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STATE OF WASHINGTON
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No. 94559-4

SUPREME COURT OF THE STATE OF WASHINGTON

MICHAEL GILMORE, a single man,

Plaintiff-Petitioner,

vs.

JEFFERSON COUNTY PUBLIC TRANSPORTATION BENEFIT AREA, d/b/a
Jefferson Transit Authority, a municipal corporation,

Defendant-Respondent.

PLAINTIFF-PETITIONER GILMORE'S ANSWER TO AMICUS BRIEF FROM
WASHINGTON DEFENSE TRIAL LAWYERS

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I. INTRODUCTION: CONCERNING ERROR PRESERVATION

Washington Defense Trial Lawyers Association's ("WDTL's") amicus brief addresses issues of error preservation. While Petitioner agrees with a few of WDTL's arguments, those arguments are mostly irrelevant to this case. Petitioner disagrees with most of WDTL's arguments, which rely upon analysis and cases of questionable utility.

Error is not preserved via some arcane incantation, the uttering of particular magic words which cast a spell that grants to the losing side the right to ask the Supreme Court for a do-over. Error preservation is a practical event which takes place when, regardless of the words used, the trial court is given notice of an alleged problem and is provided with a full and fair opportunity to correct it during the trial. ER 103(a); RAP 2.5(a); CR 46. "The reason for this rule is to afford the trial court an opportunity to correct any error, thereby avoiding unnecessary appeals and retrials." *Smith v. Shannon*, 100 Wn.2d 26, 37, 666 P.2d 351 (1983).

Denying the trial court the opportunity to correct alleged errors during trial is unfair to the trial court, to the witnesses, and to the jurors, whose labors will all have been in vain if a retrial must be ordered. It also is unfair to opposing parties, who "should have an opportunity at trial to

respond to possible claims of error, and to shape their cases to issues and theories, at the trial level, rather than facing newly-asserted errors or new theories and issues for the first time on appeal.” 2A Karl B. Tegland, WASHINGTON PRACTICE: RULES PRACTICE, RAP 2.5, Author’s Comments, 212-13 (8th ed. 2014).

Furthermore, finality is an important value in our legal system. “[O]ne of the most important services the courts provide is to bring legal disputes to an end.” *Genie Industries, Inc. v. Market Transport, Ltd.*, 138 Wn. App. 694, 715, 158 P.3d 1217 (2007). Retrials preclude or delay finality. They are wasteful of both public and private resources, and they add extra burden to our already over-burdened courts. Appellate courts are – and should be – loath to order a retrial, and should do so only if it cannot be avoided.

An issue generally cannot be raised for the first time on appeal unless it is a “manifest error affecting a constitutional right.” RAP 2.5(a)(3)...But “ ‘the constitutional error exception is not intended to afford criminal defendants a means for obtaining new trials whenever they can identify a constitutional issue not litigated below.’ ”...“We adopt a strict approach because trial counsel's failure to object to the error robs the court of the opportunity to correct the error and avoid a retrial.”

State v. Fenwick, 164 Wn. App. 392, 399, 264 P.3d 284 (2011) (emphasis added, citations omitted).

Bringing an alleged error to the trial court's attention is not enough to "preserve" it. Before an alleged error can be the basis for a new trial, the error must be shown to be harmful. "[E]rror is not prejudicial unless, within reasonable probabilities, the outcome of the trial would have been materially affected had the error not occurred." *State v. Bourgeois*, 133 Wn.2d 389, 403, 945 P.2d 1120 (1997).¹ In making this determination, the appellate court must consider the significance of the evidence to the case as a whole. *Minehart v. Morning Star Boys Ranch, Inc.*, 156 Wn. App. 457, 467-68, 232 P.3d 591 (2010). The party claiming error has the burden of proving that the error was in fact harmful. *Griffin v. West RS, Inc.*, 143 Wn. 2d 81, 91, 18 P.3d 558, 564 (2001).

II. ARGUMENT

A. Neither Amicus WDTL nor defendant has shown that the alleged error regarding Tencer's testimony was harmful.

Petitioner agrees that defendant informed the trial court that defendant wanted to call Allan Tencer as a witness. But as previously shown in Petitioner's Supplemental Brief at 18-19, defendant introduced substantial

¹Caution must be exercised when using criminal cases on harmless error, because quite a different standard applies to a constitutional error in a criminal case. In such cases the Court must reverse unless it finds beyond a reasonable doubt that any reasonable jury would have reached the same result, even without the error. *State v. Eggleston*, 129 Wn. App. 418, 118 P.3d 959 (2005). However, it is clear that RAP 2.5(a)(3) applies to civil cases. *State v. WWJ Corp.*, 138 Wn.2d 595, 602, 980 P.2d 1257 (1999).

other evidence regarding the force of impact. Defendant also declined to offer additional evidence it had available to it regarding force of impact. *See, Ashley v. Hall*, 138 Wn.3d 151, 978 P.2d 1055 (1999) (any error in admitting evidence was harmless because other, similar evidence also had been admitted).

