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**COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON**

STATE OF WASHINGTON, RESPONDENT

v.

Jeffrey Paul Giblin, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable Shelly K. Speir, Judge

No. 16-1-03685-8

Brief of Respondent

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A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

1. Are defendant's two claims of evidentiary error inadequately developed for review since he contends an admitted perception based ER 701 opinion and an excluded guilt-absolving conclusion should have both been admitted or excluded without meaningful analysis to explain their alleged equivalence or how either ruling justified the reversal of defendant's well-proved convictions for using his BMW to crush a man's leg in a recidivist act of retaliative road rage?
2. Did the court properly admit an ER 701 opinion that defendant deliberately drove his BMW in reverse as it was given by a nearby witness to an entire road-rage incident of which that driving was apart; and did the court appropriately exclude a far more removed passerby's guilt-absolving conclusion about whether defendant crushed the victim's leg against a car with specific intent to inflict great bodily harm when it was based on an unfounded assumption that invaded the jury's province of deciding defendant's guilt?

B. STATEMENT OF THE CASE.

1. PROCEDURE

Defendant proceeded to trial charged by amended information with first degree assault (Ct. I),¹ conviction for which at trial required jurors to conclude he purposely crushed his victim's leg between two cars with the specific intent to inflict great bodily harm. *Id.* Defendant also proceeded to trial for hit and run (Ct. II)² as well as second degree assault (Ct.III). CP 40-

¹ RCW 9A.36.011(1)(a), CP 1-4, 40-42, 131-33 (Inst.8-10).

² *Id.*; RCW 46.52.020(1), .020(4)(b).

42; 1RP(1/9) 15-16.³ Yet at trial he admitted to causing the injury that took his victim's leg by striking a Tesla with the BMW defendant also used to flee the scene. 5RP 665-66.

Over a defense objection, the court excluded a conclusion conveyed at passerby-witness Kome Eteuai's police interview; wherein, he expressed an admittedly uninformed doubt about whether defendant had an assaultive mental state when he crushed victim Abel Loredo's⁴ leg between the back of a BMW defendant was driving and a parked Tesla that carried Abel to the scene with his brother Brian. 2RP (1/16) 131-35. The court determined Eteuai lacked personal knowledge to inform his conclusion, which wrongly invaded the jury's province by commenting on defendant's guilt. *Id.* at 135. Eteuai's conclusion was derived from what little he saw of how the road-rage encounter ended from a passenger window of a truck as he drove by on I-5.⁵ 2RP (1/16) 115-17. Eteuai did not see if defendant looked in his mirrors or behind him as defendant reversed in Abel's direction.⁶

Over another defense objection, Brian testified about observing the moment defendant reversed his BMW toward them. 3RP 226-67. Brian's perception of that act's deliberateness was based on observations he made

³ The verbatim report of proceedings will be referred to by volume and date.

⁴ The Loredos are referred to by first name to avoid confusion. No disrespect is intended.

⁵ Interstate 5.

⁶ 2RP (1/16) 132.

from the far better vantage of where he stood in the roadway roughly 15 feet behind the reversing BMW fully aware of the context in which it reversed due to his presence with Abel throughout the sequence of events leading to that moment.⁷ Brian clarified his opinion defendant intended to reverse the BMW was based on the absence of a manifest attempt on defendant's part to stop once he accelerated toward them across the gap to where he crushed Abel's leg between the BMW and Brian's parked Tesla. RP 266-67.

Defendant's guilt was also proved by testimony from 15 witnesses and 80 exhibits admitted over a 7-day trial. CP 232. A State Patrol collision technician was among those witnesses. 4RP 409. Based on his experience, drivers who inadvertently shift into an incorrect gear either cause minor-contact collisions or avoid collision through rapid correction. 4RP 440-41. Yet the collision defendant caused propelled his BMW over the Tesla's hood despite the intervening barrier of Abel's leg. 4RP 469-71.

The defense called defendant's adolescent son and defendant to testify. 4RP 554; 5RP 623. They claimed the BMW was mistakenly shifted into reverse.⁸ Absence of mistake was corroborated by a rebuttal witness who described an earlier road-rage encounter wherein defendant confronted parents accompanied by young children in a supermarket parking lot after

⁷ 3RP 231-35, 236, 238-41, 244-61, 265-268.

⁸ 4RP 564, 565-66; 5RP 638-39.

yelling profanities at them on the roadway.⁹ That encounter also ended in physical violence. 1RP (1/24) 30-34.

