

NO. 45011-9-II

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

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STATE OF WASHINGTON, Respondent

v.

STANLEY AARON GEBAROWSKI, Appellant

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FROM THE SUPERIOR COURT FOR CLARK COUNTY  
CLARK COUNTY SUPERIOR COURT CAUSE NO.11-1-00988-2

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BRIEF OF RESPONDENT

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A. RESPONSE TO ASSIGNMENTS OF ERROR

I. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN ALLOWING OPINION EVIDENCE TO BE ADMITTED AT TRIAL

II. GEBAROWSKI IS PRECLUDED FROM ARGUING ERROR IN AN INSTRUCTION HE PROPOSED AT TRIAL

B. STATEMENT OF THE CASE

In June 2011, Stanley Gebarowski (hereafter ‘Gebarowski’) lived in an apartment in Vancouver, Washington with his brother, Anthony Williams. 1A RP at 152-54. On the evening of June 14, 2011, Mr. Williams arrived home at approximately 9:30pm and saw Gebarowski working in the garage. 1A RP at 155. Mr. Williams went upstairs to the upstairs bedroom to talk with his boyfriend, Hao Dang. 1A RP at 155. A few minutes later Gebarowski came upstairs, angry, shoved the door open and told Mr. Williams he should have told him he was not going to help him by getting more screws. 1A RP at 98, 155. Gebarowski had a knife in one hand and a block of wood in another hand. 1A RP at 158. Gebarowski appeared to be very angry and used profanity directed at Mr. Williams. 1A RP at 160-64. Gebarowski told Mr. Williams not to stare at him and that

he would beat him if he continued staring. 1A RP at 164. At this time Gebarowski was leaning forward, gripping the knife very tightly with white knuckles. 1A RP at 165. Mr. Williams feared he was going to be attacked. 1A RP at 165. Gebarowski then lunged at Mr. Williams, from 2 to 3 feet away, with the knife and block of wood still in his hands. 1A RP at 108, 165. Gebarowski appeared to have the knife raised in a stabbing position. 1A RP at 166.

Mr. Williams rolled on his back and kicked at Gebarowski, he believes kicking the knife out of Gebarowski's hand. 1A RP at 166. Despite Mr. Williams' attempts to defend himself, Gebarowski continued coming at Mr. Williams, knocking Mr. Williams' head on the nightstand and used the block of wood to hit him on the side of his head. 1A RP at 167-68. Mr. Dang jumped on Gebarowski's back in an attempt to try to stop him from assaulting Mr. Williams, and in response Gebarowski shoved Mr. Dang into the hallway causing Mr. Dang to hit his head on the wall. 1A RP at 113, 168. Gebarowski then shoved Mr. Dang down the stairs. 1A RP at 114, 169. This caused Mr. Dang to fall down the stairs hitting his neck, head and back. 1A RP at 170. Mr. Williams then tried to shove Gebarowski down the stairs. 1A RP at 169. Mr. Dang yelled out to call 911, so Mr. Williams did and Gebarowski fled the apartment. 1A RP at 119, 169.

During the assault, Mr. Williams suffered a cut on his left arm, and bruising to his head. 1A RP at 170. Mr. Williams did not testify as to the cause of the cut on his left arm, but indicated that the injury to his head was caused by the block of wood. 1A RP at 171. Mr. Williams was not aware of the cut on his arm until it was pointed out to him by police. 1B RP at 230. Mr. Dang indicated his back and head hurt for several days after the assault. 1A RP at 119.

From this incident, the State charged Gebarowski with Assault in the Second degree with a deadly weapon against Mr. Williams, Assault in the Second Degree with a deadly weapon against Mr. Dang, Assault in the Third Degree by negligently inflicting bodily harm on Mr. Williams with a weapon, Assault in the Third Degree against Mr. Dang for causing bodily harm accompanied by substantial pain that extends for a period sufficient to cause considerable suffering, and gross misdemeanor Harassment against Mr. Williams. CP 1-3. The jury convicted Gebarowski of Assault in the Second Degree as charged against Mr. Williams; Assault in the Third Degree as charged against Mr. Dang, and misdemeanor Harassment. CP 136-44.

