

NO. 33751-7-II

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IN THE COURT OF APPEALS  
FOR THE STATE OF WASHINGTON  
DIVISION II

STATE OF WASHINGTON  
BY JW  
DEPUTY

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STATE OF WASHINGTON,

Respondent,

v.

GAREN GERDTS

Appellant.

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APPEAL FROM THE SUPERIOR COURT FOR LEWIS COUNTY

The Honorable Richard L. Brosey, Judge  
Cause No. 05-1-00387-6

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BRIEF OF RESPONDENT

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## **I. ISSUES PRESENTED**

- A. Jury instructions must properly inform the trier of fact of the applicable law. The jury instruction which defined “knowledge” conformed to the WPIC. Did the lower court err in including language in that instruction which stated that acting intentionally establishes that a person acted with knowledge?
- B. Trial counsel’s performance is deficient if it falls below an objective standard of reasonableness and affects the outcome of the proceedings. Gerdts’ trial counsel did not object to the “knowledge” instruction. Was his performance deficient?
- C. An appellant who alleges prosecutorial misconduct bears the burden of establishing that the prosecutor’s conduct was both improper and prejudicial in the context of the entire record. The Deputy Prosecutor asked the defendant if a witness to whom he allegedly made an incriminating remark would have any reason to “make stuff up.” was the prosecutor’s line of questioning so flagrant and ill-intentioned that a curative instruction could not have alleviated any possible prejudice?

## **II. STATEMENT OF THE CASE**

Respondent accepts as adequate, for purposes of this Response, the “Statement of Facts and Prior Proceedings” appearing in the Opening Brief of Appellant, with additions and/or clarifications as appear hereinafter in the body of this Brief of Respondent, and as follows:

On May 17, 2005, Michelle and Marcus Sorlie were just getting out of their car to go to the 12 Step Club, in Centralia Washington.<sup>1</sup> The 12 Step Club is an organization that hosts various 12 step programs, and which also contains a safe and sober gathering place.<sup>2</sup> As Michelle got out of the car, she heard a scraping sound, and looked up to see Garen Gerdts emerge from between two vans parked nearby.<sup>3</sup> As he walked by one of the vans, it looked like he was running his hand along the side of the van, but she could not see whether he had anything in his hand.<sup>4</sup> When she passed by the van, Michelle noticed a line with curls of paint on it.<sup>5</sup> The paint curls looked fresh, and they were also on the ground next to the van.<sup>6</sup> There was another man with Gerdts, who appeared to be acting as a lookout.<sup>7</sup> Sorlie's husband Marcus said, "Hey," and Gerdts hurried away.<sup>8</sup>

Marcus works at the front counter of the 12 Step Club, and recognized Gerdts.<sup>9</sup> As he was getting out of the car and heading toward the 12 Step Club, he heard a scraping noise, and saw Gerdts scraping his hand along the side of the van.<sup>10</sup> Marcus testified:

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<sup>1</sup> RP 15.

<sup>2</sup> RP 12-13.

<sup>3</sup> RP 16, 18.

<sup>4</sup> RP 19.

<sup>5</sup> RP 16-17.

<sup>6</sup> RP 22, 23.

<sup>7</sup> RP 19.

<sup>8</sup> RP 16, 28.

<sup>9</sup> RP 26-27.

<sup>10</sup> RP 28.

“He was moving his hand right along the same side that we could view, and it was just scraping, so when we went up there and he’d ran off, the first thing my wife and I noticed was there was scrapes, bad scrapes along the side of the van. And it was bad – I mean, it was scraped. It wasn’t – he was trying to put as much damage into it as he possibly could.”<sup>11</sup>

Denise Rhodes testified that she and her husband drove their van to the 12 Step Club on May 17<sup>th</sup>. The van had no scratches when she arrived.

After Officer Gonzales determined that Gerdts was the suspect, he located Gerdts, detained him, and advised him of his *Miranda*<sup>12</sup> rights.<sup>13</sup> After telling Gerdts that he was detaining him for malicious mischief, Gerdts said, “I didn’t key the van.” Officer Gonzales had not mentioned anything about a van being damaged.<sup>14</sup>

Gerdts testified, and denied being near the van, scraping the van, or damaging the van.<sup>15</sup> He also denied saying anything about keying the van to Officer Gonzales.<sup>16</sup> On cross examination, the deputy prosecutor asked if Gerdts had ever met the officer before, if he knew of any reason why the officer would “make stuff up,” and why Gerdts thought the officer

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<sup>11</sup> RP 29-30.

