Supreme Court No. 89765-4
Court of Appeals No. 43682-5-II

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

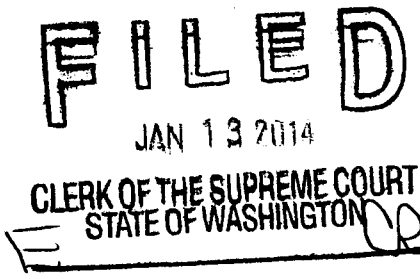
CITY OF VANCOUVER,
Respondent,
v.

ALBERT MCCLURE,
Petitioner.

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

The Honorable Darvin Zimmerman, Judge

PETITION FOR REVIEW



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Petitioner Albert McClure asks this Court to accept review of the Court of Appeals decision terminating review designated in Part B of this petition.

B.
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McClure seeks review of the unpublished opinion filed in *City of Vancouver v. McClure,* 43682-5-II. *See* Exhibit 1.

C.
ISSUE PRESENTED FOR REVIEW

Where the trial court told 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 and where these comments conveyed his belief that certain contested facts were true, did the trial court violate Const. Art. IV, §16?

D.
STATEMENT OF THE CASE

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 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 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.

In a split decision, the Court of Appeals affirmed McClure's conviction. Two members of the Court of Appeals found that the trial judge's comments were not a comment on the evidence and, if they were, they were harmless. The dissenting judge held that the trial judge's comments expressly conveyed that certain facts testified to by the complaining witness were true and bolstered that witness's credibility.

Slip Opinion at 13. That judge also held that the comments were not harmless because this was a "he said, she said" case with no independent evidence. *Id.* at 14.

E.
ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

1. THIS COURT SHOULD GRANT REVIEW BECAUSE THE MAJORITY'S DECISION CONFLICTS WITH THIS COURT'S OPINION IN *STATE V. LANE*, 125 WN.2D 825, 889 P.2D 929 (1995), AND VIOLATES CONST. ART. 4, SECTION 16. RAP 13.4(B)(1) AND (3).

Article 4, section 16 of the Washington Constitution prohibits judges from commenting on the evidence. 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." *Lane*, 125 Wn.2d at 838 (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).

First, the two majority judges stated that the court commissioner "designated" only two statements for review. This is simply not true. The ruling granting review states that McClure's "issue on the judge commenting on the evidence in his summary at the beginning of trial...meets the criterion contained in RAP 2.3(d)(1)." *See* Exhibit 2. And, it is true that he cited to a portion of the judge's comments as an example. But the grant of review states that "discretionary review of the superior court's decision on the comment on the evidence issue is warranted under RAP 2.3(d)(1)." McClure cited to two recitations by the trial judge in his Motion for Discretionary Review, at pages 5-6. *See* Exhibit 3. Those were the comments the Commissioner considered in granting review.

Moreover, limiting the review of the trial court's improper comments conflicts with the Supreme Court's statement in *Lane* that the Court's jurisprudence "demonstrate[s] adherence to a rigorous standard when reviewing alleged violations of Const. art. 4, § 16." *State v. Lane*, 125 Wn.2d 825 at 838. Here, the majority opinion applies a very lax standard, excusing the trial judge's statement as simply a "flavor" of the case.

The touchstone of error in a trial court's comment on the evidence is whether the feeling of the trial court as to the truth value of the testimony of a witness has been communicated to the jury. *Lane*, 125 Wn.2d at 838, citing *State v. Trickel*, 16 Wn. App. 18, 25, 553 P.2d 139 (1976), *review denied*, 88 Wn.2d 1004 (1977). It does not matter what the trial court "intended." It matters that the trial court communicated to the jury that Hamilton was credible and that she "obviously" was harassed by McClure. RP 1. The trial judge told the jury that McClure contacted Hamilton "dozens of time" and asked her out on a date.

Second, the majority opinion refused to apply the mandatory presumption that the comments were prejudicial once it has been demonstrated that a trial judge's conduct or remarks constitute a comment on the evidence. *Lane*, 125 Wn.2d at 838, citing *State v. Bogner*, 62 Wn.2d 247, 249, 253-54, 382 P.2d 254 (1963). Instead, the majority opinion assumes that there was some reservoir of "untainted" evidence in this case. But as the dissenting judge carefully pointed out, this case consisted of two diametrically opposing sets of facts – those testified to by Hamilton and those testified to by McClure. Hamilton's testimony was "tainted" by the trial judge's comments that supported her credibility.

Thus, the only "untainted" evidence left was McClure's claim of innocence.[1]

Moreover, as pointed out by the dissenting judge, the jury instructions did not solve this problem. The comments made by the trial judge were not isolated or trivial. It is true that the jury was told that determining credibility was their job, but there was no clear instruction to them to ignore the trial judge's statements that presumed the credibility of the State's case. The dissenting opinion reflects the correct resolution of this case.

F.
CONCLUSION

For the reasons stated above review should be granted.

DATED this 7th day of January, 2014.