The jury convicted defendant as charged. 2RP 136. Abel addressed the court at sentencing. 6RP 12. After placing his prosthetic leg on counsel table, he described how his life had been adversely affected by defendant's crimes. 6RP 12-15. Abel was followed by defendant's friend, who joined defendant's request for leniency. 6 RP 18- 19. Defendant apologized. 6RP 21-23. The court decided he deserved a high-end sentence. 6RP 23.¹⁰ CP 212-225; 6RP 23. A notice of appeal was timely filed. CP 226.

2. FACTS

Abel is a Marine Corps veteran. 3RP 303. He moved to the Tacoma area after his service. 3RP 302-303. On September 10, 2016, he helped his brother Brian move into a new home. 3RP 304. They first encountered defendant while merging onto SR 512¹¹ in Brian's Tesla. 3RP 304-06. Defendant drove his BMW along the on-ramp's shoulder to merge ahead of them. *Id.*; 3RP 308. Brian would not yield. 3RP 307. Defendant claimed he was not angered by Brian's response.¹² Yet witnesses watched defendant taunt Brian from SR 512 to I-5 with aggressive driving.¹³ On I-5, defendant

⁹ 1RP 29, 31-33, 34, 38.

¹⁰ The second degree assault was dismissed because it merged with Count I. CP 231; 6RP 3-4. Clerks papers above No. 230 anticipate the numbering of supplemental designations.

¹¹ State Route 512.

¹² 5RP 627-28, 631, 632, 636, 651-54.

¹³ 2RP (1/16) 63-67, 100-02; 3RP 231-67, 309-12.

maneuvered in front of Brian, then slammed on his brakes, forcing Brian to swerve into another lane. 3RP 239-41. Brian pulled to the shoulder near the SR 16 exit.¹⁴ He thought defendant's abrupt braking brought their cars into contact. Defendant parked his BMW in front of Brian's Tesla. 3RP 246-49.

Both men exited their cars. *Id.* They met near the back of the BMW. 3RP 249. Defendant, at 6 feet and 8 inches, towered 9 inches over Brian. 3RP 253; 4RP 575. An argument ensued. 3RP 250. Brian saw defendant's young son in the BMW. 3RP 251. Brian told defendant he had to be "fucking crazy" to drive so aggressively with a child in the car. 3RP 251. Defendant replied, "Fuck you," "you spick,"¹⁵ but denied doing so.¹⁶ Other evidence of defendant's racially charged road rage appeared in testimony given by his son. That adolescent believed Abel and Brian might be gang affiliated because he could not reconcile an incongruity he perceived to exist between their assumed ethnicity and the quality of their car. 4RP 576-579.

The altercation between Brian and defendant escalated.¹⁷ Defendant denied exchanging blows. 5RP 638. But a passerby saw him throw the first punch.¹⁸ Brian pushed defendant, causing him to stumble into the door of

¹⁴ 3RP 241-46.

¹⁵ 3RP 251-52.

¹⁶ 5RP 637-38.

¹⁷ 2RP (1/16) 91; 3RP 252-53, 364-65; 5RP 638.

¹⁸ 01/16/2018 2RP 73.

his BMW. 3RP 253. Defendant moved into its driver's seat and Brian walked toward his Tesla as Abel exited it to speak with him.¹⁹

Defendant revved his engine. 3RP 257, 367. Abel turned. *Id.* Abel saw defendant look back at him. *Id.* Defendant reversed the BMW toward Abel as Abel stood between it and Brian's Tesla. *Id.* Abel jumped.²⁰ The effort saved his entire lower body from being smashed. *Id.* But his left leg did not clear the point of impact where it was crushed by the BMW amid a violent collision that propelled the BMW onto the Tesla's hood. The two cars acted like a pair of scissors in the shearing force they exerted on Abel's leg. 4RP 437-438. Defendant accelerated forward onto the freeway. 3RP 368. He denied seeing Abel. 5RP 639. But Abel saw defendant looking at him through the BMW's driver's side mirror as defendant fled. 3RP 368.

Abel then looked down to see blood flow from his nearly severed leg. 3RP 368-69. He applied a belt as a makeshift tourniquet to slow the bleeding. *Id.* It was replaced with a medical tourniquet.²¹ Yet those efforts did not save his lower leg. 3RP 330. Its bones were broken out of place, and the surrounding skin and muscle were peeled away, or "deglov[ed]." 3RP 326. It was amputated 3 inches below the knee. 3RP 370-75. By the time of trial, he relied on a prosthetic to walk. He ate a special diet to keep what

¹⁹ 3RP 253, 255-56, 365-66.

²⁰ 3RP 302, 367-68.

