No. 43682-5-II

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

CITY OF VANCOUVER,
Respondent,

v.

ALBERT MCCLURE,
Petitioner.

ON APPEAL FROM THE SUPERIOR COURT OF THE STATE OF WASHINGTON FOR CLARK COUNTY

The Honorable Darvin Zimmerman, Judge

PETITIONER'S OPENING BRIEF

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I.
ASSIGNMENT OF ERROR

The trial court erred in telling the jury that Mr. McClure went into the victim's place of work "maybe dozens of times," asked the victim if she "wanted to go on a date with him," and asked the victim if she had ever been stalked because these comments conveyed the trial court's belief that certain contested facts were true.[1]

II.
ISSUE PERTAINING TO THE ASSIGNMENT OF ERROR

Did the trial judge prejudicially comment on the evidence in violation of Const. art. IV, § 16?

III.
STATEMENT OF FACT

Erika Hamilton worked at Subway in Vancouver, Washington between April and August, 2010. CP 139; RP 113. Albert McClure came in three nights a week. CP 140; RP 114. Hamilton stated that she was friendly with McClure when he came into the store. She said:

> He would just come in pretty frequently usually around the time I would close the shop. He always came, eat a sandwich, be very talkative, friendly, tipped well and that

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[1] Although McClure raised several issues in his Motion for Discretionary Review to this Court, the Commissioner granted review only on this claim.

> was basically it. I mean I had a couple of talks with him outside of Subway but he was a pretty frequent customer.

CP 142; RP 116. McClure told Hamilton that she was pretty. CP 143; RP 117. He also asked for her number so that he could call in his sandwich orders. *Id.* According to Hamilton, McClure also asked her out on a date but she declined. CP 144; RP 117-18.

According to Hamilton, she initially thought that he was just a friendly person. But:

> Eventually I wrote down his license plate and took a picture of his car because it was starting to alarm me to the point where I wanted, you know, if something happened to me I wanted to have someone be able to look and see . . . this person so I did that and eventually I started telling my co-workers about what was going on.

RP 118. She also told her grandparents and "they seemed very alarmed by it." *Id.* But when she told her manager, "I felt that my employer wasn't listening to me and my fears." CP 146; RP 120. Her manager did, however, offer to videotape the store when McClure was there. CP 159-60; RP 133-34. There was a closed circuit television system that managers could view – even from a remote location. CP 173; RP 147.

Hamilton testified that she was "scared that he would get upset by me turning him down." CP 146; RP 120. One day, McClure showed up with his boat and asked her if she wanted to go for a ride. She said no and

"he seemed like angry with me." CP 147; RP 121. She stated that she "***felt*** like I was followed home by him." CP148; RP 122.

On August 9, 2010, someone called her and said "I have been thinking about you all the time, I am going crazy if I can't have you, I don't know what I am going to do." CP 149; RP 123. She could not identify the caller as McClure. CP 161; RP 135. At that point, McClure had not been in the store for some time. CP 153; RP 127. Hamilton then called the police. After the telephone call, she started having panic attacks. CP 151; RP 125.

Hamilton never asked McClure to leave the store because "It's his right to eat there." CP 158; RP 132. And she had her employer's permission to "kick him out of the store." *Id.* Hamilton noted that McClure came in at the same time every night, sat in the same seat and ordered the same thing. CP 166-67; RP 140-41. She agreed that he was very habitual. C170; RP 141.

She also told defense counsel that she thought the entire thing was her "mind playing tricks on her." RP 138. She also told others that she "might just have been paranoid." RP 143. She never told McClure to leave her alone and she was nice to him even though she didn't like talking to him. RP 144.

When contacted by the police, McClure was very upset that he was being accused of stalking or harassing Hamilton. CP 197-98; RP 171-72.

Kevin Chumbley testified that McClure came to his smoothie shop at least once a day. CP 216; RP 190. He would always have the same drink. *Id.* McClure talked to Chumbley, employees and other customers. CP 217; RP 191.

Mathew Aiello managed a Starbucks in the same strip mall as Subway. CP 220; RP 194. McClure was a frequent customer. *Id.* None of the employees ever complained about him. CP 221; RP 195.

McClure testified and presented records of his sales transactions that demonstrated that he was regularly at the smoothie shop, Starbucks and other fast food restaurants. CP 231-32; RP 205-06. He admitted that he had frequent conversations with Hamilton at Subway but that he never wanted to date her. CP 250-51; RP 224-25. He said that the accusation had upset him terribly. CP 254; RP 228. He denied following Hamilton or trying bothering her. CP 256; RP 230.

The issue in this case relates to Judge Zimmerman's introduction of the case to the jury. He said:

> [T]he City Of Vancouver has brought a charge forward against Albert McClure. The charge against Mr. McClure is that of called stalking where it's alleged in the period of time of April 10th, 2010 to August 10th, 2010 without lawful authority he did intentionally and repeatedly harass

> or follow a person by the name of Erika Hamilton and so you understand again the nature of the case is that Ms. Hamilton works at a Subway sandwich shop. I think she was of age 17 at the time if I remember correctly and allegations are going to be and obviously get more specific as to the times that maybe as much as dozens of times he went into that particular store, chatted with her, asked her I guess for dating proposes I think if she wanted to go on a date with him and at some point in time maybe even asked her if she'd ever been stalked before. So they're going to get into a lot more details but that's sort of what I'll call the flavor of the case that she obviously felt uncomfortable and eventually notified the police and that ended up being charged with the offense of stalking. Okay? And to that particular charge he's entered a plea of not guilty.