Respectfully submitted,

Suzanne Lee Elliott, WSBA #12634
Attorney for Albert McClure

[1] It is unclear why the majority thinks the fact that the judge made these comments to the entire venire rather than only the 6 jurors who rendered the verdict makes any difference. The voir dire is conducted "during trial."

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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EXHIBIT 1

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

CITY OF VANCOUVER, Respondent, v. ALBERT MCCLURE, Appellant.	No. 43682-5-II UNPUBLISHED OPINION

HUNT, J — Albert McClure appeals his district court jury trial conviction for stalking, which the superior court affirmed on direct appeal. He argues that some of the trial court's remarks during its case summary for the jury venire were prejudicial unconstitutional comments on the evidence. Holding that any error was harmless, we affirm.

FACTS

I. STALKING

Between April and August 2010, Erika Hamilton worked at a Vancouver, Washington Subway restaurant, which Albert McClure patronized several times per week. On other occasions, Hamilton observed McClure drive past the Subway, without coming inside. McClure would usually come by the restaurant during the late evening, when Hamilton was the sole employee.

From the outset, McClure was flirtatious with Hamilton: He asked whether she had a boyfriend, told her that she was attractive, commented that his son would think she was pretty,

and asked for her personal cell phone number. She became alarmed when he asked whether she had ever been "stalked" before. Clerk's Papers (CP) at 144. Hamilton felt more alarmed and frightened as these incidents multiplied, especially when she would find McClure waiting outside in the parking lot almost an hour after he had finished eating inside the restaurant. She wrote down McClure's license plate number and took a photograph of his car. One night she observed a car of the type that McClure owned follow her from the restaurant; she feared he was following her home. On another occasion, she was "very shooken up" when she heard someone walking outside of her house. CP at 150.

Hamilton asked her employer to change her shift permanently so she could avoid working alone during those periods when McClure usually frequented the restaurant; her employer refused. So Hamilton began closing the restaurant early; and she asked her grandfather to come be with her at the restaurant when she was working there alone.

Hamilton feared that her repeated rebuffs of McClure's overtures would upset him and that he would become aggressive or hurt her. One day, for example, he became angry when she refused to go out on his boat with him. And after Hamilton closed the restaurant on August 9, she received a call on the restaurant's business line from an unidentified man, who disguised his voice and said that he had been thinking about her and would go crazy if he could not have her. This call caused Hamilton to shake with fear; she was terrified. The next day Hamilton reported the incident to the police department. Officer Sam Abdhala interviewed Hamilton at the restaurant and observed that she was shaking and "genuinely scared." CP at 196.

II. PROCEDURE

The City of Vancouver charged McClure with one count of stalking. He requested a jury trial. Before trial began, the Clark County District Court summarized the case to the jury venire as follows:

> [T]o explain why we're all sort of gathered here together is the 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 [purposes] 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 at 28 (emphasis added). McClure neither objected nor asked the trial court to instruct the potential jurors to disregard any of this summary. Eventually the court empanelled a jury and tried the case.

Before closing arguments, the trial court instructed the jury that if it appeared he had commented on the evidence during trial, he had not done so intentionally and that the jurors should disregard such comments. The trial court also instructed the jurors that (1) it was their duty to decide the facts of the case based only on evidence presented during trial and on their role as the sole judge of the witnesses' credibility; and (2) the City had the burden to prove each element of the crime of stalking beyond a reasonable doubt, explaining that a reasonable doubt is one for which a reason exists and may rise from the evidence or lack of evidence. The jury

convicted McClure of stalking as charged. McClure appealed to the Clark County Superior Court under RALJ 1.1(a).

The superior court affirmed, ruling, in part, that the trial court's statements were not comments on the evidence. McClure sought discretionary review of the superior court's decision on multiple grounds.

Our court commissioner granted discretionary review on the sole issue that satisfied RAP 2.3(d)[1]—whether two statements he identified from the trial court's jury venire case summary constituted prejudicial unconstitutional comments on the evidence: (1) that McClure had asked Hamilton to go on a date; and (2) that McClure's actions had made her "obviously"[2] uncomfortable. As a result, the scope of this discretionary review is very narrow, and we circumscribe our analysis accordingly.

ANALYSIS

McClure argues that the district court's oral description of the case for the jury venire was a prejudicial unconstitutional comment on the evidence because (1) some statements implied that the trial court believed the stalking charge against him was true; (2) the court's comments tainted the entire trial; and (3) the City's evidence was insufficient to overcome the resultant presumed prejudice. These arguments fail.

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[1] In granting discretionary review, our commissioner noted that if the trial court's case summary for the jury venire was a comment on the evidence, then the superior court's decision affirming McClure's conviction would conflict with the following cases: (1) *State v. Levy*, 156 Wn.2d 709, 719-20, 723, 132 P.3d 1076 (2006) (comments on the evidence are presumed prejudicial); and (2) *State v. Jackman*, 156 Wn.2d 736, 743, 132 P.3d 136 (2006) (once defendant demonstrates that court commented on evidence, burden shifts to State to show lack of prejudice, unless record reflects defendant could not have been prejudiced).

[2] CP at 28.