²¹ 2RP (1/16) 126.

was left of his leg from swelling, and other changes had to be made for him to adapt his daily life to the hardships of the injury defendant caused. *Id.*

Passerby Eteuati did not see defendant's aggressive driving, nor did he see any part of defendant's altercation with Brian. 2RP (1/16) 115-17. Eteuati first saw the cars on the shoulder of I-5 as he drove by just in time to see the BMW slam into the Tesla, pin Abel, and speed away. *Id.* at 120. Eteuati followed defendant. *Id.* at 122-23. Yet defendant sped away despite Eteuati honking his horn and signaling for defendant to pull over. *Id.* at 122-123. Eteuati captured the fleeing BMW on video before driving back to help Abel and provide defendant's license plate number to police.²²

Police responded to the scene.²³ Photographs were taken of all the damage, bloodshed and debris.²⁴ Defendant maintained the collision was caused by a gear-shifting mishap.²⁵ His son compared it to a parking lot fender bender. 4RP 565. But a reconstruction of the collision revealed the damage to be consistent with the BMW's back end grinding over the Tesla's hood,²⁶ which required more velocity and consequent force than could be generated by the fender bender defendant's son described. 4RP 476.²⁷

²² CP 232-43, Ex. 24; 2RP (1/16) 123, 140, 146, 175.

²³ 2RP (1/16) 163, 190; 4RP 407, 450.

²⁴ CP 232-43, Ex. 58, 65, 69, 73; 4RP 417-21.

²⁵ 5RP 639.

²⁶ CP 232-43, Ex. 106, 109, 110; 4RP 469-71.

²⁷ CP 232-43, Ex. 69; 4RP 427-28, 463-64.

Police did not examine defendant's BMW because it could not be immediately found. 4RP 459. At trial, defendant admitted to committing the crime of hit and run. 5RP 665. Tracking technology was used to find him. 4RP 494-500. His identity was broadcasted to the public. 4RP 459. Despite seeing the broadcast, he waited 4 days before contacting police through a third party, for he "didn't feel it was prudent" to contact police right after he fled from the collision scene.²⁸

C. ARGUMENT.

1. THIS COURT SHOULD WITHHOLD REVIEW FROM DEFENDANT'S EVIDENTIARY ERROR CLAIMS SINCE HE CONTENDS A RIGHTLY ADMITTED ER 701 OPINION AND PROPERLY EXCLUDED LEGAL CONCLUSION REQUIRED LIKE TREATMENT AT TRIAL, BUT HE FAILS TO PROVIDE MEANINGFUL ANALYSIS OF THEIR ALLEGED EQUIVALENCE OR HOW IT JUSTIFIES REVERSING THE JURY'S VERDICT.

Arguments presented without supporting authority or meaningful analysis should not be reviewed. *Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 828 P.2d 549 (1992).²⁹ Fleeting and conclusory arguments are not enough. *Id.* Appellate courts typically will not scour a record to construct arguments for a litigant. *Matter of Estate of Lint*, 135 Wn.2d 518,

²⁸ *Id.*; 5RP 643; 4RP 459-460.

²⁹ See also *State v. Elliott*, 114 Wn.2d 6, 15, 785 P.2d 440 (1990); *Saunders v. Lloyd's of London*, 113 Wn.2d 330, 345, 779 P.2d 249 (1989); *In re Disciplinary Proceeding against Whitney*, 155 Wn.2d 451, 467, 120 P.3d 550 (2005); *State v. Lazcano*, 188 Wn.App. 338, 355, 354 P.3d 233 (2015); 3 Wash. Prac., Rules Practice RAP 10.3 (8th ed.).

532, 957 P.2d 755 (1998). Analysis first developed in a reply arrives too late. *Bosely*, 118 Wn.2d at 809; *State v. Orozco*, 114 Wn.App. 17, 21, 186 P.3d 1078 (2008). Summary rejection of undeveloped claims is a fair and legally accurate result. *Id.*; RAP 10.3(a).

Defendant failed to supply meaningful analysis to connect a generic recitation of ER 701 cases to the alleged inadmissibility of Brian's opinion that the BMW was not out-of-control when it reversed. No explanation of the alleged inadmissibility is provided. Instead, defendant exclusively relies on the relational argument that Brian's opinion was inadmissible for the same unstated reason as Eteuati's conclusion about defendant's specific intent. *Id.* Or Eteuati's conclusion should have been admitted as well.

