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Court of Appeals  
Division II  
State of Washington  
7/12/2018 4:52 PM  
No. 51434-6-II

COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION II

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STATE OF WASHINGTON

V.

JEFFREY GIBLIN

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BRIEF OF APPELLANT

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A. Assignments of Error

Assignments of Error

1. The trial court abused its discretion in allowing lay opinion testimony of Brian Loredo of Mr. Giblin's intent.
2. The trial court abused its discretion in denying lay opinion testimony of Kome Eteuati of Mr. Giblin's intent.

Issues Pertaining to Assignments of Error

1. Did the trial court abuse its discretion in allowing lay opinion testimony of Brian Loredo that Mr. Giblin's did not intend to stop his BMW until he hit Brian's Tesla?
2. Did the trial court abuse its discretion in denying lay opinion testimony of Kome Eteuati that Mr. Giblin was not aware of Abel Loredo's presence between the cars at the time of the collision?

B. Statement of Facts

What started as a senseless act of "road rage" ended when a bystander literally got caught in the middle between two enraged participants and had to have his leg amputated. The primary issue on appeal is intrinsically related with the primary issue at trial: what was the intent of the defendant at the time the victim was injured? Although the trial court admitted the testimony of one witness of Mr. Giblin's intent to

crash his car, it suppressed the testimony of a second witness of his lack of intent.

The jury heard from multiple witnesses to the road rage incident, including both drivers, both front seat passengers, and three passersby. On September 10, 2016, Brian<sup>1</sup> Loredo was driving his mint condition 2014 Tesla near Puyallup in Pierce County towards I-5. RP, 229-30. His brother, Abel Loredo, was in the front passenger seat. As Brian drove on the on-ramp from Canyon Road onto Highway 512 in heavy traffic, there was a white BMW trying to merge in. RP, 306-07. Brian drove his Tesla close to the next car, “cutting off” the BMW and preventing it from getting into the lane. RP, 307, 627. The driver of the BMW, appellant Jeffrey Giblin, pulled behind the Tesla and “flipped off” Brian. RP, 231. Brian and Abel returned the favor and flipped Mr. Giblin off. RP, 379, 628.

As the vehicles got onto Highway 512 and their speeds increased, the BMW accelerated real fast and drove around the Tesla. RP, 308. The Loredo brothers testified the BMW was being driven “aggressive” and “erratic,” and the driver did not seem to care whether it hit the Tesla or any other vehicle on the highway. RP, 235-36, 310. The BMW was speeding up and braking suddenly. RP, 240-41. On the other hand, the

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<sup>1</sup> The Loredo brothers are referred to by their first names to avoid confusion.

Giblin described the BMW as the aggressor in a game of “cat and mouse.” RP, 628. At some point, Abel yelled out the window, “Pull over. We’re going to fuck you up in front of your son.” RP, 631. Eventually, the Tesla passed the BMW and continued onto the intersection of I-5 and Highway 16. RP, 242.

As the Tesla approached the intersection, Brian noticed the BMW was behind him again. RP, 245. The BMW went around the Tesla at a high rate of speed and nearly collided with the Tesla, causing Brian to swerve to avoid a collision. RP, 245-46. Brian thought his Tesla had been hit and started cussing. RP, 246. Both cars pulled over to the side of the road. RP, 246. Mr. Giblin testified he turned to his son and said, “I’ve got to get out and try to calm this down,” hoping he could de-escalate the conflict. RP, 636-37.

At that point, the testimony of the participants differs somewhat about what happened next. The Loredos testified that Mr. Giblin got out of BMW and started walking back towards the Tesla. RP, 249. Abel grabbed Brian and told him, “Don’t get out of the car.” RP, 363. Nevertheless, Brian got out of the Tesla and the verbal assaults began. Brian yelled, “You got to be fucking crazy. You got a goddamn kid in the car.” RP, 251. Mr. Giblin responded, “Fuck you, you spick, little shit. I’ll beat your ass.” RP, 252. Brian continued cussing at Mr. Giblin, calling

him “motherfucker, bitch, shit, that kind of stuff.” RP, 252. According to Brian, Mr. Giblin then swung at him, grazing the top of his head. RP, 252. Brian then swung back, hitting Mr. Giblin and pushing him into his car door. RP, 253.