I. TRIAL COURT DID NOT COMMENT ON EVIDENCE

The Washington State Constitution prohibits a judge from commenting on the evidence. WASH. CONST. art. IV, § 16. A judge's statement is a comment on the evidence if it conveys or implies the court's opinion on the merits or an evaluation of a disputed fact or issue. *State v. Lane*, 125 Wn.2d 825, 838, 889 P.2d 929 (1995). In our view, taken in context, neither of the two trial court statements that our court commissioner designated for our review were opinions about the merits of the case or an evaluation of the evidence. Rather, they merely summarized for the jury pool the *allegations* to give them a "flavor"[3] of what the case would be about.

For example, the trial court did *not* state as fact that McClure had asked Hamilton to go on a date; rather, the trial court predicted:

> [*The*] *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 [purposes] *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.

CP at 28 (emphasis added). Similarly, the trial court did not state as fact that McClure's actions had made Hamilton "obviously" uncomfortable. Rather, the trial court was merely attempting to summarize the City's allegations against McClure:

> 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 at 28 (emphasis added).

[3] CP at 28.

The context of these statements demonstrates that the trial court was not intending to express its opinion about McClure's guilt.[4] Rather it was explaining what it expected the case to be about, educating the jury venire for the purpose of ferreting out potential foreknowledge of the case or other factors that might cause individual members of the venire to be unable to sit as fair and impartial jurors. We hold, therefore, that, taken in context, these statements by the trial court were not impermissible comments on the evidence.

II. HARMLESS ERROR

Even if the trial court's pretrial summary of the case arguably contained improper comments on the evidence, we hold that they did not create reversible error. For purposes of this part of our analysis, we presume without deciding that the trial court's statements about Hamilton's obvious discomfort and McClure's asking her on a date were prejudicial comments on the evidence. *Lane*, 125 Wn.2d at 838. The burden then shifts to the State to disprove this presumption unless the record affirmatively shows the defendant could not have been prejudiced by these comments. *Lane*, 125 Wn.2d at 838-39. We hold that the City has met this burden.

A. Overwhelming Untainted Evidence

For the record to demonstrate harmless error, overwhelming untainted evidence must have "'necessarily [led] to a finding of guilt.'" *Lane*, 125 Wn.2d at 839 (quoting *State v. Guloy*, 104 Wn.2d 412, 426, 705 P.2d 1182 (1985), *cert. denied*, 475 U.S. 1020 (1986)). McClure argues that (1) the record cannot show overwhelming untainted evidence to support his

[4] We note, from the perspective of hindsight on appellate review, that the alleged error here might have been avoided if the trial court had chosen different language to summarize the case for the venire. Additionally, we note that some trial courts ask the parties to prepare an agreed summary of the case that the court presents to the venire before the parties begin their questioning.

conviction because the trial court's opening summary tainted each piece of evidence that followed at trial; and (2) the City's lack of proof about McClure's knowledge of Hamilton's fear means that the jurors used the trial court's comment to convict him. This argument fails.

McClure already had full review of his district court trial by the superior court, sitting in its appellate capacity. His argument to us, however, ignores the narrow scope of our discretionary review, which is limited to whether the trial court's introductory comments about only *some* evidence expected to be presented at trial were prejudicial. Clearly, we must review the sufficiency of that evidence on which the trial court arguably commented to determine whether the untainted evidence could overcome the presumed prejudice. But none of the trial court's introductory comments in any way alluded to *McClure's knowledge* that his actions made Hamilton feel "uncomfortable,"[5] which is the only element of stalking that McClure actually challenges that falls within the narrow scope of our commissioner's grant of discretionary review.[6]

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[5] CP at 28.

[6] To convict a person of stalking, a jury must find that (1) the defendant intentionally and repeatedly harassed or repeatedly followed another person; (2) the person harassed or followed was *fearful that the stalker intended to injure the person* and a reasonable person would experience such fear under the circumstances; and (3) the stalker either intended to frighten, to intimidate, or to harass the person or *knew or reasonably should have known* that the person was afraid, intimidated, or harassed. RCW 9A.46.110(1).

McClure contends that the jury must have used the trial court's comments to convict him to compensate for the alleged lack of trial evidence of the third element of stalking—that *he knew, or reasonably should have known,* that Hamilton was afraid of him. Br. of Appellant at 8-9. But the remarks that our commissioner identified as potentially being comments on the evidence related only to the second element of stalking—that Hamilton was fearful that McClure intended to injure her. In contrast, neither of these two remarks (that McClure had asked Hamilton to go on a date or that Hamilton obviously felt uncomfortable) reference the third element, McClure's knowledge. Because McClure's argument would thus take us outside the narrow scope of our discretionary review here, we do not further consider it.