At trial, defense moved to prevent the State from eliciting a police officer's opinion on the cause of Mr. Williams' cut on his arm and the trial court considered his motion, considering both ER 701 and 702. 1B RP at

200-03. The officer then testified that in his opinion the wound to Mr. Williams' arm appeared to have been caused by a knife. 1B RP at 229. The Court instructed the jury on the definition of deadly weapon and in the "to convict" on Assault in the Second Degree it indicated "to wit: a knife." CP 89-90. Gebarowski requested the trial court add that language into the "to convict" instructions. 1B RP at 303. In discussing this instruction with the trial court, Gebarowski's counsel stated,

Your Honor, I would ask that after the words "a deadly weapon," that the words "to wit, a knife" be added.

1B RP at 303.

Gebarowski was sentencing to a standard range sentence which include a deadly weapon enhancement. CP 8. His appeal timely follows.

C. ARGUMENT

I. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN ALLOWING OPINION EVIDENCE TO BE ADMITTED AT TRIAL

Gebarowski contends the trial court abused its discretion in allowing a police officer to testify that he believed the victim's wound was

caused by a knife.<sup>1</sup> The trial court did not abuse its discretion in admitting this evidence and the evidence was properly admitted. Gebarowski's claim fails.

A trial court's decision to admit opinion testimony is reviewed for abuse of discretion. *State v. Ortiz*, 119 Wn.2d 294, 308, 831 P.2d 1060 (1992). In this case, the trial court clearly applied the correct legal standard. It is clear from the record that in determining whether this evidence was admissible, the court examined and discussed ER 701 and 702 in making his decision about whether this evidence was admissible. 1B RP at 200-02, 212. The trial court clearly did not make its decision for an untenable reason or on a misapplication of the law.

In *State v. Cole*, 117 Wn. App. 870, 73 P.3d 411 (2003), *rev. denied*, 151 Wn.2d 1005 (2004), an officer testified at trial that in his opinion a cut mark on the victim's throat ran from left to right. On appeal, the Court held that the trial court did not abuse its discretion in admitting this evidence as the testimony was based on the officer's first-hand knowledge and was helpful to a clear understanding of a fact put in issue by the defense. *Cole*, 117 Wn. App. at 878. This case is similar to the facts of *Cole*. The officer in Gebarowski's trial testified that the cut to the

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<sup>1</sup> The Appellant's brief refers to this opinion evidence as the officer offering an opinion on the causation of the victim's head wound, however, it is clear from the testimony that the wound on which the officer offered an opinion was to the victim's arm.

victim's arm appeared to have been caused by a knife. 1B RP at 228-29. As in *Cole*, this opinion was given by someone who had first-hand knowledge of the cut- the officer saw it in person very soon after it was inflicted, and the officer's opinion was helpful to a clear understanding of how the injury occurred. This comports with ER 701. As the trial court properly considered ER701 and *State v. Cole, supra*, and applied those standards to the facts of the case, it is clear the trial court did not abuse its discretion in admitting this evidence.

Further, even if the trial court erred in admitting the opinion under ER 701, it would have been admissible under ER 702. ER 702 provides that 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, skill, experience, training or education may testify thereto in the form of an opinion. ER 702. The witness need not possess the academic credentials of an expert; practical experience may suffice. 5B K. TEGLAND, WASH. PRAC., EVIDENCE sec. 702.5 at 36 (4th ed 1999). Our Courts have previously upheld admission of expert testimony offered by a police officer. In *State v. Sanders*, 66 Wn. App. 380, 386, 832 P.2d 1326 (1992) an officer was properly allowed to offer an opinion regarding the significance of the absence of drug paraphernalia in a residence, and in *State v. Simon*, 64 Wn. App. 948, 963-

64, 831 P.2d 139 (1991), an officer with significant experience investigating prostitution properly testified about the relationship between a pimp and a prostitute. The police officer in Gebarowski's case testified to sufficient experience and expertise to allow admission of his opinion as that of an expert's under ER 702.