Brian turned and walked back to his Tesla. RP, 253. He was “getting back into his car.” RP, 253. As he did so, Abel stepped out of the passenger side of the Tesla, closed the car door, and walked to the front of the car. RP, 255-56. Abel asked, “Are you good?” Brian responded, “Dude’s tripping.” RP, 256. Abel said, “Get the fuck in the car. Let’s get the fuck out of here.” RP, 365. Abel saw Mr. Giblin turn and look over his shoulder. RP, 367. Brian was standing in front of the Tesla close to the driver’s side when he heard Abel, who was standing in front of the Tesla, say, “Watch out.” RP, 257. Brian looked over and saw the rear lights of the BMW illuminate and heard the car engine rev, and he jumped to the side. RP, 257-58. As the BMW slammed into the Tesla, Abel jumped straight up, pinning his leg between the two vehicles. RP, 258-59. The BMW then pulled away. RP, 259.

On the other hand, Mr. Giblin and his son, Jonah, testified that after Mr. Giblin got out of his car, he took two steps towards the Tesla and said, “I don’t know what this is about. . . We want nothing to do with this.” RP, 638, 668. Jonah Giblin saw his dad hold up his hands halfway

up as if to say, “What is going on?” RP, 561. At that point, Brian “sucker punched” Mr. Giblin with his right fist on the left side of his face. RP, 638, 562. Mr. Giblin did not punch Brian. RP, 580, 669. Mr. Giblin said, “I can’t believe you just hit me. You sucker punched me when I’m trying to de-escalation [sic].” RP, 638. He then returned to his car, which was still running, put it in gear, and “stomped on the accelerator.” RP, 638-39. Fearing for his safety and the safety of his son, however, he accidentally put the stick shift vehicle into reverse instead of a forward gear. RP, 638-39, 640, 683. He looked briefly in his rear view mirror for on-coming traffic, saw Brian getting into the Tesla and did not see Abel. RP, 639. Jonah Giblin did not see his father look over his shoulder. RP, 565. Realizing he was going backwards instead of forward, Mr. Giblin “hit his brakes” at the same moment the cars collided. RP, 639. Still fearing for his safety, he decided not to remain at the scene of the collision. RP, 642. Mr. Giblin did not purposely hit the Tesla nor did he intend to injure Abel Loreda. RP, 644. His intent was simply to flee the scene at that point. RP, 673.

Brian looked down and saw that Abel’s leg was severely damaged. RP, 259-60. He pulled off his belt to use it as a tourniquet. RP, 259. The leg was later surgically amputated by Dr. Long Duc Tran at Trauma Trust. RP, 325-41. The leg is amputated three inches below the knee. RP, 370.

A passerby, Kome Eteuati, observed the two vehicles collide and Abel get pinned between the vehicle. RP, 120-21. He could not tell if the driver of the BMW looked in his rearview mirror before reversing. RP, 161. Nor could he tell if the driver of the BMW was aware of Abel's presence behind his car. RP, 161. He decided to chase the BMW. RP, 122. He took a couple of photos and a short video of the BMW driving north on Highway 16. RP, 123. Those pictures were later used by the State Patrol to identify the license plate of the BMW and the registered owner as Jeffrey Giblin. RP, 183.

The issue of whether Mr. Giblin intended to assault Abel Loredó came up twice during the State's case-in-chief. The first time was during the testimony of Mr. Eteuati. Outside the presence of the jury, the following occurred:

MS. LUND: I'm looking at the transcript of the telephone taped interview. He volunteered, this is not in response to a question that I saw anyway, that "I honestly believe, sir, his intention was to hit the vehicle and drive off. But didn't realize the guy was between both cars, you know. It might have been an accident, but it was still like wrong, man."

The detective responded with, "Right. So you believe his intention was to hit the car?"

Answer: "Correct. Yes, I don't think his intention was to crush the guy, you know."

Detective: "Can you describe the car that you were following."

And then, of course, goes into a car description. Later on the detective asks, "Could you see if the driver of

the first car, the BMW, was looking when he backed up at all or could you tell?

"Honestly, I don't -- I don't think I was. I mean, honestly, sir, I don't think he" -- and then it stops. I believe those are the statements on that point.

In the defense interview of the witness, he indicated -- he, meaning the witness -- that he did not see the driver of the BMW look back as he did this, meaning back up. But said the driver could have been looking in one of his mirrors. I believe that the witness doesn't know. In other words, conceivably it could have been happening, but he doesn't know.

And when I asked Mr. Eteuati what his basis was for these earlier statements in terms of whether or not he did or did not mean to hit the man between the two cars, he didn't see anything. He doesn't know that. I believe that it comes frankly from his desire or wish that that would be the case because I was very clear when I asked him, if this was based upon something you saw and observed and that was your conclusion and that is one thing. If this is just something you think wondering about, hoping about or thinking about, then that is a different case. I believe his answers, because you might imagine it was important, I wanted to make sure I knew what the basis of his information was, which was the latter, which is that he has no idea. He simply has no idea.