Requiring a response to undeveloped claims unfairly forces the State to imagine the kind of supporting arguments one might make, then explain why they lack merit. Still, the claimed equivalence is undermined by clear differences to explain the disparate treatment. The court properly admitted Brian's ER 701 opinion defendant intentionally reversed his BMW, for the deliberateness of that act was based on Brian's perception of it from several feet behind the BMW and was informed by the immediate context. Whereas Eteuati's remark invaded the jury's province by conveying an uninformed and guilt-absolving conclusion defendant reversed without specific intent to harm Abel. Defendant's undeveloped claims should fail.

2. THE TRIAL COURT PROPERLY ADMITTED AN ER 701 OPINION DEFENDANT DELIBERATELY REVERSED HIS CAR AS THE OPINION WAS GIVEN BY A WITNESS STANDING BEHIND IT AWARE OF THE ROAD-RAGE INCIDENT IN WHICH THE DRIVING OCCURRED, AND THE COURT RIGHTLY EXCLUDED A BASELESS CONCLUSION OF A FAR MORE REMOVED PASSERBY WHO JUST GUESSED DEFENDANT LACKED A SPECIFIC INTENT TO HARM THE MAN WHOSE LEG WAS CRUSHED WHEN DEFENDANT CRASHED INTO HIM.

Evidentiary rules are construed to secure fairness and to ensure truth will be ascertained. ER 102. "Whether or not to admit evidence is a very contextually driven decision." *State v. We*, 138 Wn.App. 716, 723, 158 P.3d 1228 (2007). It depends on the case. *Id.* And that is why it is a decision committed to the trial judge's discretion. *Id.* Evidentiary rulings are only reversible for a manifest abuse of discretion. *State v. Jones*, 71 Wn.App. 798, 824, 863 P.2d 85 (1993). Discretion is abused if evidence is admitted or excluded for untenable reasons. *State v. Williams*, 137 Wn.App. 736, 743, 154 P.3d 322 (2007). Appellants are burdened to prove discretion has been abused. Evidentiary rulings are affirmed on any supported ground. *Id.*

Trial courts properly exercise discretion to admit opinion testimony under ER 701 if they allow lay witnesses to express opinions or inferences based on rational perception that is helpful juror understanding. *State v. Montgomery*, 163 Wn.2d 577, 591, 183 P.3d 267 (2008). Such opinions are not objectionable merely because they embrace ultimate factual issues

jurors must decide. ER 704; *City of Seattle v. Heatley*, 70 Wn.App. 573, 578, 854 P.658 (1993). Conversely, trial courts must exclude a witness's conclusions about a defendant's innocence or guilt for they invade a jury's exclusive province to decide whether guilt has been proved. *Id.* at 577. The distinction between permissible perception-based opinions and prohibited guilt-designating conclusions depends on the circumstances of each case, to include the following factors:

(1) the type of witness involved, (2) the specific nature of the testimony, (3) the nature of the charges, (4) the type of defense, and (5) the other evidence before the fact finder.

Montgomery, 163 Wn.2d at 591. Review of an ER 701 ruling requires focus on the nature of a convicted defendant's charges to determine whether the testimony told jurors how to decide an essential element of a charge. *State v. Farr-Lenzini*, 93 Wn.App. 453, 462, 970 P.2d 313 (1999).

Defendant seeks reversal of convictions for first degree assault and duty in case of injury or damage to attended vehicle, but then fails to explain how the challenged rulings bear upon the latter offense, especially after his admission to committing hit and run. 5RP 665. The admitted testimony from Brian described defendant's act of reversing his BMW and Eteuati's excluded remark conveyed a conclusion about what defendant was hoping to accomplish through that act. So only the assault is logically at issue. The first degree assault as charged required the State to prove that:

(1) on or about September 10, 2016, defendant assaulted Abel; (2) defendant acted with intent to inflict great bodily harm; (3) the assault (a) was committed with a deadly weapon or by a force or means likely to produce great bodily harm or death; or (b) resulted in the infliction of great bodily harm; and (4) the act occurred in Washington.

