, instrument, substance or article which under the circumstances in which it is used,

attempted to be used, or threatened to be used, is readily capable of causing death or substantial bodily harm.
CP 89.

In the elements instructions on the assault two charges, the court instructed the jury that the first element was that “the defendant assaulted [Williams or Dang] with a deadly weapon to wit: a knife.” CP 90-91.

The jury convicted Mr. Gebarowski of Assault in the Second Degree and Assault in the Third Degree, and endorsed the enhancement in both offenses. CP 6. Gebarowski was convicted of one count of misdemeanor harassment. CP 136-144.

After sentencing, Mr. Gebarowski timely appealed. CP 19.

ARGUMENT

I. THE TRIAL COURT SHOULD NOT HAVE ALLOWED OFFICER GOUDSCHAAL TO OPINE THAT WILLIAMS SUFFERED A KNIFE WOUND.

A. Standard of Review

An appellate court reviews evidentiary rulings for abuse of discretion. *State v. Gresham*, 173 Wn.2d 405, 419, 269 P.3d 207 (2012).

A trial court abuses its discretion when its order is manifestly unreasonable or based on untenable grounds. *State v. Depaz*, 165 Wn.2d 842, 858, 204 P.3d 217 (2009). An erroneous ruling requires reversal if

there is a reasonable probability that it materially affected the outcome.

State v. Asaeli, 150 Wn. App. 543, 579, 208 P.3d 1136 (2009).

B. Goudschaal's opinion testimony should have been excluded.

1. Goudschaal's testimony did not qualify as a "lay opinion," and should have been excluded under ER 701.

ER 701 places limits on the admission of lay opinion evidence:

If the witness is not testifying as an expert, the witness' testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness, (b) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue, and (c) not based on scientific, technical, or other specialized knowledge within the scope of rule 702.

The improper admission of opinion testimony from a law enforcement officer "may be especially prejudicial." *State v. King*, 167 Wn.2d 324, 331, 219 P.3d 642 (2009). Such testimony "'often carries a special aura of reliability.'" *Id.* (quoting *State v. Kirkman*, 159 Wn.2d 918, 928, 155 P.3d 125 (2007)).

Here, the court permitted the state to introduce Goudschaal's opinion that Williams suffered a knife wound. This testimony should not have been admitted as a lay opinion.

First, the opinion testimony should have been analyzed as an expert opinion under ER 702, rather than a lay opinion under ER 701. Goudschaal claimed he had "scientific, technical, or other specialized

knowledge...” ER 701; RP 198-212, 216-217, 228-229. The prosecution sought to portray Goudschaal as an expert on the examination and categorization of wounds. The evidence was therefore not admissible under ER 701. ER 701(c).

Second, Goudschaal’s opinion was not “rationally based” on the officer’s perceptions. Although he claimed to have a great deal of experience with knife wounds, the state did not prove he had any experience with knife wounds to the head. Nor did his testimony establish that he could differentiate between a knife wound and a wound caused by the edge of a block of wood (as opposed to a baseball bat). RP 198-212, 216-217, 228-229.

Third, the testimony was not “helpful” within the meaning of the rule. Without proof that Goudschaal had greater understanding than the average juror, his opinion—that the wound was a knife wound, not caused by the wooden block—was nothing more than unsupported speculation.

The evidence should have been excluded. ER 701; *King*, 167 Wn.2d at 331.

2. Goudschaal’s “expert” opinion should have been excluded under ER 702 because the state did not lay a proper foundation.

ER 702 governs the admissibility of expert testimony. Under the rule,

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skills, experience, training, or education may testify thereto in the form of an opinion or otherwise.

The proponent of the evidence must show that (1) the witness is a qualified expert, (2) the opinion is based on a theory generally accepted by the scientific community, and (3) the testimony is helpful to the trier of fact. *State v. Black*, 109 Wn.2d 336, 341, 745 P.2d 12 (1987).

Here, the evidence failed all three bases. First, Goudschaal did not qualify as an expert. Although he had experience viewing knife wounds, he did not testify that he could differentiate between knife wounds and wounds inflicted with other sharp objects (such as the edge of a wooden block or a piece of furniture). He admitted he had never read any articles on the subject, and he could not recall having heard anyone speak about the topic. Furthermore, he lacked understanding of the basic terms that he used when discussing the basis for his opinion. RP 198-212, 216-217, 228-229.

Second, Goudschaal did not show that his testimony was based on any theory generally accepted in the scientific community. Aside from Goudschaal's own testimony about his self-taught ability, nothing in the record showed any underlying theory upon which the opinion rested. RP

198-212, 216-217, 228-229. Absent some proof of a generally accepted theory, the evidence did not qualify for admission.

Third, the evidence was not helpful. Goudschaal's opinion consisted of nothing more than speculation. Under the circumstances, his testimony did not aid the trier of fact. Significantly, the state did not offer the testimony of the doctor who treated Williams. The evidence should have been excluded under ER 702. *Black*, 109 Wn.2d at 341.

3. The erroneous admission of Goudschaal's opinion testimony prejudiced Mr. Gebarowski.

A significant issue at trial involved how Williams became injured. The state did not present any medical evidence about the wound or its possible source. RP 80-91, 80-247. Williams himself was not sure of the source, but testified when asked it was the block of wood. RP 171. He testified that it could have been caused by the wooden block, or by the nightstand table. RP 187-188.