<sup>12</sup> *Miranda v. Arizona*, 384 U.S. 436, 16 L. Ed. 2d 694, 86 S. Ct. 1602, 10 A.L.R.3d 974 (1966).

<sup>13</sup> RP 43.

<sup>14</sup> RP 44.

<sup>15</sup> RP 46.

<sup>16</sup> RP 47.

testified that Gerdts mentioned the van before he did. Gerdts' trial counsel objected to the last question, and the trial court sustained the objection.<sup>17</sup>

### III. ARGUMENT

A. JURY INSTRUCTIONS MUST PROPERLY INFORM THE TRIER OF FACT OF THE APPLICABLE LAW. THE JURY INSTRUCTION WHICH DEFINED "KNOWLEDGE" CONFORMED TO THE WPIC. DID THE LOWER COURT ERR IN INCLUDING LANGUAGE IN THAT INSTRUCTION WHICH STATED THAT ACTING INTENTIONALLY ESTABLISHES THAT A PERSON ACTED WITH KNOWLEDGE?

Gerdts first asserts that lower court erred in instructing the jury, inter alia, that "acting knowingly or with knowledge ...is established if a person acts intentionally."<sup>18</sup> Relying on *State v. Goble*,<sup>19</sup> Gerdts asserts that the last sentence of Instruction No. 6 is a misstatement of the law and its inclusion creates a mandatory presumption.

In *Goble*, the "to convict" instruction contained an unnecessary element—that the defendant knew the victim of the assault was a law enforcement officer performing his official duties—which, based on the

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<sup>17</sup> RP 52.

<sup>18</sup> Supp. CP 9.

<sup>19</sup> 131 Wn.App. 194, 126 P.3d 821 (2005),

law of the case doctrine, the State was required to prove.<sup>20</sup> Goble testified that he did not realize the person he assaulted was a police officer, and several of his witnesses supported this theory. A few days after the incident, Goble told the deputy that he was sorry and did not realize he was a police officer at the time.<sup>21</sup> During deliberations, the jury sent out a note indicating that they did not understand the “knowledge” instruction, which contained the language Gerdts challenges in this appeal. This Court, in a 2 to 1 decision, found that the instruction was confusing to the jury, and that it relieved the State of the burden of proving that Goble knew the deputy’s status as a law-enforcement officer.<sup>22</sup> The *Goble* decision is of little assistance in the present case. Because the State, by including in the “to convict” instruction an unnecessary element—i.e., that Goble had to know that Deputy Riordan was a law enforcement officer and that he was on duty—the State took on the burden of proving that Goble knew Riordan was a police officer when he assaulted him. Because there was credible evidence that Goble’s acted *intentionally* in assaulting the person approaching his grandson, but did not have *knowledge* that person was an on-duty police officer when he acted, the instruction allowed the jury to find that in acting intentionally, he had to know the

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<sup>20</sup> *Id.* at 201.

<sup>21</sup> *Id.* at 197-199.

<sup>22</sup> *Id.* at 203.

person he assaulted was an officer. That the jury sent out a question indicating that it was confused by the instruction underscored the impropriety of including the last sentence of the instruction in that particular case.

As illustrated above, the decision in *Goble* was very fact-specific. The facts that justified the Court's decision in *Goble* are not present in the instant case. Here, there was no evidence that Gerdts inadvertently "keyed" the vehicle. Indeed, Gerdts' defense was essentially alibi. He and his witnesses testified that Gerdts was inside the 12-Step Club at the time the Sorlies saw him damage Rhodes' vehicle. The defense did not involve knowledge or intent at all, and thus, the potential for juror confusion was non-existent. The jury did not indicate any confusion with the instruction as given.

The *Goble* decision does not state that the language at issue is per se a misstatement of the law, or that it per se violates due process by relieving the State of its burden. The facts in *Goble* were unusual, and its application is similarly limited. Certainly, it does not control in the present case, and Gardts' challenge is without merit.

