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A. ASSIGNMENT OF ERROR

The trial court erred in improperly commenting on the evidence in giving instruction 10.

B. ISSUE PERTAINING TO ASSIGNMENT OF ERROR

Whether the trial court erred in improperly commenting on the evidence in giving instruction 10?

C. STATEMENT OF THE CASE

01. Procedural Facts

Kevin D. Savage (Savage) was charged by information filed in Mason County Superior Court on October 30, 2006, with vehicular homicide, contrary to RCW 46.61.520. [CP 114].

After Savage's initial trial ended in a mistrial [RP 109; CP 67], a second trial to a jury commenced on June 3, 2008, the Honorable Toni A. Sheldon presiding. The jury returned a verdict of guilty as charged, Savage was sentenced within his standard range and timely notice of this appeal followed. [CP 4-20, 32-33].

02. Substantive Facts

David Broussard died as a result of a collision between a motorcycle he was driving and a 1963 Buick Skylark driven by Savage on May 14, 2006. [RP 272, 312-14, 340, 552-53, 562]. The collision occurred in a 45 miles-per-hour zone at approximately 4:40 in

the afternoon. [RP 422, 431]. The motorcycle was found embedded in the front of the Buick. [RP 422].

When contacted at the scene, Savage said that he had been travelling southbound, that he had observed his brother driving in the opposite direction [RP 1135], that he had stopped and put his car in reverse and started to go backwards in the southbound lane [RP 317], that he had attempted to make a u-turn to contact his brother, and that he saw the motorcycle but believed he had enough time to safely make the turn before the ultimate collision. [RP 1135].

At trial, Savage denied ever telling the police that he had seen the motorcycle ahead of time [RP 1160, 1162], explaining that he had skidded to a stop after his brother passed him, that he backed up his car and looked both ways to see if any cars were coming, and while attempting to turn around the motorcycle hit the right front end of his car. [RP 1155-56]. "I didn't see him until right – just before he hit the front of my car." [RP 1157]. He then threw his "car in park and got out, ran over to (the driver of the motorcycle) to see if he was okay," and then "immediately called 911." [RP 1157].

An evaluation of the Buick produced no mechanical defects that would have contributed to the accident. [RP 337-347]. The State presented further evidence demonstrating that before the collision the car

had travelled in reverse somewhere in the speed range of 33 to 44 miles per hour [RP 423], that the car's brakes had locked up 39' prior to stopping [RP 450, 493], and that to go from 0 to 44 miles per hour would take 6.08 seconds and 196.4'. [RP 959-960, 993, 1117].

Broussard was wearing a helmet when he left his mother's house the day of the accident. "David never went without a helmet. Never." [RP 310]. Kenneth Pettie, who observed Broussard on his motorcycle moments before the accident, said Broussard was wearing a helmet before the collision because he "would have noticed if he wasn't wearing a helmet." [RP 282]. The chinstrap on the motorcycle helmet found at the scene between Broussard and the vehicle was clipped and the helmet was without significant damage, leading one of the paramedics to conclude that Broussard was not wearing the helmet when his head hit the ground. [RP 260-61, 269].

Based on the damage to the forks on the motorcycle, its speed at time of impact was determined to be "(a)round 45 miles per hour." [RP 609]. This was a ballpark figure, the minimum speed. [RP 750, 758, 820, 1075-78]. Using a vault speed formula, however, it was determined that the bike was travelling at 25 to 31 miles per hour at impact. [RP 827-830]. There was no evidence that the motorcycle was travelling at an excessive speed at the time of impact. [RP 1041-42].

D. ARGUMENT

THE TRIAL COURT IMPROPERLY
COMMENTED ON THE EVIDENCE
IN VIOLATION OF WASHINGTON
CONSTITUTION ART. 4, SEC. 16 BY
GIVING INSTRUCTION 10.

01. Overview: Comment on the Evidence

The Washington Constitution explicitly prohibits judicial comments on the evidence. Const. article IV, section 16.¹ The Washington Supreme Court has interpreted this section as forbidding a judge from “conveying to the jury his or her personal attitudes toward the merits of the case” or instructing a jury that “matters of fact have been established as a matter of law.” State v. Becker, 132 Wn.2d 54, 64, 935 P.2d 1231 (1997). A violation of the constitutional prohibition will arise not only where the judge’s opinion is expressly stated but also where it is merely implied. State v. Levy, 156 Wn.2d 709, 721, 132 P.3d 1076 (2006); State v. Jackman, 156 Wn.2d 736, 744, 132 P.3d 136 (2006). An instruction constituting an improper comment on the evidence is an issue of constitutional magnitude that may be raised for the first time on appeal.

¹ Article IV, section 16 reads “Judges shall not charge juries with respect to matters of fact, nor comment thereon, but shall declare the law.”

State v. Tili, 139 Wn.2d 107, 126 n.9, 985 P.2d 365 (1999) (citing State v. Becker, 132 Wn.2d at 64).