He didn't see -- as he's testified, he saw nothing of any of the driving. He saw nothing even of the physical exchange between the men. His first observations come from watching the Tesla occupants walk back to their car and did not see or could not see what, if anything, the actual driver Mr. Giblin was doing in the BMW just before or during reversing into the Tesla.

So the State would have a motion in limine as to any references to those observations -- excuse me, those conclusions not based on personal knowledge or personal observation. And I recognize counsel is going to want to get those in and may voir dire the witness, obviously if that's her wish. But that's what I'm aware of at this juncture.

THE COURT: Ms. Carnell.

MS. CARNELL: And, Your Honor, I would actually be asking to have the ability to ask the witness about those statements. One, I think it goes to his state of mind. Two, even if it was just to ask him, I mean, you don't know whether or not Mr. Giblin knew that Mr. Loreda was in between the two cars. I mean, he does make fairly clear statements about honestly believing, sir, that his intention was to hit the vehicle and drive off, but he didn't realize that the guy was between both vehicles. And I think that's monumental to the issues in this case and Mr. Giblin's defense and his right to a fair trial.

I also think that given the fact that the witness, which I'd point out a couple of times, instead of simply answering the question that he was asked by Ms. Lund decided that he was going to let the jury know that because he knew that what had happened was wrong, that this is what I guess he would have done. I'm not a hundred percent sure where he was going, but I get to ask him about these things.

MS. LUND: Response. One, I'm not aware of any admission foundation for which state of mind would be allowed based on lack of personal knowledge. That's the bottom line. Wishful thinking, yes. Bottom line is Mr. Eteuati does not know. She can certainly ask him, do you know if he could see him. Do you know if he was looking. That is all fair game. I completely agree with that. But attributing this witness's belief as to what he thinks this man could or could not see from the witness's limited vantage point and lack of information is not appropriate and is without personal knowledge and is without foundation.

As for any questions he may have asked or answered on direct, I believe those were each handled at the time at which the questions were asked.

So fair game in terms of do you know whether or not he was able to see him. Do you know whether or not he actually did see him. I understand that. But not his belief that he didn't or more importantly what his intent was or

was not to do is not appropriate based upon this witness's limited knowledge. And again, state of mind is not an exception to the lack of knowledge.

THE COURT: I'm going to grant the State's motion with respect to his statements about the defendant's intent. Not only does he lack any personal knowledge that could inform him of that, I also think that would be an improper comment on the defendant's guilt and it invades the province of the jury.

RP, 131-35.

While Brian Loreda was testifying, the following colloquy occurred:

Q. Was there anything about the way or the manner in which the car backed up that gave you any concern for it being out of control or inadvertent or --

A. Well, it just kept going.

Q. What do you mean?

A. Um, Well, you know, if you -- I guess if somebody -- to me there was no question as far as the intent.

Q. Why do you say that?

MS. CARNELL: I'm going to object, Your Honor. It's a statement on the ultimate issue.

MS. LUND: Asking for his opinion based on what he observed.

THE COURT: I'm going to overrule the objection. You can answer.

BY MS. LUND:

Q. Based on what you observed, why do you think that?

A. Because, you know, the car if you -- let's say somebody accidentally puts a car reverse, you know, when you step on the gas, once you realize -- I've done it several times to my car. As soon as I've done that, I know to stop. But it just seemed that there was no intent to stop. It just

kept going and kept going and kept going until it hit my car.

RP, 266-67.

During deliberations, the jury sent out a question that reads: “Does the intent to strike the Tesla, with knowledge that Abel and Brian Loredo were in or near the Tesla, constitute intent to inflict great bodily harm.” CP, 169. The Court instructed the jury to reread their instructions. CP, 169.

Mr. Giblin was convicted of first degree assault and leaving the scene of an injury accident. CP, 40, 171. A charge of second degree assault was dismissed at the time of sentencing. He was sentenced to 136 months. Sentencing RP, 11.

C. Argument

1. The trial court abused its discretion in allowing lay opinion testimony of Brian Loredo of Mr. Giblin’s intent.

Lay opinion testimony is governed by ER 701. ER 701 reads: “If the witness is not testifying as an expert, the witness’ testimony in the form of opinions or inferences is limited to those opinions or inferences which are (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.” The decision whether to admit opinion testimony generally lies within the discretion of the trial court. *Seattle v. Heatley*, 70 Wn.App. 573, 854 P.2d 658 (1993).

In this case two opinions were proffered by the parties on the central issue in the case: intent. The trial court abused its discretion by allowing Brian Loreda to testify that, in his opinion, Mr. Giblin had “no intent to stop” until he hit his car but refusing the proffered testimony of Kome Eteuati that he did not intend an assault.