Independent of the trial court's introductory remarks, the record contains overwhelming uncontroverted evidence of the second element of stalking[7] at issue here—that as McClure's comments to Hamilton and McClure's behavior increased in intensity, she became increasingly frightened of him. She testified about (1) her ongoing fear of McClure based on his repeated overtures and other actions, especially when she was working alone late at night; (2) the measures she took to avoid contact with him, including seeking permission to work a different shift, closing the restaurant early, and asking her grandfather to stay with her while she closed up; (3) his anger when she refused his invitation to go out on his boat with him; (4) being afraid that after she had rebuffed his many requests he would assault her or "take [her] somewhere" if she continued to turn him down, CP at 147; (5) her belief that he was not "in the same reality" and "sinking," CP at 147; (6) her fear that McClure was following her home from work; and (7) her terror after the late-evening phone call at work that prompted her call to the police. We hold that this untainted evidence of Hamilton's fear of McClure was more than sufficient to overcome any presumed prejudice from the trial court's comments during its pre-voire dire summary of what evidence it expected the jury would hear at trial.

B. Presumption that Jury Followed Court's Instructions

McClure's argument also ignores (1) the context in which the trial court made its comments (as we previously discussed in part I of this analysis section); and (2) the well-settled presumption that the jury follows the court's instructions, including here, its instruction to disregard any statements it made that might be construed as comments on the evidence. Thus,

[7] *See* n.7, above.

even if the above evidence were not sufficient to overcome the presumed prejudice, other contextual factors also preclude reversal here.

For example, an inadvertent, isolated comment followed by a curative instruction may not prejudice a party. *Dybdahl v. Genesco, Inc.*, 42 Wn. App. 486, 490-91, 713 P.2d 113 (1986) (judge's remark not prejudicial where jury instructed to disregard explicit or implied comments on merits of evidence). Prejudice against a criminal defendant may also be cured by a jury instruction that the charges are mere accusations against him or her and that the jurors should rely only on evidence produced at trial to determine guilt. *State v. Sivins*, 138 Wn. App. 52, 61, 155 P.3d 982 (2007). Once such a curative instruction is given, we presume the jury followed it. *Dybdahl*, 42 Wn. App. at 491. Such is the case here.

The record shows that (1) the trial court presented its summary of the case to the entire venire, before the final jurors were selected and sworn; and (2) the focus of this summary was a broad preliminary overview of the allegations against McClure to acquaint the potential jurors with the nature, place, and witnesses of the case in preparation for questioning about whether any jurors had fore-knowledge or reasons why they could not serve impartially. As we previously explained, the trial court consistently prefaced its summary statements with qualifying equivocal phrases like "maybe" and "I think" "[the] allegations [will show]." CP at 28. Moreover, the trial court's single mention of Hamilton's fear was not focused on any specific piece of evidence or a specific jury instruction; rather, it was in the context of explaining the "details" that the City's case was likely going to involve, offered merely to show "the flavor of the case" alleged. CP at 28.

McClure cites no cases addressing prejudicial court comments made pretrial while summarizing the case for a pool of *potential* jurors, as was the situation here. On the contrary, every case of which we are aware analyzes the potential prejudice of court comments about finite pieces of evidence or a jury instruction made *during* trial. *See, e.g., Dybdahl*, 42 Wn. App. at 490 (court's comment about "'startling figures'" in witness's testimony immediately after the testimony did not convey court's opinion on credibility); *State v. Levy*, 156 Wn.2d 709, 726, 132 P.3d 1076 (2006) (court's "mere mention of a fact" in a jury instruction did not imply court's belief that fact was true).

Furthermore, the trial court here expressly explained to the jury venire that the stalking charge against McClure was only an allegation and that he had pled not guilty. At the close of trial, the trial court again instructed the empanelled jury that (1) the burden was on the City to prove the charges beyond a reasonable doubt based on the evidence elicited at trial; (2) they were to ignore anything the court may have said that could be construed as a comment on the evidence; and (3) the jury was the sole decider of the facts of the case and the witnesses' credibility. We presume that the jury followed the court's instructions and, therefore, conclude that in convicting McClure, the jury did not use the trial court's pretrial remarks about

Hamilton's fear and his having asked her for dates.[8] *See Dybdahl*, 42 Wn. App. at 490.

We affirm.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

Hunt, J.

I concur:

Johanson, J.

[8] Under the circumstances of this case, we further decline McClure's implied invitation to be the first court to find prejudice and reversible error based on the trial court's educational pretrial summary of the case for the entire venire.

WORSWICK, J. (dissenting) — I disagree with the majority's decision holding that the trial judge's comments were not improper comments on the evidence and that the improper comments on the evidence are harmless. In my opinion, this case should be reversed and remanded. Accordingly, I respectfully dissent.

I. JUDICIAL COMMENT ON THE EVIDENCE

The majority holds that the trial judge's initial instructions to the jury venire are not improper comments on the evidence because they merely summarized for the jury pool the *allegations* to give them a "flavor" of what the case was about. Majority at 5. I cannot agree that the trial judge's remarks are not a comment on the evidence.

