

No. 45011-9-II

COURT OF APPEALS, DIVISION II  
OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON,

Respondent,

vs.

**Stanley Gebarowski,**

Appellant.

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Clark County Superior Court

Cause No. 11-1-00988-2

The Honorable Judge David E. Gregerson

**Appellant's Supplemental Brief**

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### **ASSIGNMENTS OF ERROR AND SUPPLEMENTAL ISSUE**

1. Mr. Gebarowski was deprived of his Sixth and Fourteenth Amendment right to the effective assistance of counsel.
2. Defense counsel unreasonably proposed an instruction that included a judicial comment on the evidence.

**ISSUE:** A criminal defense attorney provides ineffective assistance of counsel by proposing defective jury instructions that prejudice the accused person. Here, Mr. Gebarowski's attorney proposed asked the court to instruct jurors in a manner that included a judicial comment, removing an essential element from the jury's consideration. Was Mr. Gebarowski denied his Sixth and Fourteenth Amendment right to the effective assistance of counsel?

### **SUPPLEMENTAL FACTS AND PRIOR PROCEEDINGS**

Mr. Gebarowski was charged with second-degree assault. CP 3. Defense counsel did not propose a "to convict" instruction outlining second-degree assault. CP 69-76. The prosecution proposed an instruction requiring the jury to find that "the defendant assaulted Anthony Edward Williams with a deadly weapon..." CP 90. At defense counsel's request, the court appended the phrase "to wit: a knife" to this language. RP 303.

A separate instruction defined the phrase "deadly weapon." CP 89.

## ARGUMENT

### **DEFENSE COUNSEL PROVIDED INEFFECTIVE ASSISTANCE BY PROPOSING JURY INSTRUCTIONS THAT INCLUDED A JUDICIAL COMMENT ON THE EVIDENCE, REMOVING AN ESSENTIAL ELEMENT FROM THE JURY'S CONSIDERATION.**

A. Standard of Review.

Ineffective assistance of counsel is an issue of constitutional magnitude that can be raised for the first time on appeal. *State v. Kylo*, 166 Wn.2d 856, 862, 215 P.3d 177 (2009); RAP 2.5(a). Reversal is required if counsel's deficient performance prejudices the accused person. *Kylo*, 166 Wn.2d at 862 (citing *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984)).

B. Mr. Gebarowski's trial counsel provided ineffective assistance by asking the court to add the phrase "to wit: a knife" to the court's elements instruction for second-degree assault.

The right to counsel includes the right to the effective assistance of counsel. U.S. Const. Amends. VI, XIV; *Strickland*, 466 US at 685. Counsel's performance is deficient if it falls below an objective standard of reasonableness. *Kylo*, 166 Wn.2d at 862. Deficient performance prejudices the accused when there is a reasonable probability that it affected the outcome of the proceeding. *Id.*

The rights to due process and to a jury trial protect the right to have all elements proven to the jury beyond a reasonable doubt. *Alleyne v.*

*United States*, 133 S.Ct. 2151, 186 L.Ed.2d 314 (2013); U.S. Const. Amends. VI; XIV; Wash. Const art. I, §§ 21, 22. Defense counsel provides ineffective assistance by proposing jury instructions that relieve the state of its burden of proof, absent a tactical justification. *Kyllo*, 166 Wn.2d at 871.

Second-degree assault requires proof of an intentional assault with a deadly weapon. RCW 9A.36.021(1)(c). A weapon is not “deadly” unless the jury finds that “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.” RCW 9A.04.110(6).<sup>1</sup>

An instruction that includes the phrase “to wit” followed by a fact specific to the case can constitute a comment on the evidence. *State v. Levy*, 156 Wn.2d 709, 717-722, 132 P.3d 1076 (2006). When the instruction concerns a putative deadly weapon, it suggests to jurors that they “need not consider whether the State proved that [the weapon’s] use caused it to be qualified as a deadly weapon.” *Id.*, at 722.

Mr. Gebarowski’s trial attorney provided ineffective assistance by asking the court to include this flawed language in the “to convict” instruction. RP 309. Defense counsel had no valid strategic reason for

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<sup>1</sup> Explosives and firearms are considered *per se* deadly. RCW 9A.04.110(6).

relieving the prosecution of its burden to prove that the knife qualified as a deadly weapon. *Kyllo*, 166 Wn.2d at 871. If counsel had concerns that the jury might focus on the block of wood or the piece of furniture (instead of the knife), he could have crafted an appropriate instruction addressing that issue. Alternatively, he could have asked the prosecutor to make an election.

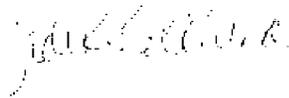
Mr. Gebarowski was prejudiced by his attorney's deficient performance. *Id.* By equating the knife with the phrase 'deadly weapon,' the instruction relieved the state of its burden to prove an element of the charged crime, and removed that element from the jury's consideration. *Levy*, 156 Wn.2d at 717-722. Mr. Gebarowski's conviction must be reversed and the case remanded for a new trial. *Kyllo*, 166 Wn.2d at 862.

**CONCLUSION**

For the reasons set forth above and those in the Opening and Reply Briefs, Mr. Gebarowski's conviction must be reversed.

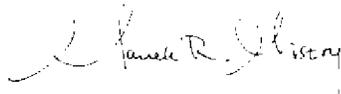
Respectfully submitted on March 4, 2014.

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CERTIFICATE OF SERVICE

I certify that on today's date:

I mailed a copy of Appellant's Supplemental Brief, postage prepaid, to:

Stanley Gebarowski, DOC #367626  
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1313 North 13th Avenue  
Walla Walla, WA 99362

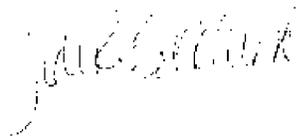
With the permission of the recipient(s), I delivered an electronic version of the brief, using the Court's filing portal, to:

Clark County Prosecutor  
prosecutor@clark.wa.gov

I filed the Appellant's Supplemental Brief electronically with the Court of Appeals, Division II, through the Court's online filing system.

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 March 4, 2014.



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Jodi R. Backlund, WSBA No. 22917  
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# BACKLUND & MISTRY

**March 04, 2014 - 1:27 PM**

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