CP 27; RP 1. Later, in opening remarks to the jury referencing timing, the court told the jury:

> And I give you some choices but again I probably have done more jury trials than any judge in the state of Washington. Guess I've been around a long time and was a prosecutor too so I can't remember a jury pretty much ever saying they didn't want to get done with it but it's up to you. So again I give you that choice as to whether or not you want to come back tomorrow and deliberate but for right now I need to make sure eve body's [sic] going to be here and have no, you know, long standing commitments for this afternoon or this evening.

CP 43; RP 17.

The jury returned a verdict of guilty. McClure filed a RALJ appeal and argued that Judge Zimmerman's comments violated Const. art. IV, § 16. The Superior Court judge found:

> In this case, the trial judge's description of the charges against McClure contained a number of statements which could arguably be described as comments on the evidence,

> if read insolation. It was both unnecessary and improper to attempt to recall how many times McClure went to a particular store, whether he indicated that he wanted to go on a date with Hamilton, or ask her if she's ever been stalked. It was especially inappropriate to, in providing the jury with a "flavor of the case", to indicate to jurors that Hamilton "obviously felt uncomfortable" as a result of McClure's behavior. These remarks were perilously close to a constitutional violation, and the district court judge is admonished to provide more abbreviated and neutral statement of the charge in future cases.

CP 375. However, the RALJ judge refused to reverse the conviction because, in other places, the trial judge couched his remarks as "allegations" and told the jury that McClure had entered a plea of not guilty. RP 375.

IV.
ARGUMENT

Article 4, section 16 of the Washington Constitution prohibits judges from commenting on the evidence. Wash. Const. art. IV, § 16 ("Judges shall not charge juries with respect to matters of fact, nor comment thereon, but shall declare the law."); *State v. Swan*, 114 Wn.2d 613, 657, 790 P.2d 610 (1990), *cert. denied*, 498 U.S. 1046, 111 S.Ct. 752, 112 L.Ed.2d 772 (1991). "A statement by the court constitutes a comment on the evidence if the court's attitude toward the merits of the case or the court's evaluation relative to the disputed issue is inferable from the statement." *State v. Lane*, 125 Wn.2d 825, 838, 889 P.2d 929 (1995)

(citing *State v. Hansen*, 46 Wn. App. 292, 300, 730 P.2d 706 (1986), *affirmed*, 737 P.2d 670 (1987)). Circumstances to consider in determining whether the trial judge commented on the evidence include: (1) whether the comment resolves a contested fact, (2) whether the statement addressed a witness's credibility, or (3) whether the remarks were isolated or cumulative. *State v. Sivins*, 138 Wn. App. 52, 59, 155 P.3d 982 (2007).

Courts apply a rigorous standard of review to alleged violations of article 4, section 16. *Sivins*, 138 Wn. App. at 59. Thus, once it is established that the trial judge commented on the evidence, the reviewing court "presumes [the comments] were prejudicial." *Id.* at 58-59. "[T]he burden is on the State to show that the defendant was not prejudiced, unless the record affirmatively shows that no prejudice could have resulted." *State v. Jackman*, 156 Wn.2d 736, 743, 132 P.3d 136 (2006). To assess prejudice, the test is "whether there is 'overwhelming untainted evidence' to support the conviction." *Sivins*, 138 Wn. App. at 61 (quoting *Lane*, 125 Wn.2d at 839).

The rationale behind this prohibition "is to prevent the trial judge's opinion from influencing the jury." *Lane*, 125 Wn.2d at 838. CrRLJ 6.4(b) allows only a limited explanation of the case to the jury: "The judge shall initiate the voir dire examination by identifying the parties and their respective lawyers and by briefly outlining the nature of the case."

Nowhere do the rules authorize the court to summarize the prosecution's evidence: "The judge may read or summarize the charging part of the complaint. Knowledge of date, place, victim, and kind of crime may help jurors respond more accurately on voir dire." CLJ Benchbook on Criminal Procedures 6/01, § 2710.12(E) (2001).

Here, the RALJ judge determined that the remarks made by the trial judge were very troubling and "perilously close to a constitutional violation." But the RALJ judge found that taken in context, along with other instructions, any improper comments were "cured."

But as set forth above, this is the incorrect analysis. Once the RALJ judge determined that any of the comments were improper, he had to presume that the comments were prejudicial. The burden then shifted to the City to demonstrate that the overwhelming untainted evidence rendered them harmless.

In this case, the City cannot meet that burden. As explained above, the evidence was far from overwhelming. Hamilton never communicated to McClure that she was afraid of him or asked him not to interact with her. As trial counsel argued in closing, while Hamilton may have felt fearful and uneasy in McClure's presence, she never once told him so. It is simply unjust to convict McClure for entering a public place, ordering a sandwich and talking to his waitress. The evidence conclusively

demonstrated that McClure is a creature of habit and a talker. But there was no evidence to demonstrate that he knew or had reason to know he was placing Hamilton in fear.

But, the trial judge's statements suggested that the charges were true. His comments vouched for the credibility of the victim – over that of Mr. McClure. Thus, the City cannot show that the judge's comments were harmless.

V.
CONCLUSION

For the reasons stated above, this Court should reverse McClure's conviction.

DATED this 30 day of November, 2012.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on the date listed below, I served by First Class United States Mail, postage prepaid, one copy of this brief on the following:

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