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Supreme Court No. 97937-5
Court of Appeals No. 36645-6-III
Superior Court No. 16-1-01427-7

**IN THE SUPREME COURT OF THE
STATE OF WASHINGTON**

STATE OF WASHINGTON,

Respondent,

v.

JEFFREY PAUL GIBLIN,

Appellant.

AMICUS BRIEF OF ROBIE G. RUSSELL

Appeal from the Superior Court of Pierce County,
Cause No. 16-1-01427-7
The Honorable Shelly K. Speir, Presiding Judge

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A. IDENTITY AND INTERESTS OF AMICUS

Amicus curiae is a recognized local attorney who, as part of his practice, provides pro bono aid and assistance to those in need, particularly in cases where the individual or group appear to be denied their right to be heard on particular legal issues that affect their rights and freedom and those of their families.

Mr. Giblin is a person who, over the years, has provided many public services to the community including the formation and operation of charitable organizations, public health services related to physical well being, and the like. In addition, he has been a good parent. However, Mr. Giblin is pursuing his motion for discretionary review *pro-se* despite not being a lawyer or having legal training.

Amicus curiae is interested in assuring that this valuable member of the community's interests and right to be heard are recognized and protected so that he may be allowed to return to his family and the community to continue the good works and efforts he has provided in the past. To that end, amicus curiae seeks to be allowed to submit briefing on the technical aspects of the rules of evidence and why the trial court's decision was erroneous and deprived Mr. Giblin of a fair trial.

B. STATEMENT OF THE CASE

The factual and procedural background of this case was adequately

set out in the unpublished decision issued by Division III of the Court of Appeals on November 7, 2019 and is adopted and incorporated by reference.

Mr. Giblin was found guilty of first degree assault and failure to remain at the scene of an accident following an incident of mutually confrontational behavior between himself and brothers Abel and Brian Loredos.¹ After a brief interaction between Mr. Giblin and the Loredos while driving and on the side of the road, Mr. Giblin returned to his vehicle and reversed it, striking both Abel and the Loredos's vehicle. Abel sustained injury to his leg that ultimately required amputation of that leg below the knee.

The primary issue in Mr. Giblin's appeal is the admissibility of opinion testimony regarding his intent when he reversed his vehicle towards Abel once the parties had pulled over to the side of the road.

During trial, the State called Mr. Eteuati, an eye-witness to the incident who gave testimony damaging to Mr. Giblin. During a break in the direct examination of Mr. Eteuati, the State moved to prevent Mr. Giblin from cross-examining Mr. Eteuati about a taped statement Mr. Eteuati had made during a telephonic interview with a detective. Mr. Eteuati told the detective that he believed Mr. Giblin's intent was to hit the

¹ For clarity, the Loredos will be referred to by their first name. No disrespect is intended.

Loredo's vehicle and drive off and that Mr. Giblin did not realize that Abel was between the cars and did not intend to hit Abel.

The prosecutor told the court that when she asked Mr. Eteuati for the basis of his belief that Mr. Giblin did not intend to hit Abel, "[H]e didn't see anything."² The prosecutor said she was clear with Mr. Eteuati that she needed to know if his statement was "based upon something [he] saw and observed," but that "he ha[d] no idea. He simply ha[d] no idea."³ The State argued to the court that Mr. Eteuati had no basis for his belief about Mr. Giblin's intent because later in the interview Mr. Eteuati told the detective that he could not see where Mr. Giblin was looking when he reversed his vehicle towards Abel.

Counsel for Mr. Giblin did not dispute the prosecutor's characterization of Mr. Eteuati's statements and argued that Mr. Eteuati made clear statements about what he honestly believed and that his statements were "monumental" to Mr. Giblin's defense and right to a fair trial.⁴

The trial court excluded Mr. Eteuati's statements about Mr. Giblin's intent, finding that he lacked personal knowledge to support his conclusion, that the opinion would be an improper comment on Mr.

² RP 133.

³ RP 133.

⁴ RP 134.

Giblin's guilt, and that it would invade the province of the jury.⁵

Later, the State called Brian Loredo and, of defense counsel's objection, permitted the State to question Brian about what he thought Mr. Giblin's intent was when Mr. Giblin backed his car up and hit Abel.⁶ Mr. Giblin was found guilty and appealed, arguing (1) the trial court erred in excluding Mr. Eteuati's opinion of Mr. Giblin's intent and (2) the trial court erred in overruling Mr. Giblin's objection to Brian Loredo's opinion of Mr. Giblin's intent. The court of appeals affirmed the trial court's rulings finding that there was a lack of foundation for Mr. Eteuati's opinion on the issue of Mr. Giblin's specific intent.

C. ISSUES PRESENTED ON AMICUS

The trial court abused its discretion in overruling Mr. Giblin's objection to Brian Loredo and the court of appeals erred in affirming the trial court where Brian Loredo lacked knowledge of facts sufficient to support his lay opinion regarding Mr. Giblin's intent.