Even defendant's doctor conceded that Mr. Gilmore was hurt by the crash.² So there was no dispute that this impact was capable of causing human injury. The real dispute was medical: of which injuries and the surgery experienced by Mr. Gilmore was the crash a proximate cause? Tencer's non-medical opinion about force was largely irrelevant to this dispute, and to defendant's actual theory of the case, which was that Mr. Gilmore was trying to defraud defendant. RP 50, RP 56. Without a showing that the exclusion of Tencer's testimony materially affected the outcome of the case, any alleged error in his exclusion was harmless.

B. Neither Amicus WDTL nor defendant has shown that defendant properly preserved the alleged error regarding the L&I evidence.

Petitioner also agrees that defendant made the trial court aware of defendant's desire to put L&I collateral source information into evidence.

²She admitted he had neck strain and headache (RP 887-90), muscle spasm (RP 879), upper back pain (RP 908), and even a "cervical straining injury" (RP 910). She denied Mr. Gilmore's herniated discs, which resulted in surgery, could be attributed to the crash.

But defense counsel spoke at different times about different L&I evidence. At RP 50, he stated that he would not inquire into time loss payments, and at both RP 50 and RP 517 he stated that he wanted to introduce evidence of Mr. Gilmore's PPD award. At RP 543, defense counsel withdrew the request to introduce evidence about the PPD award. At RP 517 and RP 543, defense counsel stated that he did want to inquire into time loss payments.

Defendant's waiver of this alleged error, and its failure to preserve it, lie in:

(a) Failing to make any formal offer of proof regarding exactly which L&I information defendant wanted to put into evidence, or how (*i.e.*, through what foundation or competent witness) defendant planned to offer it, ER 103(a)(2); and

(b) Failing to respond to the trial court's offer to reconsider the issue if defendant could provide any authority that the L&I collateral source door "could be opened". RP 543. *See, Trueax v. Ernst Home Ctr., Inc.*, 124 Wn.2d 334, 339, 878 P.2d 1208 (1994) ("If an exception is inadequate to apprise the judge of certain points of law, those points will not be considered on appeal.").

Petitioner acknowledges the general rule that an appellate court can consider case law not presented to the trial court, *Fire District v. Washington Auto*, 50 Wn. App. 355, 357 n.1, 745 P.2d 1332 (1987). But when the trial court invites a party to provide authority, and that party fails to do so until

long after the verdict, this failure should constitute waiver and/or invited error.

C. Neither Amicus WDTL nor defendant has shown that a timely objection could not have cured any harm caused by the allegedly improper argument.

An essential feature of error preservation is “mitigation of harm”. This is consistent with the public policy favoring finality and disfavoring new trials. If an issue could have been remedied by the trial court at the time, then failure to seek that remedy precludes review. If the rule were otherwise, our Courts would be encouraging parties to gamble on the verdict and then appeal if the verdict is not to their liking. *See, State v. Jackman*, 113 Wn.2d 772, 781-82, 783 P.2d 580 (1989) (failure to seek continuance); *State v. Ramirez*, 62 Wn. App. 301, 305, 614 P.2d 227 (1991) (failure to seek limiting instruction); *State v. Gallo*, 20 Wn. App. 717, 728, 582 P.2d 558 (1978) (failure to move to strike, even though a timely objection was made).

Error preservation is a practical doctrine. By objecting, an aggrieved party draws the trial court’s attention to the issue and gives the trial court the opportunity to (a) decide whether what is happening even is improper; (b) if so, put a stop to it before it gets worse, and (c) take correc-

tive action as appropriate. When a party “lies in the weeds” and does not object, that party denies the trial court the chance to address the situation. “The failure to object deprived the court of the opportunity to take corrective action at the time of the improper remark.” *A.C. ex rel. Cooper v. Bellingham Sch. Dist.*, 125 Wn. App. 511, 526, 105 P.3d 400 (2004). “There may, of course, be tactical reasons for withholding an objection or motion to strike that would call attention to unfavorable evidence. But the likely price for such tactics is preclusion from arguing the issue on review.” 1 WASHINGTON APPELLATE PRACTICE DESKBOOK §11.7(a)(a)(i) 11-36 (2016).

Most of the “improper argument” cases cited by WDTL and by defendant are criminal cases. Criminal cases where convictions are reversed because prosecutors made improper arguments are not particularly helpful in civil cases, because in civil cases, life and liberty are not at issue. *Alcoa v. Aetna Cas. & Sur.*, 140 Wn.2d 517, 539, 998 P.3d 856 (2000). Furthermore, prosecutors are held to a different and much higher standard than are lawyers in civil cases. *See* RPC 3.8, Comment [1]: “A prosecutor has the responsibility of a minister of justice and not simply that of an advocate.”