CP132 (Inst.9); RCW 9A.36.011(1)(a),(c).³⁰

Since Brian's perception-based opinion described the deliberate manner in which defendant reversed his BMW and Eteuati's excluded conclusion supposed if defendant hoped to harm anyone by reversing, only the *mens rea* element is relevant here. The *mens rea* for first degree assault is "the specific intent to inflict great bodily harm." *State v. Elmi*, 166 Wn.2d 209, 215, 207 P.3d 439 (2009). "Specific intent is defined as intent to produce a specific result, *as opposed to intent to do the physical act that produces the result.*" *Id.* (emphasis added). The latter predicate intent to do an act, like reverse a car, is not the specific intent element of first degree assault. *See Id.* Specific intent also need not match a specific victim. *Id.*

³⁰ Although the challenged evidentiary rulings do not logically pertain to defendant's admitted act of hit and run, the elements of the charged offense of duty in case of personal injury or damage to attended vehicle under RCW 46.52.020 required him to be the driver of a vehicle who is knowingly involved in an accident resulting in injury to any person and fails to carry out his obligation to (1) immediately stop the vehicle at the scene of the accident or as close thereto as possible; (2) immediately return to and remain at the scene of the accident until all duties are fulfilled; (3) give his name, address, insurance company, policy number and vehicle license number and exhibit his driver's license to any person struck or injured or the driver or any occupant of, or any person attending, any vehicle collided with; and (4) Render to any person injured in the accident reasonable assistance, including carrying or making of arrangements for carrying of such person to a physician or hospital for medical treatment if it is apparent that such treatment is necessary or if such carrying is requested by the injured person or on his behalf. CP143-44 (Inst. 20-21).

- a. Brian was rightly allowed to offer his ER 701 opinion defendant deliberately reversed his BMW as it was based on Brian's observation of the driving as well as its context, and did not answer the ultimate question of whether defendant reversed with a specific intent to inflict great bodily harm upon Abel.

The specific intent ultimately at issue in a first degree assault trial is not a defendant's intent to do a physical act that produces a relevant result, like reversing a car. See *Elmi*, 166 Wn.2d at 215. Criminal intent amounting to the crime's *mens rea* element differs from "intent" as commonly used to denote deliberate or volitional acts. RCW 9A.08.010(1)(a); *State v. Deer*, 175 Wn.2d 725, 732, 287 P.3d 539 (2012). Under RCW 9A.08.010 (1)(a):

A person acts with intent or intentionally when he or she acts with the *objective or purpose to accomplish a result which constitutes a crime.*

Id. (emphasis added). Whereas as "intent" as commonly used often means:

The act, fact, or instance of intending [V]olition....

Webster's Third Int'l New Dictionary 1777 (2002). A sizable denotative difference separates a witness in an assault trial predicated on misuse of a car wrongly opining a car was reversed with intent to cause a criminal result, e.g., to inflict harm on a bystander, from a perception-based opinion the car was intentionally reversed, *i.e.*, deliberately driven backward in a volitional act irrespective of the act's purpose or result. *State v. Baird*, 83 Wn.App. 477, 486, 922 P.2d 157 (1996) (properly opined about cut's deliberateness).

Review of the record confirms the trial court correctly interpreted Brian's admitted opinion about defendant intending to reverse his BMW to be a perception-based description of that act's volitional quality. Accurate interpretation of an answer depends on understanding the question. Brian's challenged answer responded to a limited question about whether defendant appeared to be in control of his reversing BMW; the question did not elicit insight into why defendant was reversing or what he hoped to achieve:

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.

3RP 266-67. There was no objection to this exchange, precluding review. ER 103; RAP 2.5(a). An objection contending the answer elicited would be a statement on an ultimate issue was made when the State asked: "What do you mean?" When the objection was overruled, this exchange followed:

Q: Based upon 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 [sic] - I've done it before. ... 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....

3RP 266-67. This answer was not met with a renewed objection and motion to strike, which also precludes review as the trial court was never called on to evaluate the answer's admissibility once received. ER 103; RAP 2.5(a). A court does not abuse its discretion by letting unchallenged answers stand.

Yet had there been a timely objection, the court would have been right to admit Brian's answer under *Montgomery's* five factor test. The first factor turns on the type of witness involved. Brian was a civilian eyewitness to how the BMW reversed who was standing about 15 feet behind it and had experience inadvertently shifting cars into reverse. This made him a lay witness who "may testify as to observations gleaned from his ... senses as well as to inferences arising from those perceptions." *State v. Blake*, 172 Wn.App. 515, 519, 298 P.3d 769 (2012) (sensory-based opinion Blake shot the victim properly admitted). Whether driving is steady enough to appear deliberate or erratic enough to seem out-of-control is precisely the kind of common sense impressions ER 701 allows. *Heatley*, 70 Wn.App. at 579 (unsafe driving); *Farr-Lenzini*, 93 Wn.App. at 463 (erratic driving); *State v. Lewellyn*, 78 Wn.App. 788, 970 P.2d 313 (1999).

