

No. 42944-6-II

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

STATE OF WASHINGTON,
Respondent,

v.

SHILA J. WYATT,
Appellant.

APPELLANT'S REPLY BRIEF

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I. ARGUMENT

POINT I: A Witness's Statement That She Was Reporting a Drunk Driver Was Not Admissible as Lay Opinion Testimony

The witness's statement to the 911 operator that she was reporting a drunk driver was not admissible as lay opinion testimony because it was neither based on personal knowledge nor helpful to the jury. As argued in Appellant's Brief, the statement was not relevant to proving any elements of the charged crime and, in any event, any probative value was outweighed by the risk of unfair prejudice. See Appellant's Brief at 17-26. In addition, the witness's lack of personal knowledge and the statement's lack of relevance also made it inadmissible under ER 701.¹

As an initial matter, the opinion was inadmissible because it was not based on Kaylee Kinney's personal knowledge of whether Ms. Wyatt's had been drinking. Lay opinions not based on personal knowledge are inadmissible. State v. Dolan, 118 Wn. App. 323, 329, 73

1. On appeal, the State asserts it would be a "stretch" to call the statement an opinion, but nevertheless argues it was admissible under ER 701. Brief of Respondent at 3-5.

P.3d 1011 (2003) (holding police officer and social worker could not opine about cause of victim's injuries). While Kinney could observe Ms. Wyatt's driving, she had no knowledge of whether Ms. Wyatt had been drinking. Thus her opinion that Ms. Wyatt was a drunk driver was inadmissible.

Next, the opinion was not admissible because it was not helpful to either a clear understanding of the witness's testimony or the determination of a fact in issue. The Rules of Evidence allow lay opinion testimony if it meets three criteria. It must be:

(a) rationally based on the perception of the witness, (b) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue, and (c) not based on scientific, technical, or other specialized knowledge within the scope of rule 702.

ER 701. While the disputed testimony in this case satisfies the first and third criteria, it was not "helpful to a clear understanding of the witness' testimony or the determination of a fact in issue." *Cf.* Brief of Respondent at 4-5.

First, the witness's statement was not helpful to the determination of a fact in issue because the State did not allege Ms. Wyatt had driven while intoxicated or that her reckless driving was due to intoxication. CP 3, VRP 10-11. Next, the statement was not helpful to a clear understanding of Kinney's testimony because her testimony did not in the least require clarification: she merely offered her detailed observations of Ms. Wyatt's driving. VRP 30-49. Moreover, as the State points out, there was no discussion of possible intoxication or drinking during Kinney's testimony or, indeed, the rest of the trial. Brief of Respondent at 5. Thus, the statement that Ms. Wyatt was driving drunk was more confusing than clarifying.

To the extent the statement was probative, it was probative only for its unfairly prejudicial value. The State argues the statement explained to the jury the impression Ms. Wyatt's driving made on Kinney: that Kinney thought Ms. Wyatt's driving was so bad she must have been drunk. Brief of Respondent at 4-5. In other words, the statement provided proof of Ms. Wyatt's bad

driving in addition to Kinney's description of the manner in which Ms. Wyatt allegedly drove.

But Ms. Wyatt was not drunk and Kinney was not actually reporting a drunk driver. Accordingly, this kind of proof is exactly the type of confusing and unfairly prejudicial evidence ER 403 is designed to avoid. ER 403 (requiring a court to exclude relevant evidence if its probative value is "substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury"). See Appellant's Brief at 20-23.

What was probative and fairly prejudicial from Kinney's testimony was the detailed description of how Ms. Wyatt drove. By contrast, the only probative value to the statement that she was a drunk driver was its unfairly prejudicial message that Kinney, without any substantiating evidence, believed Ms. Wyatt to be drunk.

For these reasons and the reasons set forth in Appellant's Brief at 17-26, the trial court abused its discretion in admitting Kinney's statement, that error

harmed Ms. Wyatt, and this Court should reverse her conviction.

Point II: Excluding Trooper Orf's Opinion that Ms. Wyatt Drove Negligently on Relevance Grounds Was an Abuse of Discretion

The trial court improperly denied Ms. Wyatt's request to question Trooper Orf about his opinion as to how she drove the night of the accident, in other words, his expert accident reconstruction testimony. Expert testimony is admissible if a) it is generally accepted in the relevant scientific community, b) the witness qualifies as an expert, and c) the expert's testimony would be helpful to the trier of fact. ER 702; State v. Copeland, 130 Wn.2d 244, 256, 922 P.2d 1304 (1996). The State concedes Orf qualified as an expert. Brief of Respondent at 11. It does not suggest the science was not accepted by the scientific community. See State v. Phillips, 123 Wn. App. 761, 766, 98 P.3d 838 (2004) (noting trial courts routinely admit evidence from qualified accident reconstruction experts). Its only real argument under ER 702 is that

the evidence was irrelevant. Brief of Respondent at 10, 15.

