

NO. 45319-3-II

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

STATE OF WASHINGTON,

Respondent,

v.

SOL NATHANIEL GROVER

Appellant.

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

The Honorable H. Christopher Wickham, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENT OF ERROR

The trial court commented on the evidence and caused prejudicial reversible error when it told the jury during closing argument that witness credibility was “the issue here.”

B. ISSUE PERTAINING TO ASSIGNMENT OF ERROR

Did the court, by telling the jury during closing argument that credibility was “the issue” unconstitutionally comment on the evidence and create reversible error?

C. STATEMENT OF THE CASE

Sol Grover spent much of a day consoling himself with alcohol over the breakup with his boyfriend. RP 171-72. He had been crying all day and was an emotional wreck. RP 173. Around 9 p.m., he made his way to an Olympia Intercity Transit bus stop. RP 121-23, 173. Intercity Transit is a public transit system. RP 28. Mr. Grover sat in the bus shelter waiting to catch a bus home. RP 173. He had a black plastic bag with him containing certain items to include a soda in a glass container. RP 128, 174.

Shortly before the bus arrived, another bus patrol, Johnny Burrell, sat down at the shelter. RP 127-28. Mr. Burrell noticed Mr. Grover was muttering to himself. RP 128. Mr. Burrell thought Mr. Grover was drunk. RP 129. At one point, Mr. Grover stood up and knocked over the black

plastic bag. RP 130. Mr. Burrell heard what sounded like breaking glass. RP 130. Mr. Grover grabbed the bag and held onto it. RP 130. Mr. Burrell could see a puddle forming under the bag. RP 131.

The bus arrived. Mr. Burrell got onto the bus first. RP 131. He took this same bus night after night and recognized the bus driver.¹ RP 122. Before Mr. Grover could get on the bus, the driver closed the doors on him. RP 132. Mr. Grover kicked on the bus door in frustration. RP 175. He did not understand why the driver refused him service; he had never been refused a ride previously just because he was intoxicated. RP 176.

The bus cameras showed that the bag Mr. Grover carried was wet on the bottom. RP 30, 123-24, 134. Intercity Transit has a policy against allowing riders to carry drippy wet items onto the bus as they can cause slip and fall accidents. RP 35-36.

The bus driver alerted his immediate supervisor, John Lucas, that he refused service to a rider. RP 53-54. It is Mr. Lucas's job to follow up on such actions by the drivers. RP 51-56. Mr. Lucas drove to the bus shelter arriving about 20 minutes later. RP 57. He had an option of giving Mr. Grover a courtesy ride or denying him service on other buses. RP 61.

¹ The bus driver did not testify.

Mr. Lucas could see right off that Mr. Grover was intoxicated. RP 61-63. After engaging Mr. Grover, Mr. Lucas told Mr. Grover he was not welcome on other buses that night and he should leave the bus shelter and move on. RP 61-63.

Mr. Grover tried to explain that he was upset about the breakup with the boyfriend and he just wanted to get home. RP 238. Mr. Lucas was not sympathetic. RP 178. Mr. Lucas called dispatch and asked for law enforcement back up to come to the shelter. RP 65-66. Mr. Lucas testified that when he was on the phone, Mr. Grover suddenly stood up and hit him on the side of the face. RP 67.

Mr. Grover said what really happened is Mr. Lucas had been very aggressive toward him from the start, he had been gay-bashed three times in his life, and he put his hands and arms to his face to protect himself, and in doing so unintentionally made contact with Mr. Lucas's face. RP 179-183, 188, 189.

The call to dispatch was recorded and played for the jury at trial. RP 72-76. Mr. Lucas testified that the only voice on the recording, other than the dispatcher's voice, was his voice. RP 71-76. Mr. Grover said his voice could also be heard saying, "Get away from me. RP 186.

The police did respond to the area. RP 141-46. Mr. Grover had walked away, hoping to get away from the aggressive Mr. Lucas and to

catch a different bus on another route. RP 141-46. Mr. Grover was arrested without incident. RP 141-46.

The prosecutor charged Mr. Grover with Assault in the Third Degree² for assaulting Mr. Lucas, who was employed as the immediate supervisor of a transit operator by a public transit company. CP 3. At trial, Mr. Grover argued for a self-defense instruction. RP 226. The court gave the instruction. Supplemental Designation of Clerk's Papers, Court's Instructions to the Jury, Instruction 10 (sub. nom. 27).

In closing argument, the State argued that it has proven its case and that Mr. Grover's version on what happened was not true and should not be believed. RP 261-83.

During argument, Mr. Grover objected to the State's attack on Mr. Grover's testimony as improperly shifting the burden of proof. RP 278. The court overruled the objection but invited Mr. Grover to renew the objection if appropriate. RP 278. The following exchange then occurred.

MR. POWERS:³ Credibility. The problem with the defendant's version is that in terms of the physical evidence that you have here, it just doesn't work, and could that be more obvious? He – I mean, put simply, [Mr. Grover] has absolutely no explanation for the injury, none.