To constitute an improper comment on the evidence, the court need not have expressly conveyed to the jury its personal feelings on an element of the offense; it is sufficient if these feelings are merely implied. *State v. Levy*, 156 Wn.2d 709, 721, 132 P.3d 1076 (2006). "A court's statement 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. Stvins*, 138 Wn. App. 52, 58, 155 P.3d 982 (2007) (emphasis added) (quoting *State v. Lane*, 125 Wn.2d 825, 838, 889 P.2d 929 (1995)). A trial judge is prohibited from making even implied comments on the evidence in order "to prevent the jury from being unduly influenced by the court's opinion regarding the credibility, weight, or sufficiency of the evidence." *Stvins*, 138 Wn. App. at 58 (citing *State v. Eisner*, 95 Wn.2d 458, 462, 626 P.2d 10 (1981)).

The majority holds that this trial judge did not comment on the evidence because he qualified his comments as "allegations," or prefaced them by saying, "I think." I cannot agree

that by characterizing his comments as allegations, the trial judge avoided making an improper comment on the evidence. Here, the trial judge's lengthy recitation of the facts went beyond giving the jury a "flavor" of the case and implied to the jury that certain facts were true and that Erika Hamilton's testimony was credible. *See Lane*, 125 Wn.2d at 837-38 (instruction stating the reason for witness's sentence being reduced impermissibly implied that witness's testimony as a whole was credible). And the judge's statements that he "thinks" his comments may be correct makes these comments more, not less, problematic, in that it directly conveys the judge's personal feelings about the case.

The trial judge did not merely read the allegations from the information. Instead, the trial judge provided the jury with an impromptu summary of the City of Vancouver's (City) case against Albert McClure which included references to disputed facts. For example, the trial judge referenced McClure asking Erika Hamilton on a date and McClure asking her if she had ever been stalked. Hamilton testified that McClure made these comments to her, but McClure expressly denied ever making such comments. Therefore, the trial judge implied that disputed facts had been proved and that Hamilton was a credible witness.

And in an even more egregious comment, the trial judge stated that "[Hamilton] *obviously* felt uncomfortable." Clerk's Papers (CP) at 28 (emphasis added). An essential element of stalking is that the defendant knew or reasonably should know that the person was afraid, intimidated, or harassed, and that the feeling of fear experienced by the person allegedly being stalked "must be one that a reasonable person in the same situation would experience under all the circumstances." RCW 9A.46.110(1)(b), (c)(ii). By commenting that Hamilton "obviously" felt afraid, the trial judge stated as fact a critical, disputed element that was

necessary to prove the State's case. In my opinion, this comment is also an impermissible judicial comment on the evidence.

Here, the trial judge referenced several disputed facts, implied that Hamilton was a credible witness, announced his personal feelings about the case, and stated that an element of the State's case was "obviously" true. I am not persuaded that the trial judge has avoided making improper comments on the evidence by characterizing its comments as "allegations" establishing the "flavor" of the case. Majority at 5. Accordingly, I would hold that the trial judge's comments were improper comments on the evidence which violated article IV, section 16 of the Washington State Constitution.

II. HARMLESS ERROR

The majority opinion also holds that even if the trial judge's comments were improper comments on the evidence, they were harmless. For purposes of its harmless error analysis, the majority must presume that the judge's comments were an improper comment on the evidence and, additionally, must presume that the improper comments were prejudicial. *Levy*, 156 Wn.2d at 723. The majority does not adequately overcome this required presumption. Accordingly, I disagree.

This is a "he said she said" case, not, as the majority states, a case with "overwhelming uncontroverted evidence." Majority at 8. The majority's opinion essentially ignores the presumption of prejudice that applies when determining whether judicial comments on the evidence are harmless. The majority appears to apply a sufficiency of the evidence standard and assumes the truth of the City's evidence. In my opinion, the trial judge's comments, which implied Hamilton was a credible witness, tainted Hamilton's testimony. Because judicial

comments on the evidence are presumed to be prejudicial, "overwhelming *untainted* evidence" must support the defendant's conviction. *Lane*, 125 Wn.2d at 839-40 (emphasis added). Many of the facts proving the elements of stalking were contested; the jury was required to resolve conflicts between Hamilton's and McClure's testimony. Given the presumption of prejudice, I cannot consider Hamilton's testimony to be untainted evidence. Because the City relied on Hamilton's tainted testimony to prove several of the essential elements of stalking, there is not overwhelming, untainted evidence supporting the jury's verdict.

To prove McClure committed the crime of stalking, the City was required to prove that (1) McClure intentionally and repeatedly harassed or repeatedly followed Hamilton, (2) Hamilton was placed in fear that McClure intended to injure her, (3) Hamilton's fear must have been "one that a reasonable person in the same situation would experience under all the circumstances," and (4) McClure either (a) intended to frighten, intimidate, or harass Hamilton; or (b) knew or reasonably should have known that Hamilton was afraid, intimidated, or harassed even if McClure did not intend to frighten, intimidate, or harass Hamilton. RCW 9A.46.110(1).

I agree that there was overwhelming, untainted evidence establishing that Hamilton was actually afraid. The City presented evidence from Hamilton's grandfather and the police officer who responded to her complaint. Both witnesses testified that she appeared afraid. However, the City relied exclusively on tainted evidence to prove other elements of stalking including (1) that McClure repeatedly followed or harassed her, (2) Hamilton's fear was reasonable, and (3) McClure knew or should have known that Hamilton was afraid, intimidated, or harassed.