The prosecution did not charge Mr. Gebarowski with assaulting Williams with the block or the nightstand. CP 1. Nor did the prosecutor claim they qualified as deadly weapons for purpose of the substantive crime of second-degree assault. RP 50.

Other than Goudschaal's testimony, none of the evidence established that Mr. Gebarowski assaulted his brother with the knife.

Accordingly, the erroneously admitted opinion testimony likely affected the outcome of trial. *Asaeli*, 150 Wn. App. at 579.

Mr. Gebarowski's conviction for second-degree assault must be reversed. *Id.* The charge must be remanded for a new trial. *Id.*

II. THE COURT IMPERMISSIBLY COMMENTED ON THE EVIDENCE.

A. Standard of Review.

Courts review *de novo* allegations of constitutional error. *State v. Lynch*, --- Wn.2d ---, 309 P.3d 482, 484 (Sept. 19, 2013). A manifest error affecting a constitutional right can be raised for the first time on appeal. RAP 2.5(a)(3).

Jury instructions are reviewed *de novo*. *Anfinson v. FedEx Ground Package Sys., Inc.*, 174 Wn.2d 851, 860, 281 P.3d 289 (2012).

Instructions must make the relevant standard manifestly apparent to the average juror. *State v. Kyllo*, 166 Wn.2d 856, 864, 215 P.3d 177 (2009).

Courts presume prejudice when a judge comments on the evidence. *State v. Levy*, 156 Wn.2d 709, 725, 132 P.3d 1076 (2006). To overcome this presumption, the record must affirmatively show that no prejudice could have resulted. *Levy*, 156 Wn.2d at 725. This is a higher standard than that normally applied to constitutional errors. *Id.*

- B. The court's "to convict" instruction on second-degree assault contained a judicial comment because it removed a factual issue from the jury's consideration.

Under art. IV, § 16 of the Washington Constitution, "Judges shall not charge juries with respect to matters of fact, nor comment thereon, but shall declare the law." Art. IV, § 16. A comment on the evidence "invades a fundamental right" and may be challenged for the first time on review under RAP 2.5(a)(3). *State v. Becker*, 132 Wn.2d 54, 64, 935 P.2d 1321 (1997).

A judge can neither convey a personal attitude nor instruct jurors that factual matters have been established as a matter of law. *Levy*, 156 Wn.2d at 721. The comment need not be expressly made; a judge violates the constitutional prohibition by making implied comments as well. *Id.* A statement qualifies as a judicial comment if the court's attitude can be inferred. *State v. Lane*, 125 Wn.2d 825, 838, 889 P.2d 929 (1995); accord *State v. Jackman*, 156 Wn.2d 736, 744, 132 P.3d 136 (2006).

Instructions using the phrase "to wit" risk being construed as judicial comments. The instruction in *Levy* had this flaw. The problem instruction in that case directed jurors to determine whether or not "the defendant, or an accomplice, possessed one or more deadly weapons, to wit: a .38 revolver or a crowbar." *Levy*, 156 Wn.2d at 717. The defendant challenged the instruction for the first time on review, arguing it

included a comment on the evidence. The Supreme Court concluded that the defendant had raised a manifest error affecting a constitutional right. *Id.*, at 719. The court held that “the reference to the crowbar as a deadly weapon was likely a judicial comment because the jury need not consider whether the State proved that its use caused it to be qualified as a deadly weapon.” *Id.*, at 722.¹

In Mr. Gebarowski’s case, jurors were tasked with determining if the knife qualified as a deadly weapon. The court defined deadly weapon as an article, “which under the circumstances in which it [was] used, attempted to be used, or threatened to be used, [was] readily capable of causing death or substantial bodily harm.” CP 89. The court’s elements instruction directed jurors to determine whether or not the state had proved that Mr. Gebarowski assaulted Williams “with a deadly weapon[,] to wit: a knife...” CP 90.

This instruction includes the same flaw as the instruction in *Levy*. Under *Levy*, the instruction amounts to a comment on the evidence. By describing the knife as a deadly weapon, the court removed from the

¹ In *Levy*, the issue concerned an enhancement. The .38 revolver qualified as a deadly weapon *per se*; by contrast, the state had to “prove that the crowbar was used in a way that met the criteria of a deadly weapon” under RCW 9.94A.602. *Levy*, 156 Wn.2d at 721-22.

jury's consideration the issue of how it was used and whether it was readily capable of causing death or substantial bodily harm. Instead, jurors could have interpreted the instruction to require them to convict if Mr. Gebarowski assaulted Williams with the knife, regardless of its capabilities or how he used it.

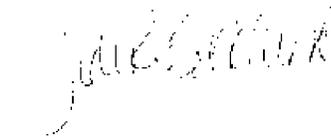
Here, the record does not affirmatively show harmlessness under the *Levy* test. *Levy*, 156 Wn.2d at 725. Accordingly, the court's impermissible comment requires reversal. *Id.* at 725. The charge must be remanded to the trial court for a new trial. *Id.*

CONCLUSION

For the foregoing reasons, Mr. Gebarowski's conviction for second-degree assault must be reversed. The charge must be remanded for a new trial.

Respectfully submitted on December 16, 2013,

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CERTIFICATE OF SERVICE

I certify that on today's date:

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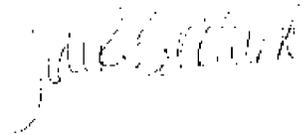
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I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Olympia, Washington on December 16, 2013.



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