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COURT OF APPEALS

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No. 33751-7-II

STATE OF WASHINGTON

COURT OF APPEALS, DIVISION II  
OF THE STATE OF WASHINGTON

BY  
TECUTY

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STATE OF WASHINGTON,

Respondent,

vs.

**Garen Mark Gerds,**

Appellant.

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Lewis County Superior Court

Cause No. 05-1-00387-6

The Honorable Judge Richard L. Brosey

**Appellant's Opening Brief**

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## ASSIGNMENTS OF ERROR

1. The trial court erred by instructing the jury with an erroneous definition of knowledge.
2. The trial court erred by giving Instruction No. 6, which reads as follows:

A person knows or acts knowingly or with knowledge when he is aware of a fact, circumstances or result which is described by law as being a crime, whether or not the person is aware that the fact, circumstance or result is a crime.

If a person has information which would lead a reasonable person in the same situation to believe that facts exist which are described by law as being a crime, the jury is permitted but not required to find that he acted with knowledge.

Acting knowingly or with knowledge also is established if a person acts intentionally.  
Supp. CP, Instruction 6.

3. The court's "knowledge" instruction contained an improper mandatory presumption.
4. The court's "knowledge" instruction impermissibly relieved the state of its burden of establishing an element of the offense by proof beyond a reasonable doubt.
5. Mr. Gerdt was denied the effective assistance of counsel when his attorney failed to object to the improper "knowledge" instruction.
6. The prosecuting attorney committed misconduct requiring reversal.

## ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

Mr. Gerdt was charged with Malicious Mischief in the Second Degree. The prosecutor claimed that he "knowingly and maliciously" scratched the paint on a van. At trial, the court's "knowledge" instruction inappropriately included a mandatory presumption, requiring the jury to

find knowledge if Mr. Gerdts acted intentionally (without explaining what kind of intentional act could give rise to the presumption). The instruction also misstated the law, defining knowledge to mean awareness “of a fact, circumstance or result which is described by law as being a crime.” Defense counsel did not object to the erroneous instruction.

1. Using a *de novo* standard of review, did the trial court’s “knowledge” instruction create an impermissible mandatory presumption? Assignments of Error Nos. 1-4.
2. Using a *de novo* standard of review, did the trial court’s “knowledge” instruction misstate the law and mislead the jury? Assignments of Error Nos. 1-4.
3. Using a *de novo* standard of review, was Mr. Gerdts denied the effective assistance of counsel by his lawyer’s failure to object to the erroneous “knowledge” instruction? Assignments of Error Nos. 1-5.

Mr. Gerdts was alleged to have scratched the paint on a van. At trial a police officer testified that Mr. Gerdts, when approached, spontaneously denied scratching the van. Mr. Gerdts, by contrast, testified that the officer broached the topic first. On cross-examination, the prosecuting attorney asked Mr. Gerdts if he knew of “any reason why the officer would make stuff up?” He was also asked “[W]hy do you think he testified that you said something about the van before he did?” An objection was sustained.

4. Did the prosecuting attorney violate Mr. Gerdts’ constitutional right to a fair trial? Assignments of Error No. 6.
5. Did the prosecuting attorney commit misconduct requiring reversal of the conviction? Assignment of Error No. 6.

## STATEMENT OF FACTS AND PRIOR PROCEEDINGS

Garen Gerdts was charged in Superior Court in Lewis County with Malicious Mischief in the 2<sup>nd</sup> Degree, for allegedly scratching the paint on a van. CP 12-13. At trial, a police officer testified that Mr. Gerdts, when approached, spontaneously denied scratching the van. Mr. Gerdts, by contrast, testified that the officer broached the topic first. On cross-examination, the prosecuting attorney asked Mr. Gerdts if he knew of “any reason why the officer would make stuff up?” He was also asked “[W]hy do you think he testified that you said something about the van before he did?” An objection was sustained. RP (8-4-05) 52. The court gave the jury the following instruction on knowledge, without defense objection:

A person knows or acts knowingly or with knowledge when he is aware of a fact, circumstances or result which is described by law as being a crime, whether or not the person is aware that the fact, circumstance or result is a crime.

If a person has information which would lead a reasonable person in the same situation to believe that facts exist which are described by law as being a crime, the jury is permitted but not required to find that he acted with knowledge.

Acting knowingly or with knowledge also is established if a person acts intentionally.  
Instruction 6. Supp. CP.

Mr. Gerdts was convicted as charged and sentenced to 39 days in the Lewis County Jail. CP 4-11. He appealed the judgment and sentence. CP 3.

