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 REPLY BRIEF

Suzanne Lee Elliott
Attorney for Petitioner
1300 Hoge Building
705 Second Avenue
Seattle, WA 98104
(206) 623-0291

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Constitutional Provisions

I.
REPLY ARGUMENT

A. THE TRIAL JUDGE'S REMARKS WERE A COMMENT ON THE EVIDENCE

The City argues that the trial judge's statement was not a comment on the evidence. 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).

Here, the trial judge's comment resolved several questions of fact. He told the jury that McClure had gone to the victim's place of work "dozens of times." He said that the alleged victim "obviously felt uncomfortable." He said that McClure "asked her if she had ever been stalked before." All of these were disputed issues of fact. CP 27. The statement clearly suggested the alleged victim was credible. *Id.* And the remarks were lengthy. Worse yet, the remarks were made at the beginning of the case so they had primacy in the juror's minds when the evidence was being admitted.

B. MCCLURE DOES NOT HAVE THE BURDEN OF PROVING THAT THE REMARKS WERE HARMFUL

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).

C. THE STATE'S EVIDENCE THAT A CRIME HAD BEEN COMMITTED WAS NOT "OVERWHELMING"

To assess prejudice, the test is "whether there is 'overwhelming untainted evidence' to support the conviction." *Sivins*, 138 Wn. App. at 61 (quoting *State v. Lane*, 125 Wn.2d 825, 839, 889 P.2d 929 (1995)). 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.

Moreover, the jury instructions did not cure the error in this matter. There was no "independent" evidence in this case. The evidence came down to a credibility contest between McClure and the alleged victim. But before the first witness had taken the stand, the judge had tainted the jurors with his assessment of the evidence. The "boilerplate" instructions could not cure this error.

II.
CONCLUSION

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

DATED this 14 day of May, 2013.

Respectfully submitted,

Suzanne Lee Elliott

Suzanne Lee Elliott, WSBA #12634
Attorney for Albert McClure

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:

Mr. Jonathan Schetky
City Attorney's Office
415 West 6th Street
PO Box 1995
Vancouver, WA 98665

Mr. Albert McClure
14300 NE 20th Avenue, #204
Vancouver, WA 98686

14 May 2013
Date

William Hackney

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 REPLY BRIEF

Suzanne Lee Elliott
Attorney for Petitioner
1300 Hoge Building
705 Second Avenue
Seattle, WA 98104
(206) 623-0291

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Constitutional Provisions

I.
REPLY ARGUMENT

A. THE TRIAL JUDGE'S REMARKS WERE A COMMENT ON THE EVIDENCE

The City argues that the trial judge's statement was not a comment on the evidence. 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).

Here, the trial judge's comment resolved several questions of fact. He told the jury that McClure had gone to the victim's place of work "dozens of times." He said that the alleged victim "obviously felt uncomfortable." He said that McClure "asked her if she had ever been stalked before." All of these were disputed issues of fact. CP 27. The statement clearly suggested the alleged victim was credible. *Id.* And the remarks were lengthy. Worse yet, the remarks were made at the beginning of the case so they had primacy in the juror's minds when the evidence was being admitted.

B. MCCLURE DOES NOT HAVE THE BURDEN OF PROVING THAT THE REMARKS WERE HARMFUL

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).

C. THE STATE'S EVIDENCE THAT A CRIME HAD BEEN COMMITTED WAS NOT "OVERWHELMING"

To assess prejudice, the test is "whether there is 'overwhelming untainted evidence' to support the conviction." *Sivins*, 138 Wn. App. at 61 (quoting *State v. Lane*, 125 Wn.2d 825, 839, 889 P.2d 929 (1995)). 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.

Moreover, the jury instructions did not cure the error in this matter. There was no "independent" evidence in this case. The evidence came down to a credibility contest between McClure and the alleged victim. But before the first witness had taken the stand, the judge had tainted the jurors with his assessment of the evidence. The "boilerplate" instructions could not cure this error.

II.
CONCLUSION

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

DATED this 14 day of May, 2013.

Respectfully submitted,

Suzanne Lee Elliott

Suzanne Lee Elliott, WSBA #12634
Attorney for Albert McClure

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:

Mr. Jonathan Schetky
City Attorney's Office
415 West 6th Street
PO Box 1995
Vancouver, WA 98665

Mr. Albert McClure
14300 NE 20th Avenue, #204
Vancouver, WA 98686

14 May 2013
Date

William Hackney