B. TRIAL COUNSEL'S PERFORMANCE IS DEFICIENT IF IT FALLS BELOW AN OBJECTIVE STANDARD OF REASONABLENESS AND AFFECTS THE OUTCOME OF THE PROCEEDINGS. GERDTS' TRIAL COUNSEL DID NOT OBJECT TO THE "KNOWLEDGE" INSTRUCTION. WAS HIS PERFORMANCE DEFICIENT?

Gerdts next asserts that his trial counsel's performance was deficient in that he failed to object to the "knowledge" instruction discussed above. The law regarding ineffective assistance of counsel is well established. To prevail on a claim of ineffective assistance of counsel, a defendant must show both ineffective representation and resulting prejudice.<sup>23</sup> To satisfy the first prong, a defendant must show that counsel's performance fell below an objective standard of reasonableness.<sup>24</sup> To satisfy the second prong, a defendant must establish that counsel's performance was so inadequate that there exists a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different."<sup>25</sup> A reasonable probability is a probability sufficient to undermine confidence in the outcome.<sup>26</sup>

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<sup>23</sup> *State v. Early*, 70 Wn.App. 452, 460, 853 P.2d 964 (1993), *review denied*, 123 Wn.2d 1004 (1994); *State v. Graham*, 78 Wn.App. 44, 56, 896 P.2d 704 (1995).

<sup>24</sup> *Strickland v. Washington*, 466 U.S. 668, 693, 80 L.Ed 2d 674, 104 S.Ct 2052 (1984); *State v. Sardinia*, 42 Wn.App. 533, 540, 713 P.2d 1302 (1978).

<sup>25</sup> *Strickland*, 466 U.S. at 694.

<sup>26</sup> *State v. Thomas*, 109 Wn.2d 222, 226, 743 P.2d 816 (1987).

There is a strong presumption that counsel's performance was adequate, and exceptional deference must be given when evaluating counsel's strategic decisions.<sup>27</sup> Furthermore, a reviewing court is not required to address both prongs of the test if the defendant makes an insufficient showing on one prong.<sup>28</sup>

As argued above, the knowledge instruction in this case was proper. Thus, Gerdts cannot prevail on the first Strickland prong, and his challenge must fail. Even assuming *arguendo* that failure to object to this standard WPIC instruction was error, Gerdts fails to demonstrate that in this case, it deprived him of due process. The witnesses who observed his conduct testified to a very purposeful act. Gerdts' claim must be rejected.

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<sup>27</sup> *Strickland*, 466 U.S. at 689.

C. AN APPELLANT WHO ALLEGES PROSECUTORIAL MISCONDUCT BEARS THE BURDEN OF ESTABLISHING THAT THE PROSECUTOR'S CONDUCT WAS BOTH IMPROPER AND PREJUDICIAL IN THE CONTEXT OF THE ENTIRE RECORD. THE DEPUTY PROSECUTOR ASKED THE DEFENDANT IF A WITNESS TO WHOM HE ALLEGEDLY MADE AN INCRIMINATING REMARK WOULD HAVE ANY REASON TO "MAKE STUFF UP." WAS THE PROSECUTOR'S LINE OF QUESTIONING SO FLAGRANT AND ILL-INTENTIONED THAT A CURATIVE INSTRUCTION COULD NOT HAVE ALLEVIATED ANY POSSIBLE PREJUDICE?

Finally, Gerdts argues that the deputy prosecutor committed misconduct by asking Gerdts two questions on cross-examination: 1) whether he knew why the officer would "make stuff up;" and 2) why he thought the officer testified that Gerdts mentioned the van first.<sup>29</sup> Prosecutorial misconduct requires a showing that the prosecutor's conduct was both improper and prejudicial in the context of the entire record and circumstances at trial.<sup>30</sup> The defendant bears the burden of showing both prongs of prosecutorial misconduct.<sup>31</sup> Failure to object to an improper remark waives the right to assert prosecutorial misconduct unless the

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<sup>28</sup> *State v. Tarica*, 59 Wn. App. 368, 374, 798 P.2d 296 (1990).

<sup>29</sup> Opening Br. of Appellant at 9.

<sup>30</sup> *State v. Hughes*, 118 Wn. App. 713, 727, 77 P.3d 681 (2003).