A. *Repeatedly Followed or Harassed*

The trial judge's comments affected the City's evidence proving that McClure repeatedly harassed or followed Hamilton. Hamilton testified that McClure came into the Subway restaurant almost every time that she was working and would stay in or around the store for long periods of time while she was working. She also testified that a car similar to McClure's followed her home one night and an unidentified person called her at the Subway making comments like "I'm going to go crazy if I can't have you." CP at 150. In contrast, McClure testified that he never spent more than approximately 15 minutes in the Subway. McClure also testified that he was not following Hamilton and had never been to her house. There was no evidence that McClure was the individual who either was walking outside Hamilton's house, or who was the "unidentified man" who had called her on the restaurant's business line.

If the trial judge's comments did not taint Hamilton's testimony by implying she was a credible witness, Hamilton's testimony would be overwhelming evidence proving that McClure repeatedly harassed or followed her. And even though the trial judge implied that Hamilton's testimony was credible, I would consider Hamilton's testimony overwhelming if it were uncontroverted. However, McClure's testimony contradicted Hamilton's testimony on every point required to prove he repeatedly followed or harassed Hamilton and, as a result, there was not overwhelming, untainted evidence supporting the essential element of stalking that McClure repeatedly followed or harassed Hamilton.

B. *Reasonable Fear*

The City was also required to prove that Hamilton's fear was fear "that a reasonable person in the same situation would experience under all the circumstances." RCW

9A.46.110(1)(b). When the trial judge commented that Hamilton "obviously felt uncomfortable" (CP at 28), he implied that (1) the facts Hamilton would testify to were true and (2) those facts would "obviously" make any person feel afraid. No other witness testified that he or she would feel afraid under the same circumstances. McClure testified that he visited the Subway for no more than 15 minutes at a time and his conversations with Hamilton were limited to impersonal, casual conversation while he ordered food.

Hamilton's untainted testimony *could* have been sufficient evidence to allow a reasonable jury to find that a reasonable person would be afraid under those circumstances. However, McClure testified to circumstances under which no reasonable person would be afraid. Without Hamilton's testimony, the City could not prove that a reasonable person would feel afraid under the circumstances. Accordingly, there is not untainted evidence that establishes an essential element of stalking.

C. *Knew or Should Have Known*

In addition, the trial judge's comments tainted the evidence proving that McClure reasonably should have known that Hamilton was afraid, intimidated, or harassed. RCW 9A.46.110(1)(c)(ii). In addition to her other testimony, Hamilton testified that McClure asked her if she had ever been stalked before, told her she was pretty, and asked for her personal cell phone number. Hamilton also testified that McClure had asked her out on a date and invited her to go on his boat. Like other aspects of Hamilton's testimony, this testimony was directly contradicted by McClure's testimony. McClure testified that he never asked Hamilton on a date. Although he admitted that he made a passing comment about taking Hamilton on his boat, he did not wait for a response, and never got angry at her for not accompanying him on his boat.

McClure also testified that he engaged in limited casual conversation with Hamilton while she was serving him. Moreover, Hamilton did not tell McClure to stop coming to the restaurant. Hamilton did not tell McClure that he was making her uneasy. McClure denied knowing that Hamilton was alarmed or frightened.

If the facts to which Hamilton testified were true, a reasonable jury could find that McClure knew or should have known that he was frightening, intimidating, or harassing Hamilton.[9] But some of the trial judge's comments directly implied that the facts Hamilton testified to were true. For example, the trial judge commented that McClure asked Hamilton out on a date, a fact which was disputed by McClure's testimony. The City's argument that McClure should have known Hamilton felt afraid, intimidated, or harassed must have rested on the assumption that a person should know that consistently engaging in inappropriate, overly personal conversation with a stranger would be frightening, intimidating, or harassing. The trial judge's comments implied the existence of disputed facts which established that McClure did engage in overly personal conversations with Hamilton while she was at work. Therefore, the City also relied on tainted evidence to prove that McClure should have known that Hamilton was afraid, intimidated, or harassed.

[9] It does not appear that the City argued below that McClure intended to frighten, intimidate, or harass Hamilton or that he knew she was afraid, intimidated, or harassed. There is uncontroverted evidence in the record that Hamilton never told McClure he was upsetting her or that she wanted him to leave her alone. Lack of notice is not a defense to stalking if the alleged stalker was intending to intimidate or harass, but there is no evidence in the record that McClure intended to frighten, intimidate, or harass Hamilton. RCW 9A.46.110(2)(a). And because the uncontroverted evidence in the record establishes that McClure did not know Hamilton was afraid, intimidated, or harassed, I limit my analysis to whether the trial judge's comments tainted the evidence proving that McClure should have known that Hamilton was afraid, intimidated, or harassed.