Mr. HANSEN:⁴ Your honor, I'm going to renew the objection. It's not up to my client to explain the injury.

² RCW 9A.36.031(1)(b)

³ the prosecutor

⁴ defense counsel

MR. POWERS: It's a credibility issue, Your Honor, with regard to defendant's version of events.

THE COURT: I think the prosecutor is allowed to proceed with his argument in helping the jury determine credibility, *which is the issue here.*

(emphasis added) RP 279. Mr. Grover did not object to the court's statement.

In his closing argument, Mr. Grover argued he did not intentionally strike Mr. Lucas. RP 286 His arm was up only in a defense posture to prevent Mr. Lucas from coming at him. RP 300-01.

The jury found Mr. Grover guilty as charged. Supp. DCP, Verdict Form (sub. nom. 28).

The court sentenced Mr. Grover to 12 months in custody plus an additional 12 months on community custody. CP_10.

Mr. Grover made a timely appeal. CP 15-23.

D. ARGUMENT

THE COURT IMPROPERLY AND PREJUDICIALLY COMMENTED ON THE EVIDENCE WHEN IT TOLD THE JURY DURING THE STATE'S CLOSING ARGUMENT THAT CREDIBILITY WAS "THE ISSUE" AT TRIAL.

Article IV, Section 16 of the Washington State Constitution provides, "Judges shall not charge juries with respect to matters of fact, nor comment thereon, but shall declare the law." This provision prohibits

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 1321 (1997). The court's personal feelings on an element of the offense need not be expressly conveyed; it is sufficient if they are merely implied. *State v. Jackman*, 156 Wn.2d 736, 744, 132 P.3d 136 (2006). “Thus any remark that has the potential effect of suggesting that the jury need not consider an element of an offense could qualify as judicial comment.” *State v. Levy*, 156 Wn.2d 709, 721, 132 P.3d 1075 (2006).

The purpose of prohibiting judicial comments on the evidence is to prevent the trial judge's opinion from influencing the jury. *State v. Hansen*, 46 Wn. App. 292, 300, 730 P.2d 706 (1986).

Early in Washington’s constitutional history, the court explained:

The constitution has made the jury the sole judge of the weight of the testimony and of the credibility of the witnesses, and it is a fact well and universally known by courts and practitioners that the ordinary juror is always anxious to obtain the opinion of the court on matters which are submitted to his discretion, and that such opinion, if known to the juror, has a great influence upon the final determination of the issues.

State v. Crotts, 22 Wn. 245, 250-51, 60 P. 403 (1900).

Because the constitution expressly prohibits any judicial comment on the evidence, a claimed error based upon such a comment involves a manifest constitutional error that may be raised for the first time on

appeal. *Levy*, 156 Wn.2d at 719-20. Impermissible judicial comments on the evidence are presumed to be prejudicial. *Levy*, 156 Wn.2d at 723.

Here the court telling the jury that credibility was “the issue” is tantamount to a prosecutor’s improper request in closing argument that a jury should “declare the truth” by its verdict. *State v. Anderson*, 153 Wn. App. 417, 429, 220 P.3d 1273 (2009). After all, it is the jury's duty to determine whether the State has proved its allegations against a defendant beyond a reasonable doubt. It is not the jury's job to solve a case. *State v. Evans*, 163 Wn. App. 635, 644, 260 P.3d 934 (2011); *Anderson*, 153 Wn. App. at 429.

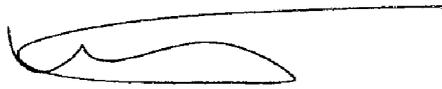
By telling the jury that credibility was “the issue,” the court invited the jury to solve the case rather than determine if the State proved beyond a reasonable doubt that Mr. Grover assaulted Mr. Lucas and, if so, whether Mr. Grover acted in self-defense.

When a judge improperly comments on the evidence, reversal is required unless the State shows that the defendant was not prejudiced or the record affirmatively shows that no prejudice could have resulted. *Levy*, 156 Wn.2d at 725. The State cannot show Mr. Grover was not prejudiced or that no prejudice could have occurred.

E. CONCLUSION

Mr. Grover's conviction should be reversed and remanded for retrial.

Respectfully submitted this 6th day of May 2014.

A handwritten signature in black ink, appearing to read 'LISA E. TABBUT', with a long horizontal line extending to the right from the top of the signature.

LISA E. TABBUT/WSBA #21344
Attorney for Sol Nathaniel Grover

CERTIFICATE OF SERVICE

Lisa E. Tabbut declares as follows:

On today's date, I efiled Appellant's Brief with: (1) the Thurston County Prosecutor's Office, at paoappeals@co.thurston.wa.us; and (2) the Court of Appeals, Division II; and (3) I have maintained Mr. Grover's copy of the brief in my file as will provide it to him when I have his current address.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed May 6, 2014, in Longview, Washington.



Lisa E. Tabbut, WSBA No. 21344
Attorney for Sol Nathaniel Grover

COWLITZ COUNTY ASSIGNED COUNSEL

May 06, 2014 - 4:32 PM

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