D. ARGUMENT

1. The trial court abused its discretion in overruling Mr. Giblin's objection to Brian Loredo's lay opinion testimony about Mr. Giblin's intent.

A lay witness can offer opinions that are (1) rationally based on the witness's perceptions, (2) helpful to the trier of fact in understanding the witness's testimony or determining a fact in issue, and (3) not based on

⁵ RP 135.

⁶ RP 266-267.

scientific, technical, or other specialized knowledge covered by ER 702.⁷ ER 704 provides that “[t]estimony in the form of an opinion or inferences otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact.”

Case law establishes that the limits of ER 701 and ER 704 are exceeded when a witness testifies “in the form of an opinion regarding guilt ... of the defendant”⁸ because such an opinion “‘inva[de]s the exclusive province of the [jury].’”⁹ However, “testimony that ... is based on inferences from the evidence is not improper opinion testimony.”¹⁰ “The fact that an opinion supports a finding of guilt ... does not make the opinion improper.”¹¹

An opinion is admissible only if it has a rational basis, which is the same as to say that the opinion must be based on *knowledge*. The knowledge may be personal, or it may be scientific, technical or specialized. So-called “lay” opinion is simply opinion based on personal knowledge (i.e., on knowledge derived from the witness' own perceptions, and from which a reasonable lay person could rationally infer the subject matter of the offered opinion).¹²

Mr. Giblin’s defense at trial was, in part, that he put his car in

⁷ ER 701; *State v. Montgomery*, 163 Wn.2d 577, 591, 183 P.3d 267 (2008).

⁸ *State v. Demery*, 144 Wash.2d 753, 759, 30 P.3d 1278 (2001).

⁹ *Demery*, 144 Wash.2d at 759, 30 P.3d 1278 (alterations in original) (internal quotation marks omitted) (quoting *City of Seattle v. Heatley*, 70 Wash.App. 573, 577, 854 P.2d 658 (1993)).

¹⁰ *Heatley*, 70 Wash.App. at 578, 854 P.2d 658.

¹¹ *State v. Collins*, 152 Wash.App. 429, 436, 216 P.3d 463 (2009).

¹² *State v. Kunze*, 97 Wn. App. 832, 850, 988 P.2d 977 (1999) (emphasis in original) (internal citations omitted).

reverse unintentionally and the backwards motion of his car was a mistake. Brian Loredos' testimony about what he believed Mr. Giblin's intent to be when Mr. Giblin's car reversed was based solely on Brian's observation that Mr. Giblin's car began reversing and did not stop until it struck the Loredos' vehicle.¹³ Brian had no knowledge of what Mr. Giblin was thinking or what happened inside Mr. Giblin's vehicle when Mr. Giblin put it in gear. Brian Loredos certainly could not see what happened inside Mr. Giblin's vehicle.

ER 602 mandates that "A witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter." Like the testimony of Mr. Eteuati that was excluded by the trial court, Brian Loredos lacked knowledge of facts sufficient to support his opinion that the reversing of Mr. Giblin's vehicle was intentional. Brian could certainly testify that he saw Mr. Giblin's vehicle travel in reverse, however, it was improper to allow him to offer his lay opinion that Mr. Giblin *intended* to drive in reverse. The trial court abused its discretion in overruling the objection to Brian's law opinion about Mr. Giblin's intent.

2. The Court of Appeals' decision is contrary to the rules of evidence numerous decisions of the Court of Appeals and the Supreme Court.

¹³ RP 266-267.

As discussed above, the trial court abused its discretion and erred when it overruled the objection to Brian Loredo's lay opinion testimony that Mr. Giblin intentionally reversed his vehicle where Brian Loredo had no knowledge of Mr. Giblin's intent or actions inside his vehicle.

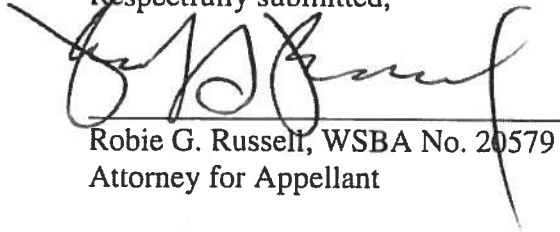
The decision of the Court of Appeals affirming the trial court is contrary to ER 602, ER 701, ER 704, *Montgomery*, *Demery*, *Heatley*, *Collins*, and *Kunze*, at a minimum.

E. CONCLUSION

This court should accept review of Mr. Giblin's case to correct the trial court's and the Court of Appeals' incorrect rulings on the admissibility of lay opinion testimony.

DATED this 5th day of February, 2020.

Respectfully submitted,



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Attorney for Appellant

LAW OFFICE OF REED SPEIR

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