The State's relevance argument fails because the evidence was extremely relevant and helpful to the jury. Expert testimony is helpful to the jury if it concerns matters beyond the common knowledge of the average layperson and is not misleading. State v. Groth, 163 Wn. App. 548, 564, 261 P.3d 183 (2011). Courts generally interpret possible helpfulness to the trier of fact broadly and favor admissibility in doubtful cases. *Id.*; see State v. Bottrell, 103 Wn. App. 706, 717-18, 14 P.3d 164 (2000) (holding trial court abused its discretion in excluding doctor's testimony that would have shed light on defendant's intent).

Here, Orf's testimony would have been helpful to the jury. See Appellant's Brief at 28-29. His accident reconstruction efforts comprised a matter beyond the common knowledge of the average layperson. See Phillips, 123 Wn. App. 761, 766. These efforts led him to believe Ms. Wyatt drove negligently, a conclusion

that could not be viewed as misleading, even though it was opposed to the State's theory of the case. Indeed, the State highlights the evidence's relevance with the remark that Orf's testimony would have been a "windfall" for Wyatt. Brief of Respondent at 16. Only highly relevant testimony could have had such an impact on the case.

Instead of truly making a relevance argument, the State argues its own witness's investigation was so deficient "it would have been difficult to establish a foundation for an expert opinion under ER 702." *Id.* Brief of Respondent at 15, 11-16. But the quality of the scientific investigation goes to the weight, not the admissibility of the evidence. State v. Gregory, 158 Wn.2d 759, 830, 147 P.3d 1201 (2006) ("whether a given scientific technique has been performed correctly in a particular instance, *i.e.*, whether laboratory error has occurred, goes to its weight, not admissibility."). Under these circumstances, the State failed to explain why Orf's testimony should have been excluded on relevance or any other grounds.

Finally, the State's suggestion that Orf's testimony was inadmissible because, if the situation were different, he could not have testified Ms. Wyatt drove recklessly, does not withstand scrutiny. See Brief of Respondent at 16. First, as explained in Appellant's Brief, opinion testimony that "embraces an ultimate issue to be decided by the trier of fact" is admissible. ER 704; State v. Montgomery, 163 Wn.2d 577, 590, 183 P.3d 267 (2008).

Even more significantly, the reason a witness cannot opine as to a defendant's guilt is that such an opinion violates the *accused's* constitutional right to a jury trial, including the right to have the jury independently determine the facts. State v. Demery, 144 Wn.2d 753, 759, 30 P.3d 1278 (2001), *cited in*, State v. King, 167 Wn.2d 324, 331, 219 P.3d 642 (2009). While the Legislature laudably gives victims certain statutory rights, RCW 7.69 et seq., our constitutional trial rights protect persons accused of crimes. U.S. Const. amends. V, VI, XIV; Wash. Const. art. I, §§ 3, 22. No constitutional consideration prevents a witness

from providing exculpatory testimony at a criminal trial.

Indeed, the trial court's refusal to allow Ms. Wyatt to question Trooper Orf about his opinion as to how she drove violated her right to present a defense. The right to present defense witnesses is a fundamental element of due process of law. State v. Ellis, 136 Wn.2d 498, 527, 963 P.2d 843 (1998). Washington defines the right to present witnesses as a right to present material and relevant testimony. State v. Roberts, 80 Wn. App. 342, 350-51, 908 P.2d 892 (1996). For these reasons, the trial court's exclusion of Orf's opinion, far from somehow preventing "prejudice" to the State, Brief of Respondent at 16-17, violated Ms. Wyatt's constitutional rights.

For these reasons and the reasons set forth in Appellant's Brief at 26-36, the trial court abused its discretion in excluding Orf's testimony, this error harmed Ms. Wyatt, and this Court should reverse her conviction.

* * * * *

For the remainder of her arguments, Ms. Wyatt relies on Appellant's Brief.

II. CONCLUSION

For all of these reasons and the reasons set forth in Appellant's Brief, Shila Jean Wyatt respectfully requests this Court to reverse her conviction.

Dated this 12th day of October 2012.

Respectfully submitted,

/s/ Carol Elewski
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Attorney for Appellant

CERTIFICATE OF SERVICE

I certify that on this 12th day of October 2012, I caused a true and correct copy of Appellant's Reply Brief to be served, by e-filing, on:

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