A judicial comment is presumed prejudicial. The presumption of prejudice may only be overcome if the record affirmatively shows no prejudice could have resulted. Levy, 156 Wn.2d at 725. The fundamental question in deciding whether a judge has impermissibly commented on the evidence is whether the alleged comment or omission “conveys the idea that the fact has been accepted by the court as true.” Levy, 156 Wn.2d at 726.

In Becker and Jackman, the court found improper comments warranted reversal where the comments concerned questions that were highly contested or the principal issues in the case. Jackman, 156 Wn.2d at 744 (judicial comment removed material fact from the jury’s consideration); Becker, 132 Wn.2d at 65 (finding comment “tantamount to a directed verdict”).

02. Instruction

Over objection [RP 1202-03], the trial court gave the following instruction:

The driver of a motor vehicle shall not turn such vehicle so as to proceed in the opposite direction unless such movement can be made in safety and without interfering with other traffic.

An oncoming driver is the favored driver under such circumstance and the primary duty to avoid a collision is upon the disfavored turning driver.

[Court's Instruction 10; CP 46].

This instruction is drawn from the civil case of Mendelsohn v. Anderson, 26 Wn. App. 933, 614 P.2d 693 (1980), which concerned the propriety of the jury being given a "deception instruction." In discussing the deception rule, which provides a defense for a driver deceived into making an otherwise wrongful turn, the court noted the following:

A driver intending to turn left must yield the right-of-way to any approaching vehicle close enough to constitute an immediate hazard. RCW 46.61.185. The oncoming driver is the favored driver under the circumstances and the primary duty to avoid a collision is upon the disfavored turning driver.... (citation omitted).

Mendelsohn, 26 Wn. App. at 937.

Instruction 10 above in this case was apparently fashioned from this statement and not from the deception instruction upheld in

Mendelsohn, which reads:

If the on coming driver wrongfully, negligently, or unlawfully operates his vehicle in such a manner that it would deceive a reasonably careful driver making the left turn, so as to cause him to proceed forward on the assumption that he had a fair margin of safety, and if the driver turning left is in fact so deceived, then the right of way rule would not apply in favor of the on coming driver.

Id.

03. Argument

There are several things wrong with court's instruction 10. In order to convict Savage, it was the State's burden, in part, to prove that he drove his vehicle in a reckless manner or with disregard for the safety of others. [Court's Instruction 11; CP 47]. That is, that he either drove in a "rash or heedless manner, indifferent to the consequences" or in a manner constituting "a more serious dereliction than ordinary negligence." [Court's Instruction 7; CP 43]. Court's instruction 10, however, permitted the jury to structure its analysis as follows:

Does the fact that an accident results mean that a person should not have turned his vehicle to go in the opposite direction? The person who so drove his vehicle is disfavored. Thus it is likely Savage is guilty since he turned his vehicle in the opposite direction and was involved in an accident, irrespective of whether he was driving in a reckless manner or with disregard for the safety of others.

Court's instruction 10 was equivalent to a directed verdict, and violated the Washington Constitution's prohibition on judicial comments on the evidence.

The instruction not only permitted the jury to infer that Savage's action in turning his vehicle in an opposite direction rose to a higher level than ordinary negligence, but also to consider this action standing alone as sufficient to establish that Savage had driven his vehicle in a reckless manner

or with disregard for the safety of other, which is a factual determination the jury needed to make, not the court, with the result that the instruction constituted an unconstitutional comment on the evidence by the trial judge.

This court must presume that the comment was prejudicial. State v. Lane, 125 Wn.2d 825, 838, 889 P.2d 929 (1995). In such a case, “[t]he burden rests on the State to show that no prejudice resulted to the defendant unless it affirmatively appears in the record that no prejudice could have resulted from the comment.” Id. (citing State v. Stephens, 7 Wn. App. 569, 573, 500 P.2d 1262 (1972), aff’d in part, rev’d in part, 83 Wn.2d 485, 519 P.2d 249 (1974)). In applying the constitutional harmless error analysis to a case involving judicial comment, our Supreme Court has held:

[E]ven if the evidence commented upon is undisputed, or “overwhelming,” a comment by the trial court, in violation of the constitutional injunction, is reversible error unless it is apparent that the remark could not have influenced the jury.

State v. Bogner, 62 Wn.2d 247, 252, 382 P.2d 254 (1963).

It cannot be credibly asserted that the court’s improper comment in instruction 10 did not influence the jury. The State cannot sustain its burden of rebutting the presumption that the court’s comment was prejudicial, with the result that this court should reverse Savage’s conviction because of the unconstitutional comment on the evidence made by the trial court in instruction 10.

E. CONCLUSION

Based on the above, Savage respectfully requests this court to reverse and dismiss his conviction for vehicular homicide.

DATED this 6th day of January 2009.

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CERTIFICATE

I certify that I mailed a copy of the above brief by depositing it in the United States Mail, first class postage pre-paid, to the following people at the addresses indicated:

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DATED this 6th day of February 2009.

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