Even if the trial court did abuse its discretion in admitting this testimony, the admission did not affect the trial's outcome. In *State v. Bourgeois*, 133 Wn.2d 389, 403, 945 P.2d 1120 (1997) the Court found that an evidentiary error is harmless unless, within reasonable probabilities, the outcome of the trial would have been materially affected had the error not occurred. Contrary to Gebarowski's contention, this case did not turn on whether the knife was used to cause the wound to the victim's arm. The defendant completed an assault on the victim with the knife when he lunged at the victim while holding the knife, putting the victim in apprehension that he was going to be assaulted with the knife. Further, the officer was thoroughly cross-examined and defense pointed out that the victim did not realize he'd received an injury to his arm until the police pointed it out. It is clear that the officer's opinion was merely his opinion and whether the defendant completed an Assault in the Second degree against the victim was left to the province of the jury. The officer's opinion did not affect the trial's outcome. Gebarowski's claim fails.

II. GEBAROWSKI IS PRECLUDED FROM ARGUING ERROR IN AN INSTRUCTION HE PROPOSED AT TRIAL

Gebarowski contends the trial court's instruction to the jury on second-degree assault improperly contained a judicial comment on the evidence. However, Gebarowski fails to inform this Court that Gebarowski is in fact the party who requested the offending language be included in this instruction. 1B RP at 303. It is therefore baffling that Gebarowski now contends this Court should reverse his conviction for error he himself invited. The invited error doctrine bars Gebarowski from now arguing his conviction is improper based on an instruction he requested.

At trial, the court instructed the jury on Assault in the Second degree as follows:

To convict the defendant of the crime of Assault in the Second Degree as charged in Count 1, each of the following elements of the crime must be proved beyond a reasonable doubt:

- (1) That on or about June 14, 2011, the defendant assaulted Anthony Edward Williams with a deadly weapon to wit: a knife; and
- (2) That this act occurred in the State of Washington.

If you find from the evidence that each of these elements have been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand, if, after weighing all the evidence, you have a reasonable doubt as to any of these elements, then it will be your duty to return a verdict of not guilty.

CP 90. The trial court also instructed the jury on the definition of deadly weapon. CP 89. Initially, the State had proposed the same instruction without the language “to wit: a knife.” 1B RP at 302-03. Gebarowski’s counsel then asked the trial court to add in language, “to wit: a knife” on this instruction. 1B RP at 303.

Gebarowski is barred from arguing this jury instruction is improper and a basis for reversal under the invited error doctrine. The invited error doctrine prevents a party who sets up an error at trial from claiming that very action as error on appeal. *State v. Momah*, 167 Wn.2d 140, 153, 217 P.3d 321 (2009). In the case of *City of Seattle v. Patu*, 147 Wn.2d 717, 58 P.3d 273 (2002), the defendant proposed an instruction that was missing an essential element of the crime, the court accepted the instruction and the jury convicted the defendant. *Patu*, 147 Wn.2d at 719. On appeal, Patu sought reversal of the conviction based on the trial court’s failure to include an essential element of the offense in the instruction. *Id.* The Supreme Court affirmed Patu’s conviction and held the invited error doctrine applied because a party may not request an instruction and later

complain on appeal that the requested instruction was given. *Id.* at 721. In a similar case, *State v. Studd*, the Court held that the invited error doctrine applied to defendants who proposed an erroneous instruction at trial and found the defendants could not raise the issue on appeal. *State v. Studd*, 137 Wn.2d 533, 973 P.2d 1049 (1999).

As Gebawoski proposed the language in the instruction that he now complains of, the invited error doctrine prevents him from complaining about it now on appeal.

Further, even if it weren't invited error, though it clearly is, case law shows this instruction was proper and appropriate and the court did not comment on the evidence. Gebarowski's claim fails.