Specific nature of the testimony is assessed under the second factor. Brian's answer reflects an attempt by a civilian-lay witness to coherently explain why he did not perceive the BMW to be out-of-control. He did not

opine about anything defendant hoped to achieve by driving backward. But it is that type of element implicating mind reading which causes opinions to exceed ER 701; as occurred *Farr-Lenzini*, where a trooper opined a driver was “attempting to get away from [him] and knew [he] was back there and [was] refusing to stop.” *Farr-Lenzini*, 93 Wn.App. at 463. The comparable that never occurred here would have been for Brian to say defendant was attempting to hit him or Abel, knew they were back there and refused to stop until Abel was crushed. Yet here, Brian’s opinion was confined to his perception the BMW was not out-of-control. His experience driving along with his close perception of the BMW supported a proper inference about the acts that produced rearward movement—shifting, steering, acceleration. See *Elmi*, 166 Wn.2d at 215; *Farr-Lenzini*, 93 Wn.App. at 463.

Nature of the charge is the third factor. The only charge relevant to the way the BMW reversed is first degree assault. That specific intent crime required defendant to reverse his BMW for the specific purpose of inflicting great bodily harm. Proof defendant intentionally reversed his BMW did not prove that element, for he still could have reversed and hit Abel unaware anyone was in the way, or accidentally hit him by misjudging the BMW’s clearance. Pedestrians are accidentally hit by drivers who deliberately drive backward and forward all the time. E.g., *Kennedy v. Sea-Land Serv. Inc.*, 62 Wn.App. 839, 844, 816 P.2d 75 (1991).

Type of defense is factor four. Defendant said that he inadvertently shifted into reverse and accelerated backward unaware anyone was there. SRP 638-39. He claimed to have “no idea [Abel] was back there” and had seen Brian “get into his car.” *Id.* Ignorance of their presence is a defense to first degree assault’s specific intent to inflict great bodily harm. See *Elmi*, 166 Wn.2d at 215. Brian’s opinion offered nothing about this specific intent. His perception of the BMW’s deliberate motion was subject to debate. Yet it was fine for an opinion to support conviction by contradiction. *Blake*, 172 Wn.App. at 523. An example of this appears in *State v. Michalak*, where denial was refuted by a correctly admitted opinion the kick underlying a third degree assault charged “was directed at” the victim officer.³¹

The last factor looks at other evidence before the jury. Defendant’s jury was able to consider the competing accounts of how the BMW reversed in the context of corroborating acts of preceding aggression described by passersby. There was also physical evidence of the crash interpreted by a collision tech, defendant’s flight from the scene while pursued by a good Samaritan wearing out his horn and ER 404(b) evidence of defendant’s earlier road rage to prove absence of mistake. This Court should affirm.

³¹ *State v. Michalak*, No. 49368-3-II, 2017 WL 6018071, at *3 (1 Wash. Ct. App. December 5, 2017) (unpublished). GR 14.1 allows citation to unpublished opinions of the Court of Appeals filed on or after March 1, 2013. The unpublished decision cited above has no precedential value, is not binding on any court, and is cited only for such persuasive value as the court deems appropriate.

- b. Eteuati's interview remark was appropriately excluded as it was an uninformed conclusion that invaded the province of defendant's jury to decide if he reversed the BMW specifically intending inflict great bodily harm on Abel.

Trial courts are to preclude witnesses from expressing their personal beliefs about a defendant's guilt or innocence. *Montgomery*, 163 Wn.2d at 591. The prohibition includes conclusions on whether a defendant possesses the requisite criminal intent to commit an offense. *Id.*; *State v. Mohamed*, 195 Wn.App. 161, 169, 380 P.3d 603 (2016). It is the province of the jury alone to decide if that essential *mens rea* element of an offense on trial has been proved. *Id.*; *Heatley*, 70 Wn.App. at 578. Specific intent crimes require the jury to decide if the defendant intended to produce a specific result which constitutes a crime. *Elmi*, 166 Wn.2d at 215; RCW 9A.08.010 (1)(a). The *mens rea* for first degree assault is "the specific intent to inflict great bodily harm." *Id.* Lay witnesses are likewise precluded from providing ER 701 opinions without personal knowledge of the underlying events since such opinions must be rationally based upon perception. *State v. Dolan*, 118 Wn.App. 323, 329, 73 P.3d 1011 (2003); *Blake*, 172 Wn.App. at, 519.

There is no error in the exclusion of Eteuati's conclusion about what defendant wanted to achieve by reversing his BMW because that conclusion commented on defendant's specific intent to commit first degree assault. During a pre-trial police interview, Eteuati shared:

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.

2RP (1/16) 131. Eteuati thereafter answered questions which revealed he lacked a factual basis for his conclusion:

Q: Could you see if the driver of the first car, the BMW, was looking when he backed up at all or could you tell?

