

No. 45319-3-II

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

STATE OF WASHINGTON,

Respondent,

v.

SOL N. GROVER,

Appellant.

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

The Honorable Christopher Wickham, Judge
Cause No. 13-1-00881-9

BRIEF OF RESPONDENT

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A. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR.

1. Whether the court, by stating that credibility is “the issue,” commented unconstitutionally on the evidence and prejudiced the defendant.

B. STATEMENT OF THE CASE.

The State accepts the appellant's statement of the substantive and procedural facts of the case.

C. ARGUMENT.

The court did not improperly or prejudicially comment on the evidence by telling the jury that credibility was “the issue here.”

The appellant argues for the first time on appeal that that the trial court erred by commenting on the evidence during trial in the following exchange.

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

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

THE PROSECUTOR: 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.

RP 279. Grover, argues that by stating “which is the issue here,” the judge prejudicially commented on the evidence. That is not the case. The court’s statement could not be construed as conveying the court’s attitude towards the evidence or issues presented.

The Washington Constitution, article IV, § 16 states that “Judges shall not charge juries with respect to matters of fact, nor comment thereon, but shall declare the law.” Article IV, § 16 intends to “prevent the jury from being influenced by knowledge conveyed to it by the trial judge as to his opinion of the evidence.” Casper v. Esteb Enterprises, Inc., 119 Wash.App. 759, 770, 82 P.3d 1223 (citing State v. Jacobsen, 78 Wash.2d 491, 495, 477 P.2d 1 (1970)). Therefore it “forbids only those words or actions which have the effect of conveying to the jury a personal opinion of the trial judge regarding the credibility, weight or sufficiency of some evidence introduced at the trial. Id.

A court’s statement constitutes a comment on the evidence only “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)). This court has consistently held that to be a comment on the evidence within Article IV, § 16 of the Washington constitution, “the jury must be able to infer from what the judge said that he believed or disbelieved the testimony in question.” Egede-Nisson v. Crystal Mtn. Inc., 93 Wn.2d 127, 139, 606 P.2s 1214 (1980). Judicial comments are not held to be prejudicial per se, and are shown to be not prejudicial if the record affirmatively shows no prejudice could have resulted. State v. Levy, 153 Wash.2d 709, 725, 132 P.3d 1076.

In State v. Cerny, 78 Wn.2d 845, 855-56, 480 P.2d 199 (1971), *vacated as related to death penalty*, Cerny v. Washington, 408 U.S. 939, 92 S. Ct. 2873, 33 L. Ed 2d 761 (1972). a murder case, the trial judge responded to the defense’s objection to circumstantial evidence by stating, “I think the chain of evidence has been established.” The appeals court held that the judge’s statement was not an unconstitutional comment on the evidence, reasoning that “a trial court, in passing upon objections to testimony, has the right to give its reasons therefore and the same will not be treated as a comment on the evidence,” Id. Additionally, the jury in Cerny was instructed “that the court can have no opinion on the facts of the case and that anything said by the court during

the trial on objections must not be taken as an opinion of the court as to the facts of the case or as expressing any opinions of the court thereon.” Id. at 856. It is also noted that a jury is presumed to have followed the court’s instructions. Id.

The trial judge’s comments in Grover were not comments on the evidence because they did not convey a statement that could have been inferred by the jury as the judge’s opinion. As in Cerny, the trial court was simply explaining the reasoning for overruling the defenses objection. Id. at 855-56. In light of the record, the court’s comment cannot reasonably be interpreted as offering a personal opinion about the case. Therefore, the reasoning of the judge was not a comment on the evidence.

Moreover, as was the jury in Cerny, the jury in the present case was instructed at least once that anything said by the court should not be taken as an opinion of the court as to the facts of the case.

Our state constitution prohibits a trial judge from making a comment on the evidence. It would be improper for me to express by words or conduct any personal opinion about the value of testimony or other evidence. If it appeared to you that I have indicated my personal opinion in any way, either during the trial or in giving these instructions, you must disregard this entirely.

Trial RP 253. As in Cerny, the jury is presumed to follow the courts instructions.

Grover relies upon State v. Anderson, 153 Wn. App. 417, 220 P.3d 1273 (2009), though the facts are distinguishable from Grover's trial. In Anderson, the court determined the prosecutor made improper remarks by repeatedly requesting that the jury "declare the truth." Anderson, 153 Wn. App. at 429. The court stated that the prosecutor misstated the jury's duty to "determine whether the State has proved its allegations against a defendant beyond a reasonable doubt." Id. However the Anderson court considered the improper prosecutorial arguments in the context of jury instructions that clearly instructed the jury of their actual duties. Id. In looking at the comments in the context of the instructions the court determined that there was not a substantial likelihood the misconduct affected the verdict, and a new trial was not warranted because of it. Id. The misconduct by the prosecutor in Anderson, which was found not to be prejudicial, was far more pervasive than the one comment by the judge during Grover's trial.

The trial court's explanation for its ruling was not an unconstitutional comment on the evidence pursuant to Cerny. The jury is presumed to have followed the instructions given to it by the

court, and therefore, the brief statement by the court explaining its ruling would not have been construed by the jury as an expression of the court's opinion. The trial court did not issue an unconstitutional comment on the evidence.

D. CONCLUSION.

Accordingly, Grover was not prejudiced by the judge's explanation for overruling defense counsel's objection. For the reasons stated, the State respectfully asks this court to affirm Grover's conviction.

Respectfully submitted this 1st day of July, 2014.



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THURSTON COUNTY PROSECUTOR

July 01, 2014 - 8:28 AM

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