

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 Reply Brief**

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## ARGUMENT

### **I. OFFICER GOUDSCHAAL’S OPINION SHOULD NOT HAVE BEEN ADMITTED.**

ER 701, which governs lay opinion evidence, does not permit introduction of expert testimony. ER 701(c). Goudschaal claimed to base his opinion on specialized knowledge. RP 228-229. This distinguishes his testimony from the lay opinion offered in *State v. Cole*, 117 Wn. App. 870, 878, 73 P.3d 411 (2003). Brief of Respondent, pp. 5-6.

In *Cole*, a detective testified that based on his observations, a cut “appeared to run from left to right.” *Id.* The detective did not claim special knowledge. *Id.*

Here, by contrast, Goudschaal testified that he’d investigated “close to a hundred” cases involving knife assaults, and that “[b]ased on that knowledge and experience” he determined that the injury was caused by a knife. RP 228-229. His opinion was not based simply on observation; instead, he purported to combine his observations with his specialized knowledge.

The opinion should have been excluded. ER 701(c).

Furthermore, Goudschaal’s opinion was neither rationally based on his perceptions nor helpful to the jury. He did not claim experience with knife wounds to the head; nor did he claim he could differentiate between

knife wounds and wounds caused by other sharp objects (such as the edge of the wooden block or the nightstand table).<sup>1</sup> RP 198-212, 216-217, 228-229.

The evidence should not have been admitted under ER 701.

Nor should Goudschaal's testimony have been admitted under ER 702. He did not claim his testimony was based on any generally accepted theory. RP 198-212, 216-217, 228-229. Accordingly, the state "failed to lay the most rudimentary foundation for the evidence." *State v. Black*, 109 Wn.2d 336, 350, 745 P.2d 12 (1987) (Utter, J., concurring). Respondent fails to address this basic shortcoming. Brief of Respondent, pp. 6-7. The absence of argument on this point can be treated as a concession. *In re Pullman*, 167 Wn.2d 205, 212 n.4, 218 P.3d 913 (2009).

Nor did Goudschaal claim he could differentiate between knife wounds and those inflicted by other sharp objects (such as the edge of a block or piece of furniture). He had never read any articles or heard anyone speak on the subject. He lacked basic understanding of the terminology he used in discussing his opinion. RP 198-212, 216-217, 228-229. His opinion – based on nothing more than speculation—was

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<sup>1</sup> He did testify that he had investigated "probably twenty or so" cases involving blunt pieces of wood, such as a bat or stick. RP 29. But he also testified that a contusion is a tear in the flesh, though as the state correctly stipulated, it is actually a bruise. RP 209-211.

not helpful to the jury, and the state did not offer the testimony of the doctor who treated Williams. The evidence should have been excluded under ER 702. *State v. Black*, 109 Wn.2d 336, 341, 745 P.2d 12 (1987).

The error prejudiced Mr. Gebarowski. No other evidence established that Mr. Gebarowski assaulted Williams with the knife. The improper admission Officer Goudschaal's opinion was especially prejudicial because it carried the special aura of reliability that accompanies testimony from a law enforcement officer. *State v. King*, 167 Wn.2d 324, 331, 219 P.3d 642 (2009). Respondent's erroneous harmless error analysis lacks merit. Brief of Respondent, p. 7.

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). Instead of properly applying this test, Respondent argues (in essence) that the evidence was sufficient for conviction. Brief of Respondent, p. 7. Contrary to Respondent's assertion, there is no indication that the jury based its verdict on an assault completed when Mr. Gebarowski lunged toward his brother with the knife. Brief of Respondent, p. 7.

There is a reasonable probability that the error materially affected the outcome. Officer Goudschaal's opinion that Mr. Gebarowski cut his brother undoubtedly contributed to the finding that he was guilty of

second-degree assault. Without the improper opinion testimony, the jury might have found him guilty of a lesser charge or acquitted him altogether.

Accordingly, the conviction must be reversed, and the charge remanded for a new trial. *Asaeli*, 150 Wn. App. at 579.

**II. THE COURT IMPERMISSIBLY COMMENTED ON THE EVIDENCE.**

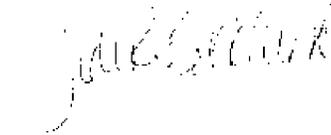
Mr. Gebarowski rests on the argument set forth in his Opening Brief, and on Supplemental Brief (if accepted by the court).

**CONCLUSION**

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

Respectfully submitted on March 4, 2014,

**BACKLUND AND MISTRY**



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## CERTIFICATE OF SERVICE

I certify that on today's date:

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

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

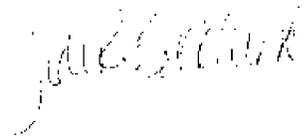
With the permission of the recipient(s), I delivered an electronic version of the brief, using the Court's filing portal, to:

Clark County Prosecuting Attorney  
prosecutor@clark.wa.gov

I filed the Appellant's Reply 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  
Attorney for the Appellant

# BACKLUND & MISTRY

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

## Transmittal Letter

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