### ARGUMENT

**I. THE COURT’S “KNOWLEDGE” INSTRUCTION VIOLATED DUE PROCESS BECAUSE IT CREATED A MANDATORY PRESUMPTION, MISSTATED THE LAW, AND MISLED THE JURY REGARDING AN ESSENTIAL ELEMENT.**

‘Knowledge’ is an element of Malicious Mischief in the Second Degree; to obtain a conviction, the prosecution must prove that the defendant knowingly and maliciously caused physical damage to the property of another. RCW 9A.48.080. Under RCW 9A.08.010(1)(b), “A person knows or acts knowingly or with knowledge when (i) he is aware of a fact, facts, or circumstances or result described by a statute defining an offense; or (ii) he has information which would lead a reasonable man in the same situation to believe that facts exist which facts are described by a statute defining an offense.”

Jury instructions, when taken as a whole, must properly inform the trier of fact of the applicable law. *State v. Douglas*, 128 Wn.App. 555 at 562, 116 P.3d 1012 (2005). An omission or misstatement of the law in a jury instruction that relieves the state of its burden to prove every element of the crime charged is erroneous and violates due process. *State v.*

*Thomas*, 150 Wn.2d 821 at 844, 83 P.3d 970 (2004); *State v. Randhawa*, 133 Wn.2d 67 at 76, 941 P.2d 661 (1997). Jury instructions are reviewed *de novo*. *Joyce v. Dept. of Corrections*, 155 Wn.2d 306 at 323, 119 P.3d 825 (2005). A jury instruction which misstates an element of an offense is not harmless unless it can be shown beyond a reasonable doubt that the error did not contribute to the verdict. *State v. Brown*, 147 Wn.2d 330 at 341, 58 P.3d 889 (2002).

Furthermore, due process prohibits the use of conclusive presumptions in jury instructions. Such presumptions conflict with the presumption of innocence and invade the factfinding function of the jury. *State v. Savage*, 94 Wn.2d 569 at 573, 618 P.2d 82 (1980), *citing Sandstrom v. Montana*, 442 U.S. 510, 99 S.Ct. 2450, 61 L.Ed.2d 39 (1979)) and *Morissette v. United States*, 342 U.S. 246, 72 S.Ct. 240, 96 L.Ed. 288 (1952).

Here, 'knowledge' was defined by Instruction No. 6 (based on WPIC 10.02), which included the following optional language (bracketed in WPIC 10.02): "Acting knowingly or with knowledge also is established if a person acts intentionally." Instruction No. 6, Supp. CP.<sup>1</sup>

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<sup>1</sup> The final sentence is bracketed in the WPIC because it is to be used only where applicable.

Inappropriate use of the last sentence relieves the prosecution of its burden of establishing the knowledge element, and is reversible error. *State v. Goble*, 131 Wn.App. 194, 126 P.3d 821 (2005). In *Goble*, the accused was charged with assaulting a person whom he knew to be a law enforcement officer.<sup>2</sup> The trial court's "knowledge" instruction was the same as that given in this case. The Court of Appeals reversed the conviction because the last sentence of the instruction could be read to mean that an intentional assault established Mr. Goble's knowledge, regardless of whether or not he actually knew the victim's status as a police officer. *Goble*, at 203.

Here, as in *Goble*, the inclusion of the final sentence was erroneous; it allowed the jury to presume that Mr. Gerdts knowingly caused physical damage if he took any intentional act, but did not give any guidance as to what intentional act could trigger this mandatory presumption. Under the instruction as given, the jury could attribute knowledge to Mr. Gerdts if he intentionally walked past the vehicle, even if he didn't know he'd scratched it.

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<sup>2</sup> Although not an element of the charged offense, knowledge was included in the "to convict" instruction and thus became an element under the law of the case in *Goble*. *Goble* at 201.

The instruction was also confusing and misleading for another reason. The court told the jury that a person “acts knowingly” when he “is aware of a fact, circumstance or result described by law as being a crime...” This language differed from the statutory language of RCW 9A.08.010(1)(b); under Instruction No. 6, the information at issue—the “fact, circumstances or result”—must itself be described by law as a crime. This is nonsensical. *See* RCW 9A.08.010 (which requires that the fact be described by a criminal statute, not that the fact itself be described as a crime). The *Goble* court criticized WPIC 10.02 on this basis as well. *See Goble at* 203 (“We agree that the instruction is confusing.”)

The end result was that the jury was unable to determine what was meant by the knowledge element of the “to convict” instruction and the instruction defining malicious mischief. Instructions Nos. 4 and 5. The instruction defining knowledge created a conclusive presumption and violated due process. *Goble, supra; Savage, supra*. Because of this, the conviction must be reversed and the case remanded for a new trial. *Goble, supra*.

**II. DEFENSE COUNSEL WAS INEFFECTIVE FOR FAILING TO OBJECT TO THE COURT’S “KNOWLEDGE” INSTRUCTION.**

The Sixth Amendment to the United States Constitution guarantees that “In all criminal prosecutions, the accused shall enjoy the Right... to

have the Assistance of Counsel for his defense.” U.S. Const. Amend. VI. Similarly, Article I, Section 22 of the Washington State Constitution declares that “In criminal prosecutions the accused shall have the right to appear and defend in person, or by counsel...” Wash. Const. Article I, Section 22. The right to counsel is the right to the effective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668, 686, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984) (quoting *McMann v. Richardson*, 397 U.S. 759, 771 n. 14, 90 S.Ct. 1441, 25 L.Ed.2d 763 (1970)).