A: Honestly, I don't – I don't think I was. I mean, honestly, sir, I don't think he –

2RP (1/16) 132. He could not see if defendant looked rearward. *Id.* at 151.

When the prosecutor inquired about Eteuati's factual basis for his conclusion, he responded: "[H]e didn't see anything. He doesn't know." *Id.* at 132. He saw nothing of the aggressive driving that preceded the encounter or subsequent interactions. *Id.* at 117, 121, 132, 151, 156. Eteuati put his limited understanding of those events in context. While traveling near the speed limit on I-5, Eteuati saw a man walk toward the Tesla and another between the Tesla and BMW about 15 feet from the BMW. *Id.* at 118-20. Eteuati "Wasn't sure of what was happening." *Id.* at 117. As he continued driving forward down I-5 near the speed limit he saw the BMW reverse and hit the Tesla, smashing the guy in between. *Id.* at 120. Because defendant immediately tried to flee, Eteuati decided to chase him. *Id.* at 121.

The State moved to exclude Eteuati's conclusion about defendant's mental state while reversing before Eteuati's cross-examination began. *Id.* at 129-30. That motion was granted in a ruling explained by the trial court:

I'm going to grant the State's motion with respect to [Eteuati's] statements about the defendant's intent. Not only does [Eteuati] 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.

2 (1/16) 135.

Defendant failed to prove the ruling was an abuse of discretion. "The evil sought to be avoided by prohibiting a witness from expressing an opinion about a defendant's guilt or innocence is having that witness tell the jury what result to reach." *State v. Cruz*, 77 Wn.App. 811, 815, 894 P.2d 573 (1995). Eteuati's statement:

I honestly believe ... [defendant's] intention was to hit the vehicle and drive off. But didn't realize the guy was between both cars

answered, for jurors, the element of whether defendant assaulted Abel with specific intent to inflict great bodily harm. A conclusion almost identical in its improper assumption about the *reason* for a defendant's driving appears in *Farr-Lenzini*, where a Trooper wrongly testified:

[T]he person driving that vehicle was attempting to get away from me and knew I was back there and was refusing to stop.

Farr-Lenzini, 93 Wn.App. at 463.

Eteuati's excluded conclusion differs only in absolving defendant's guilt by speculating about what defendant was not thinking and did not see. By speculating about defendant's goal in reversing, the conclusion far exceeded Brian's perception-based opinion the BMW was deliberately reversed. This overreach into the jury's exclusive domain to decide that core question itself warranted exclusion irrespective of what Eteuati perceived while driving by the collision. *See State v. Quaale*, 182 Wn.2d 191, 200, 340 P.3d 213 (2014) (opinion improperly "went to the core issue and the only disputed element").

Exclusion was also correct since Eteuati lacked Brian's superior vantage and awareness of the events preceding the collision. Brian stood within several feet of the BMW as it reversed toward him. Eteuati watched the collision while maintaining control of his truck as he traveled forward with I-5 traffic. Eteuati did not know what defendant was focused on while reversing as Eteuati could not see what defendant was doing. Eteuati lacked understanding of the altercation between Brian and defendant, which put defendant's act of reversing his BMW in context. The guilt-absolving conclusion's plain lack of probative value balanced against the substantial prejudice of a witness, an Army Ranger like Eteuati, telling jurors how to decide an essential element otherwise justified exclusion under ER 403 as the ruling can be affirmed on any supported basis, even if not raised below.

- c. The challenged rulings were harmless, if error, due to the limited scope of Brian's opinion and the admitted lack of foundation to support Eteuati's conclusion.

Where evidentiary error is not of constitutional magnitude, it is not prejudicial unless there is a reasonable probability it materially affected the verdict. *State v. Barry*, 183 Wn.2d 297, 303, 352 P.3d 161 (2015). This rule prevents defendants from securing reversals without proof of outcome-determinative prejudice. *Id.* Harmlessness is assessed by measuring all the admissible evidence of a defendant's guilt against the prejudice, if any, caused by the inadmissible evidence. *Id.* Opinions on guilt are treated as constitutional error, and harmless if any reasonable jury would have reached the same result absent the error. *Quale*, 182 Wn.2d at 202.