<sup>31</sup> *Hughes*, 118 Wn. App. at 727.

remark was so flagrant and ill-intentioned that it causes enduring and resulting prejudice that a curative instruction could not have remedied.<sup>32</sup>

A prosecutor may not ask a witness to opine whether another witness is telling the truth.<sup>33</sup> Defense counsel should object to such questions, however; if he or she does not, the reviewing court will be reluctant to find reversible error, which requires misconduct “so flagrant and ill-intentioned that a curative instruction could not have obviated the resulting prejudice.”<sup>34</sup>

In *State v. Boehning*,<sup>35</sup> on which Gerdts relies, the deputy prosecutor on *five* occasions during cross-examination, attempted to get the defendant to say that the victim had no reason to fabricate the allegations.<sup>36</sup> The court held that the victim’s credibility was central to the State’s case, and that the misconduct was cumulative.<sup>37</sup> In contrast, in the present case, the two questions at issue were anything but pointed. One question inquired whether Gerdts knew of any reason Officer Gonzales would “make stuff up,” and the other inquired as to whether he knew of a reason why the officer would say that Gerdts mentioned the van first. The

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<sup>32</sup> *State v. Russell*, 125 Wash.2d 24, 86, 882 P.2d 747 (1994).

<sup>33</sup> *State v. Jones*, 117 Wn.App. 89, 68 P.3d 1153 (2003); *State v. Jerrels*, 83 Wn.App. 503, 925 P.2d 209 (1996).

<sup>34</sup> *Jerrels*, 83 Wn.App. at 508 (quoting *State v. Suarez-Bravo*, 72 Wn.App. 359, 367, 864 P.2d 426 (1994)).

<sup>35</sup> 127 Wn.App. 511, 111 P.3d 899 (2005).

<sup>36</sup> *Id.* at 524.

<sup>37</sup> *Id.* at 525.

questions in the present case were nothing like those in *Boehning*, and did not have the cumulative effect as did those pointed and repeated questions asked by the deputy prosecutor in *Boehning*. Further, Officer Gonzalez' credibility was not central in the present case, as was the victim's in *Boehning*. He was no an eyewitness, as were Michelle and Marcus Sorlie. Gerdts bears the burden of showing that the deputy prosecutor's conduct was both improper and prejudicial in the context of the *entire record* and circumstances at trial. Given the unequivocal testimony of two witnesses who observed Gerdts keying Rhodes' vehicle, the cross-examination of Officer Gonzales—even if improper—had little effect on the evidence as a whole.

This case is also distinguishable from *State v. Suarez Bravo*,<sup>38</sup> which Gerdts also cites. The deputy prosecutor in *Suarez Bravo* asked the defendant whether he lived in a high-crime area, implied that Hispanic orchard workers deal in cocaine, asked about the defendant's fears of deportation and his status as a Hispanic non-citizen, and tried to induce the defendant to call the State's witnesses liars. The court held that the *cumulative* effect of this prejudicial line of questioning warranted reversal of the defendant's conviction. As previously stated, the questions in the present case were perhaps ill-advised, but certainly do not rise to the level

of those in *Suarez Bravo* or *Boehning*. Nor was the subject of those questions—Officer Gonzales—a crucial witness. Although the line of questioning was admittedly improper, given the strength of the other evidence against Gerdts, these vague questions were innocuous.

#### IV. CONCLUSION

The “knowledge” instruction, as given, was proper in this case. Thus, Gerdts’ trial counsel’s failure to object to it did not render his performance deficient. Further, the deputy prosecutor’s question of Gerdts was not flagrant or ill-intentioned. Accordingly, his appeal should be denied.

#### V. REQUEST FOR COSTS

Should this Court determine that the State substantially prevails in this matter, the State requests that Gerdts be required to pay all taxable costs of this appeal, pursuant to RAP Title 14.

Respectfully submitted this 16<sup>th</sup> day of August, 2006.

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<sup>38</sup> *Supra*, at 367.

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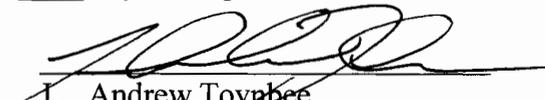
CERTIFICATE

I certify that on 8/16/06, I mailed a copy of the foregoing supplemental response by depositing same in the United States Mail, postage pre-paid, to the following parties at the addresses indicated:

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