Defense counsel must employ “such skill and knowledge as will render the trial a reliable adversarial testing process.” *State v. Lopez*, 107 Wn.App. 270 at 275, 27 P.3d 237 (2001). Counsel’s performance is evaluated against the entire record. *Lopez*, at 275.

The test for ineffective assistance of counsel consists of two prongs: (1) whether defense counsel’s performance was deficient, and (2) whether this deficiency prejudiced the defendant. *State v. Holm*, 91 Wn.App. 429, 957 P.2d 1278 (1998), citing *Strickland*, *supra*. The defendant must show a reasonable probability that, but for counsel’s errors, the result of the proceeding would have been different. *Holm*, *supra*, at 1281. Finally, a reviewing court is not required to address both prongs of the test if the defendant makes an insufficient showing on either prong.

To establish deficient performance, a defendant must demonstrate that counsel's representation fell below an objective standard of reasonableness based on consideration of all the circumstances. *State v. Bradley*, 141 Wn.2d 731, 10 P.3d 358 (2000). To prevail on the prejudice prong of the test for ineffective assistance of counsel, an appellant must show that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceedings would have been different." *State v. Saunders*, 91 Wn.App. 575 at 578, 958 P.2d 364 (1998). A reasonable probability is a probability sufficient to undermine confidence in the outcome. *In re Fleming*, 142 Wn.2d 853 at 866, 16 P.3d 610 (2001). A claim of ineffective assistance is reviewed *de novo*. *State v. S.M.*, 100 Wn.App. 401 at 409, 996 P.2d 1111 (2000).

Here, 'knowledge' was an essential element of the crime charged. Despite this, Mr. Gerdt's attorney failed to object to the court's "knowledge" instruction, which was a distortion of the statutory definition found in RCW 9A.08.010(1)(b). This failure to object was deficient performance; a reasonably competent attorney would have been familiar with the statute, and would have known that the language of the instruction differed from the language of the statute. *See, e.g., State v. Thomas*, 109 Wn.2d 222 at 229, 743 P.2d 816 (1987) ("[a] reasonably

competent attorney would have been sufficiently aware of relevant legal principles to enable him or her to propose an [appropriate] instruction.”)

Mr. Gerds was prejudiced by the error. The “knowledge” instruction was confusing and misleading, and it misstated the law. As a result, the jury would not have been able to properly interpret the “to convict” instructions. Defense counsel’s failure to object to the improper “knowledge” instruction denied Mr. Gerds the effective assistance of counsel. *Strickland*. The conviction must be reversed, and the case remanded for a new trial.

### **III. THE PROSECUTOR COMMITTED MISCONDUCT REQUIRING REVERSAL.**

A prosecutor has a duty to act impartially and in the interest of justice. *State v. Rivers*, 96 Wn.App. 672 at 675, 981 P.2d 16 (1999). It is “flagrant misconduct” to ask one witness whether another witness is lying. *State v. Boehning*, 127 Wn.App. 511, 525, 111 P.3d 899 (2005). Cross examination intended to compel a defendant to call police witnesses liars is prosecutorial misconduct which invades the province of the jury, and which may prompt a juror to conclude that “ ‘an acquittal would reflect adversely upon the honesty and good faith of the police witnesses.’ ” *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).

In this case, after Mr. Gerdts testified that the officer first brought up the damage to the van, the prosecutor asked Mr. Gerdts about the discrepancy between his testimony and that of the officer:

Q. Do you know any reason why the officer would make stuff up?

A. No.

Q. So why do you think he testified that you said something about the van before he did?

RP (8-4-05) 52.

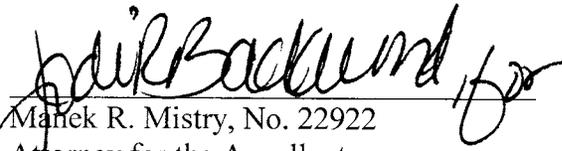
Although a subsequent objection was sustained, the damage had already been done. The questions were intended to force Mr. Gerdts to call the officer a liar, and thus violated the rule set forth in *Boehning, supra*. Furthermore, the discrepancy at issue-- whether Mr. Gerdts or the officer first brought up the van-- related to an issue that was critical to Mr. Gerdts' defense. The misconduct prejudiced Mr. Gerdts, and requires reversal. *Boehning, supra*.

**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 May 4, 2006.

**BACKLUND AND MISTRY**

  
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CERTIFICATE OF MAILING

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

Garen Gerds  
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 May 4, 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 May 4, 2006.

\_\_\_\_\_  
Jodi R. Backlund, WSBA No. 22917  
Attorney for the Appellant

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