Article 4, section 16 of the Washington Constitution provides: "Judges shall not charge juries with respect to matters of fact, nor comment thereon, but shall declare the law." This prevents the jury from being influenced by a judge's opinion on the evidence. *State v. Jacobsen*, 78 Wn.2d 491, 495, 477 P.2d 1 (1970). A comment on the evidence arises when "the court's attitude toward the merits of the cause are reasonably inferable from the nature or manner of the questions asked and the things said. *State v. Cerny*, 78 Wn.2d 845, 855, 480 P.2d 199 (1971), *judgment vacated in part*, 408 U.S. 939, 92 S. Ct. 2873, 33 L.Ed.2d 761 (1972).

Gebarowski argues the to convict instruction on Assault in the Second Degree constitutes an impermissible comment on the evidence. However, Gebarowski fails to cite to *State v. Akers*, 88 Wn. App. 891, 946 P.2d 1222 (1997) wherein the Court of Appeals commented on nearly this identical issue. In *Akers*, the court stated it was not a judicial comment to include language such as “to wit: a knife” in a special verdict form on deadly weapon. *Akers*, 88 Wn. App. at 898. The Court specifically stated,

By asking a jury whether a defendant was ‘armed with a deadly weapon, to-wit: a knife’ at the time of an alleged robbery, for example, we do not believe that a judge instructs the jury that the particular knife at issue is a deadly weapon as defined by law, that is, that it either had the capacity to and may readily have inflicted death, or that it had a blade more than 3 inches long, where those are disputed issues at trial, and where the jury has been properly instructed on the law defining deadly weapons and on the burden of proof.

*Id.* at 898. In Gebarowski’s case, the jury was properly instructed on the law defining deadly weapons and on the burden of proof. CP 89. As the court concluded in *Akers*, by including the “to wit: a knife” language in the jury instruction, the judge was not telling the jury that the knife was a deadly weapon as defined by law. The judge did not convey a personal attitude or instruct jurors that factual matters had been established as a matter of law.

A jury instruction does not deprive a defendant of a fair trial if the instructions correctly state the applicable law, are not misleading, and allow each side to present their arguments. *State v. Foster*, 91 Wn.2d 466, 589 P.2d 789 (1979). If the instructions to the jury are readily understood and not misleading then they are sufficiently clear. *Id.* at 480. The instructions in Gebarowski's case met this test. The jury was separately instructed on the definition of deadly weapon and it was made clear this was a question for the jury. 2 RP at 391-92.

Even if this Court finds the trial court's instruction was improper, the error was harmless. A constitutional error can be harmless if this Court is satisfied beyond a reasonable doubt that any reasonable jury would have reached the same result in the absence of the error. *State v. Guloy*, 104 Wn.2d 412, 425, 705 P.2d 1182 (1985); *see also, State v. Ng*, 110 Wn.2d 32, 37, 750 P.2d 632 (1988). It is important to note the trial court gave the exact same instruction on count 2, a different victim, and the jury found Gebarowski did not commit Assault in the Second degree against the second victim, but rather came back with the lesser included of Assault in the Third Degree. This is important in showing the jury considered the facts of the case and did not take the trial court's statement of "to wit" as fact. Further, based on the testimony of the witnesses, there is no way the jury could have found the knife that was shown to the jury and admitted

into evidence, was not a deadly weapon in the way it was used. The prosecutor was also clear in her closing argument that the knife being a deadly weapon was something the State had to prove in its case. 2 RP at 391-92. Further, defense never argued or submitted to the jury that the knife was not a deadly weapon. 2 RP at 407-19. It is clear that this knife, and the way it was used, was a deadly weapon. The court's instruction, if erroneous, was harmless beyond a reasonable doubt.

D. CONCLUSION

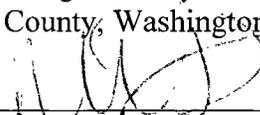
Gebarowski's claims are without merit as the trial court did not abuse its discretion in allowing the police officer to give his opinion and the invited error doctrine precludes Gebarowski from now arguing error in an instruction he proposed at trial. The trial court should be affirmed in all respects.

DATED this 14<sup>th</sup> day of February, 2013.

Respectfully submitted:

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## February 14, 2014 - 4:01 PM

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