Generally, lay witnesses are allowed to opine on a variety of topics based upon their observations. Examples include the speed of a vehicle, *Clevenger v. Fonseca*, 55 Wn.2d 25, 345 P.2d 1098 (1959), a person’s level of intoxication, *Seattle v. Heatley*, 70 Wn.App. 573, 854 P.2d 658 (1993), or that a murder scene appeared to have been staged. *State v. Kunze*, 97 Wn.App 832, 988 P.2d 977 (1999).

Courts have distinguished between lay opinions based upon observations, however, and opinion testimony as to intent. Lay opinions, “particularly expressions of personal belief, as to the guilt of the defendant, the intent of the accused, or the veracity of witnesses,” are generally not admissible. *State v. Montgomery*, 163 Wn.2d 577, 591, 183 P.3d (2008). Courts sometimes give more leeway to expert testimony of intent. See *State v. Baird*, 83 Wn.App. 477, 922 P.2d 157 (1996) (opinion

testimony that knife wounds were inflicted deliberately was properly admitted).

Mr. Giblin first assigns error to the admission of Brian Loredo's opinion that he "did not intend to stop" until he hit his car. This opinion as to his intent was not admissible, was timely objected to, and should have been excluded.

2. The trial court abused its discretion in denying lay opinion testimony of Kome Eteuati of Mr. Giblin's intent.

If the Court felt the opinion of Brian Loredo was admissible, however, it should have also admitted the opinion of Mr. Eteuati. Mr. Eteuati would have testified it was not Mr. Giblin's intent to "crush" Abel Loredo. The Court should have allowed either the opinion testimony of both Mr. Eteuati and Brian Loredo or neither. To the extent that Mr. Eteuati's opinion was based upon his brief opportunity to observe went to the weight of his opinion, not its admissibility. It was an abuse of discretion to allow one without the other.

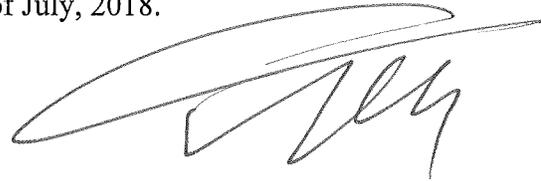
The trial court's decision to admit the opinion of his criminal intent while suppressing the opinion of his innocent intent was not harmless. The dispositive issue in this case was whether Mr. Giblin had an intent to inflict great bodily harm. His disagreement was with the driver of the Tesla, Brian Loredo, not the passenger, Abel Loredo. But it was Abel

who was injured. The jury articulated the central issue very well with their question to the Court, “Does the intent to strike the Tesla, with knowledge that Abel and Brian Loredo were in or near the Tesla, constitute intent to inflict great bodily harm.” CP, 169. Given this central question, improperly allowing one opinion of intent while suppressing another was prejudicial error.

D. Conclusion

This Court should reverse and remand for a new trial.

DATED this 12<sup>th</sup> day of July, 2018.

A handwritten signature in black ink, appearing to read 'T. Weaver', with a long horizontal flourish extending to the right.

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Thomas E. Weaver, WSBA #22488  
Attorney for Defendant

**THE LAW OFFICE OF THOMAS E. WEAVER**

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

STATE OF WASHINGTON, ) Court of Appeals No.: 51434-6-II  
 )  
Plaintiff/Respondent, ) DECLARATION OF SERVICE  
 )  
vs. )  
 )  
JEFFREY GIBLIN, )  
 )  
Defendant/Appellant. )

STATE OF WASHINGTON )  
 )  
COUNTY OF KITSAP )

On July 12, 2018, I e-filed the Brief of Appellant in the above-captioned case with the Washington State Court of Appeals, Division Two; and also designated said document to be sent via email, through the Court of Appeals transmittal system, to the Pierce County Prosecutor ([PCpatcecf@co.pierce.wa.us](mailto:PCpatcecf@co.pierce.wa.us)).

On July 12, 2018, I deposited into the U.S. Mail, first class, postage prepaid, a true and correct copy of the Amended Statement of Arrangements to the defendant:

Jeffrey Giblin, DOC #405744  
Stafford Creek Corrections Center  
191 Constantine Way  
Aberdeen, WA 98520

////  
////

1 I declare under penalty of perjury under the laws of the State of Washington that the foregoing  
2 is true and correct.

3 DATED: July 12, 2018, at Bremerton, Washington.

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6 Alisha Freeman  
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**THE LAW OFFICE OF THOMAS E. WEAVER**

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