Brian's opinion the BMW was not out-of-control or inadvertently reversed, but rather deliberately driven backward, was not an opinion on guilt for it only spoke to the predicate physical act of reversing. The specific intent element on which a verdict of guilty depended *was not* intent to do the physical act that produces the result (reversing the BMW); rather, it was intent to produce a specific result (inflict great bodily harm on Abel). *See Elmi*, 166 Wn.2d at 215. Application of the nonconstitutional error test is therefore warranted. The opinion was not outcome determinative, for it only clarified Brian's unobjected-to testimony. Brian's challenged opinion also conveyed his perspective of an event Abel described without objection:

So at that time that I'm walking back across the front of the Tesla, I'm in the middle area of the hood, I turn and look and I see [defendant] looking at me He was this way reversing... when you reverse back, you take a look at what's behind you. So he was looking at me ... At that time, when I saw that, I didn't have that much time or reaction to do anything, so I jumped to try and avoid anything that I could. ... I jumped up, and that's when he caught my leg between his car and the bumper. And from there he pulled forward, I fell down.... And I remember looking toward his [defendant's] vehicle, and I saw [defendant] looking through the little rearview mirror on the driver side. I guess he was also assessing the situation.... I seen [sic] his eyeballs and I was afraid he was going to come back or reverse again

3RP 367-68.

The only potential prejudice capable of attending Brian's opinion is the semantic overlap between his use of "intent" with the legally defined concept of specific intent and criminal intent. Conflation could have been redressed through a curative instruction defendant never requested. *State v. Johnson*, 60 Wn.2d 21, 26-30, 371 P.2d 611 (1962); *see also State v. Gamble et.al*, 168 Wn.2d 161, 178-79, 225 P.3d 973 (2010). Courts rightly recognize the State cannot choose its witnesses, so the judicial system by necessity extends a degree of leeway to language selected by civilian laity unfamiliar with technical meanings or consequences carried by some words in court. *Id.*; *see also Heatley*, 70 Wn.App. at 581; ER 704.

More circumstantial evidence of defendant's intent to reverse the BMW was admitted through expert interpretation of the collision, passersby

who saw the collision, defendant's incriminating flight from the collision and the ER 404(b) evidence of defendant's prior road rage that rebutted his claim of mistake. Such overwhelming proof of his guilt would overcome the harmless error test applied to irregularities of constitutional magnitude, yet only the less demanding nonconstitutional test applies here.

That latter, easier to overcome, test equally applies to Eteuati's excluded guilt-absolving conclusion. For through the challenged ruling the jury was shielded from Eteuati's supposition about defendant's innocence. The jury was not exposed to an opinion about defendant's guilt. And Eteuati admitted to lacking a factual basis to support his conclusion about the result defendant hoped to achieve by reversing the BMW. Eteuati's far removed vantage further compromised by him having to divide his attention with the task of continued travel on I-5 amid traffic vitiated the persuasive force, if any, capable of attending his conclusion.

The principle prejudice adhering to Eteuati's conclusion was the confusion it would have caused by conflicting with the jury's instructions; specifically, it could not be reconciled with instructions reserving the right to decide defendant's guilt to the jury. The conflict would have imposed upon the State to explain in summation that Eteuati's conclusion, although admitted by the court, was not to influence the juror's conclusions about whether defendant reversed the BMW with specific intent to harm Abel.

See Heatley, 70 Wn.App. at 581 (prejudicial for opinions to be framed in conclusory terms that parroted legal standard). Conversely, defendant could not have properly argued to jurors that the State failed to prove the specific intent element since Eteuati thought it lacked factual support. The evidence which renders the admission of Brian's opinion harmless, would equally neutralize any prejudice attending exclusion of Eteuati's conclusion under either harmless error test. Although the nonconstitutional test applies.

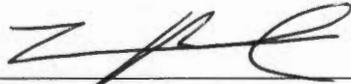
D. CONCLUSION.

The absence of meaningful analysis attending defendant's relational argument should preclude its review, for he left unexplained how Brian's admitted perception-based opinion and Eteuati's excluded guilt-absolving conclusion are equivalent and how equivalence could warrant reversal. Yet review of both remarks reveals the accuracy of each ruling. Brian's opinion was properly limited to describing the deliberate appearance of defendant's physical act of reversing his BMW—proof of which, without more, would not make him guilty of a charged crime. Eteuati's conclusion, if accepted, would have taken on the prejudicial quality of a witness-directed verdict.

Overwhelming evidence of defendant's guilt made any error harmless. So, defendant's convictions for vindictively severing Abel's leg and racing away from the scene should be affirmed.

DATED: September 25, 2018.

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Certificate of Service:
The undersigned certifies that on this day she delivered by air mail or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington on the date below.

9-26-18 Theresa Ka
Date Signature

PIERCE COUNTY PROSECUTING ATTORNEY

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