The civil cases cited by WDTL where verdicts were reversed for improper argument are predominantly 50 years old or older, and they were decided before adoption of our Rules of Appellate Procedure, including specifically RAP 2.5 (1976), and our Rules of Evidence, including specifically ER 103 (1979). WDTL's cited cases do not represent the modern trend of "great deference" to a trial court's view of whether an event during trial was prejudicial or affected the verdict. *See, e.g., Dickerson v. Chadwell*, 62 Wn. App. 426, 433, 814 P.2d 687 (1991), *review denied*, 118 Wn.2d 1011 (1992).

WDTL urges this Court to "clarify" the law on error preservation by holding that an objection need not be made to preserve an alleged error after a motion in limine. WDTL cites *State v. Smith*, 189 Wash. 422, 65 P.2d 1075 (1937) and *Fenimore v. Drake Constr. Co.*, 87 Wn.2d 85, 549 P.2d 483 (1976). But WDTL did not cite or distinguish *State v. Weber*, 159 Wn.2d 252, 272, 149 P.3d 646 (2006), which addresses this very issue, and which limits *Smith* and *Fenimore*.

Weber held that *Smith*, *Fenimore* and *State v. Kelly*, 102 Wn.2d 188, 685 P.2d 564 (1984), stand for the proposition that a party who loses a motion in limine to exclude has a standing objection unless otherwise

instructed by the trial court. *Weber*, at 272. The *Weber* Court distinguished that situation from one where the motion in limine to exclude is granted. In such a case, the Court held that the winner of a pre-trial motion must object if he or she believes the ruling is being violated.

Without an objection, the trial court never had an opportunity to determine whether the evidence would even have been covered by the pretrial motions, or if it was covered by the motions, whether the court could have cured any potential prejudice through an instruction.

Id. *Weber* fits this case like a glove³, and it supports Petitioner's position. Had defendant objected to the argument made by plaintiff's trial counsel, the trial court would have ruled on the objection. If the trial court had overruled it, this Court would have had the benefit of the trial court's discretionary decision that, in the context of the entire case, the argument was permissible. If the trial court had sustained the objection, the trial court could have issued a curative instruction, and more to the point, the argument would have stopped.

WDTL cites another old criminal case, *State v. Case*, 49 Wn.2d 66, 74, 298 P.2d 500 (1956), for the proposition that "If misconduct is so fla-

³*Weber* also holds, at 276-7, that "even improper remarks by the prosecutor are not grounds for reversal 'if they were invited or provoked by defense counsel and are in reply to his or her acts and statements, unless the remarks are not a pertinent reply or are so prejudicial that a curative instruction would be ineffective.'"

grant that no instruction can cure it, there is, in effect, a mistrial and a new trial is the only and the mandatory remedy.” Petitioner agrees in principle such an improper argument could occur, possibly even in a civil case. One can imagine circumstances where a lawyer blurts out something before an objection can be interposed, which cannot thereafter be undone. A prosecutor in a DUI trial might say in closing, “You should convict the defendant because.... HE HAS THREE PRIOR DUIs!” This kind of bell cannot be unring, and is so clearly improper that one can fairly attribute “ill will” to the lawyer who rings it.

But that case is not this case. There is no analogous bright line rule forbidding the argument made in this case. Moreover, the argument about which defendant now complains unfolded over minutes, not seconds. If the argument had been improper, then an objection would have stopped it.

Neither WDTL nor defendant has pointed to anything in the record which suggests that incurable damage was done. Defendant failed to request WPI 1.07 before closing argument. That instruction almost certainly would have cured any hypothetical issue. Defense counsel never objected to plaintiff’s opening close. An objection almost certainly would

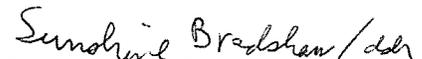
have cured any hypothetical prejudice. Defendant brought into the courtroom the image of government agents killing people, so defendant can hardly complain about that. *State v. Weber*, 159 Wn.2d 252, 276-77, 149 P.3d 646 (2006). Defendant failed to object to plaintiff's rebuttal closing. Again, an objection almost certainly would have cured any hypothetical prejudice. If defendant was indeed so afraid of plaintiff's closing that it feared to object in the jury's presence, it could have taken up the trial court's post-argument invitation and objected outside the jury's presence, RP 1037-8. Such an objection, plus a request for WPI 1.07 or a similar curative instruction before deliberations began, almost certainly would have cured any hypothetical prejudice.

Therefore, even if this Court concluded that the argument was improper, the verdict still should be affirmed.

DATED this 22^d day of December, 2017.



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