The majority's analysis of the effect of the trial judge's comments is too narrowly applied to the evidence required to prove the essential elements of stalking. In my opinion, the trial judge's improper comments on the evidence tainted evidence necessary to prove several essential elements of stalking. Accordingly, the trial judge's improper comments on the evidence cannot be considered harmless.

D. *Remedial Instruction*

Finally, the majority relies on the presumption that the jury followed the trial judge's instruction to disregard any implied comments on the evidence. I agree that prejudice resulting from an isolated or inadvertent judicial comment on the evidence may be cured by an instruction to the jury. *Sivins*, 138 Wn. App. at 61 (citing *Eisner*, 95 Wn.2d at 463). However, the trial judge's comments in this case were neither isolated nor trivial. Therefore, I do not believe they could be cured by an instruction to the jury.

For the above reasons, I disagree with the majority's opinion holding that the trial judge's comments in this case were not improper judicial comments on the evidence or that the trial judge's comments were harmless. I would reverse McClure's convictions and remand for further proceedings. Accordingly, I respectfully dissent.

Worswick, C.J.

EXHIBIT 2

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

CITY OF VANCOUVER, Respondent, v. ALBERT McCLURE, Petitioner.	No. 43682-5-II RULING GRANTING REVIEW

Albert McClure seeks discretionary review of the superior court's decision affirming his district court conviction for stalking. This court grants review on a limited issue.

Between April and August 2010, McClure frequented a Subway restaurant in Vancouver three nights a week. Erika Hamilton worked there. He was about 40 and she was 17. He would come to the restaurant near its closing time. She said he seemed "very flirty and like asked me if I had a boyfriend." Resp. to Mot. for Disc. Rev., App. A excerpts of Report of Proceedings (RP) at 114. She also said he was "very talkative, friendly, tipped well and that was basically it." Resp. to Mot. for Disc. Rev., App. A excerpts of Report of Proceedings (RP) at 116. One time he waited in his car until she took her break and had a cigarette with her. He told her she was attractive and, on another occasion, asked her if she had been stalked before. He asked for her cell phone number, so he could call in his order ahead of time, but she told him to call the restaurant's number. He also asked her on a date, but she declined. On another

occasion, he was waiting outside the restaurant and asked if she wanted to go out on his boat.

According to Hamilton's testimony, these incidents and conversations began to alarm her. She told her manager about McClure, but he did not do anything. She also told her grandparents about McClure. She attempted to change her shift, but could not arrange it. She sometimes closed the restaurant early, or had another employee make McClure's sandwiches, so that she could avoid him. One time she felt like he followed her home because a car similar to his followed her until she turned into her driveway and then continued on. Another time, she received a phone call after the restaurant had closed from a person who sounded like a man disguising his voice and who said "I have been thinking about you all the time, I'm going to go crazy if I can't have you, I don't know what I'm going to do." Resp. to Mot. for Disc. Rev., App. A excerpts of Report of Proceedings (RP) at 123. She reported this call to her grandparents, her manager and the police. She believed the caller was McClure and began having panic attacks when she closed the restaurant.

The City of Vancouver charged McClure with stalking. The municipal court introduced the case to the jury as follows:

> [T]he City of Vancouver has brought a charge forward against Albert McClure. The charge against Mr. McClure is that of called [sic] stalking where it's alleged in the period of time from 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 [sic] I think if she wanted to go on a date with him and at

> some point 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.

Resp. to Mot. for Disc. Rev. at 5 (quoting an excerpt of RP at 1).[1]

Hamilton testified as described above. Managers of nearby restaurants testified that McClure was a frequent customer but that no employees had complained about him. McClure testified that while he had frequent conversations with Hamilton, he never wanted to date her and had not followed her.

The district court jury convicted McClure as charged. He appealed to superior court, arguing: (1) the first judge assigned to the case, Judge Swanger, erred in not recusing himself sua sponte because he had presided over an earlier case involving McClure; (2) the evidence of stalking was insufficient; (3) the court erred in granting an order in limine that prevented him from asking Hamilton about a rape that she had suffered three years prior and about molestation as a child; (4) the judge commented on the evidence when he mentioned that he used to be a prosecutor; (5) the court erred in denying a motion for a mistrial after a testifying officer violated an order in limine; and (6) the judge commented on the evidence when he summarized the case as quoted above. The superior court concluded that Judge Swanger was not obliged to recuse himself, that the evidence was sufficient, that the order in limine was within the district court's discretion, that the judge did not comment on the evidence in his comment about

[1] McClure did not append the district court transcript to his motion, so this court could not review his testimony in detail.

having been a prosecutor and that the court had not erred or shown bias in denying the motion for mistrial. As to the last claim of error, the court found the judge's summary of the case "troubling" and "perilously close" to an unconstitutional comment on the evidence. Mot. for Disc. Rev., Exhibit 1 at 7-8. But it found that:

> the entire summary viewed in context, did not convey the judge's personal opinion concerning the merits of the City's case. The judge indicated that his statements were based on a "charge" and that the factual statements were "alleged" or "allegations." Judge Zimmerman indicated that he was attempting to help the jurors understand the nature of the case by providing the summary. There were repeated references to the fact that the court was guessing or thought particular allegations were being made; the trial judge made it clear that he was unaware of details. Finally, the court immediately advised the jury after the summary that McClure had entered a plea of not guilty to the particular charge. That comment, together with later instructions concerning the burden of proof, the presumption of innocence, and the need for evidence, cured any misunderstanding that jurors may have had about the judge predetermining the issues or the facts.

Mot. for Disc. Rev., Exhibit 1 at 8-9.

McClure seeks discretionary review, arguing that (1) the evidence was insufficient to establish beyond a reasonable doubt that McClure knew that Hamilton was afraid of him, (2) the evidence was insufficient to establish that Hamilton's fear was reasonable, (3) the district court violated his right to present a defense when it granted the order in limine as to Hamilton's past rape and molestation, and (4) the trial judge prejudicially commented on the evidence.[2] Both McClure and the City cite to RAP 2.3(b) as to whether this court should grant review. But RAP 2.3(d), not RAP 2.3(b), applies to motions for discretionary review of a superior court decision reviewing the

[2] The City moves to dismiss McClure's motion as untimely filed under RAP 6.2(b). But McClure filed his motion within the deadline set by this court on July 31, 2012. The City's motion to dismiss is denied.

decision of a court of limited jurisdiction. Under RAP 2.3(d), this court may grant review only:

> (1) If the decision of the superior court is in conflict with a decision of the Court of Appeals or the Supreme Court; or
> (2) If a significant question of law under the Constitution of the State of Washington or of the United States is involved; or
> (3) If the decision involves an issue of public interest which should be determined by an appellate court; or
> (4) If the superior court has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by the court of limited jurisdiction, as to call for review by the appellate court.

McClure does not demonstrate that his first three issues meet any of these criteria for discretionary review. But as to his issue on the judge's commenting on the evidence in his summary at the beginning of trial; he meets the criterion contained in RAP 2.3(d)(1). Article IV, section 16 of the Washington State Constitution provides that "[j]udges shall not charge juries with respect to matters of fact, nor comment thereon." Its purpose is to "prevent the jury from being unduly influenced by the court's opinion regarding the credibility, weight, or sufficiency of the evidence." *State v. Sivens*, 138 Wn. App. 52, 58, 155 P.3d 982 (2007); *State v. Eisner*, 95 Wn.2d 458, 462, 626 P.2d 10 (1981) (quoting *State v. Jacobsen*, 78 Wn.2d 491, 495, 477 P.2d 1 (1970)). A court comments on the evidence when it makes a statement from which its evaluation of a disputed issue can be inferred. *State v. Lane*, 125 Wn.2d 825, 838, 889 P.2d 929 (1995). In its summary, the district court judge stated that McClure had asked Hamilton "if she wanted to go on a date with him" and stated that Hamilton "obviously felt uncomfortable." Mot. for Disc. Rev. Exhibit 1 at 7 (quoting an excerpt of RP at 1). These were disputed issues, so these statements appear to be comments on the

evidence. And comments on the evidence are presumed to be prejudicial. *State v. Levy*, 156 Wn.2d 709, 719-20, 132 P.3d 1076 (2006). Once a comment on the evidence has been demonstrated, the burden shifts to the City "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). In concluding that the district court judge's summary was not a comment on the evidence, or that he cured the summary by concluding with mentioning McClure's plea of not guilty, the superior court's decision conflicts with the above cases. As such, discretionary review of the superior court's decision on the comment on the evidence issue is warranted under RAP 2.3(d)(1). Accordingly, it is

ORDERED that McClure's motion for discretionary review is GRANTED as to the issue of whether the district court judge's summary constituted a prejudicial unconstitutional comment on the evidence. McClure will file his designation of clerk's papers and statement of arrangements within 15 days.

DATED this 24th day of September, 2012.

Eric B. Schmidt
Court Commissioner

cc: Nicole T. Dalton
Suzanne Lee Elliott
Kevin J. McClure
Jonathan C. Schetky
Hon. Robert A. Lewis
Hon. Darvin Zimmerman

SUZANNE LEE ELLIOTT LAW OFFICE

January 07, 2014 - 2:26 PM

Transmittal Letter

Document Uploaded: 436825-Petition for Review.pdf

Case Name: City of Vancouver v. Albert McClure

Court of Appeals Case Number: 43682-5

Is this a Personal Restraint Petition? Yes ● No

The document being Filed is:

Designation of Clerk's Papers Supplemental Designation of Clerk's Papers

Statement of Arrangements

Motion: ____

Answer/Reply to Motion: ____

Brief: ____

Statement of Additional Authorities

Cost Bill

Objection to Cost Bill

Affidavit

Letter

Copy of Verbatim Report of Proceedings - No. of Volumes: ____
Hearing Date(s): _____

Personal Restraint Petition (PRP)

Response to Personal Restraint Petition

Reply to Response to Personal Restraint Petition

● Petition for Review (PRV)

Other: _____

Comments:

No Comments were entered.

Sender Name: Suzanne L Elliott - Email: **calbouras@hotmail.com**