

JAN 11 2012

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

NO. 29693-8-III

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

STATE OF WASHINGTON,

Respondent,

v.

RYAN HIGGINS,

Appellant.

FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR GRANT COUNTY

The Honorable John Antosz, Judge

REPLY BRIEF OF APPELLANT

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A. STATEMENT OF CASE IN REPLY

The State does not appear to disagree with the defense Statement of the Case. Compare: Appellant's Brief at 2-16 with Respondent's Brief at 1-18.

B. ARGUMENT IN REPLY

1. THE STATUTE AND JURY INSTRUCTIONS WERE UNCONSTITUTIONALLY VAGUE IN DEFINING HOW THE JURY WAS TO DETERMINE THE ESSENTIAL ELEMENT OF WHETHER LACK OF CONSENT WAS "CLEARLY EXPRESSED."

The State responds to this issue by claiming the matter was solely an issue of credibility for the jury to determine. Resp. Br. at 20-21.

Appellant has not challenged the sufficiency of the evidence. He has challenged whether the statute and jury instructions adequately set the legal standard by which the jury was to assess the evidence. App. Br. at 17-31.

The State agrees "'clearly expressed' implies an action on the part of the victim which is communicated to the perpetrator." Resp. Br. at 20. This statement begs the question raised in this appeal: Does the law determine this element from the viewpoint of the person making the communication or the person intended to receive the communication?

Credibility determinations are for the jury. "Communication," however, involves two individuals: one who makes the expression, and one who receives it. The law says the expression may be by words or conduct. It is undisputed that Ms. Nuckols engaged in conduct -- i.e., scooting her body beneath Mr. Higgins as he got on top in the small tent, RPII 82 -- that could be interpreted as "clearly expressing" consent, even if Ms. Nuckols did not intend that communication with that conduct.

Ms. Nuckols testified that she used words to express her lack of consent, but neither Mr. Higgins nor the several friends in close proximity to the tent heard these words. She also described physical movement on her part, although the history of this couple's relationship would not necessarily resolve the ambiguity of this conduct as Mr. Higgins perceived it.

The law, and so the jury instructions, must clearly determine by which person's perception the jury is to determine whether the message was "clearly expressed" by words or conduct. The instructions permitted the jury to convict if it found that Ms. Nuckols attempted to communicate her lack of consent, and believed she said things

clearly, but did not communicate adequately for a reasonable person in Mr. Higgins's position to perceive it. Permitting a criminal conviction on this basis violates due process, as the standard does not adequately convey what is legal behavior and what is a crime. App. Br. at 17-30 and authorities there cited.

The State cites no conflicting legal authority and does not distinguish appellant's authority.

2. THE TRIAL COURT'S INSTRUCTIONS DID NOT RENDER ITS UNCONSTITUTIONAL COMMENTS ON THE EVIDENCE HARMLESS ERROR.

Early in its constitutional history, the Washington Supreme Court explained the prohibition of a court commenting on the evidence:

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 Wash. 245, 250-51, 60 P. 403 (1900); State v. Lane, 125 Wn.2d 825, 838, 889 P.2d 929 (1995).

a. The Court Made Unconstitutional Comments on the Evidence.

The State argues the court's statements to the jury are not comments on the evidence if they accurately state the law. Resp. Br. at 21. But the case law says an instruction that "does **no more than** accurately state the law" is not a comment on the evidence. State v. Ciskie, 110 Wn.2d 263, 282-83, 751 P.2d 1165 (1988).

There is no question that the trial court here did more than merely state the law. Rather, it chose to tell the jury to pay "close attention" to certain evidence the State presented. Nothing in the law requires the jury to pay "close attention" to the State's exhibits. The State cites no authority suggesting it does. Such comments are especially damaging when the court does not give the same instruction for equivalent defense exhibits. See App. Br. at 33. The evidence it drew attention to were the defendant's own statements to others. The defense challenged the meaning and significance of these statements made after the event. App. Br. at 11-13.

The State argues the court's comments here did not state any opinion "as to the weight that

evidence or testimony should have been given by the jury." Resp. Br. at 25. It is difficult to reconcile this statement with the court's repeated admonitions to the jury to "pay close attention" to certain evidence the State offered. RPII 80, 101; App. Br. at 14-15. By emphasizing this evidence over other equivalent evidence offered by the defense, the court conveyed its sense that this evidence was more important, more worthy of the jury's attention, than other evidence -- that the jury should give this evidence more weight. This is precisely the sort of comment the Constitution prohibits. Const., art. IV, § 16.

b. The Error Was Not Harmless.

The State's authorities agree with those cited by appellant on the standard of review for unconstitutional comments on the evidence:

Once it has been demonstrated that a trial judge's conduct or remarks constitute a comment on the evidence, a reviewing court will presume the comments were prejudicial. ... In such a case, "the 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."

State v. Lane, supra, 125 Wn.2d at 838.

The record here shows prejudice could have resulted: the court directed the jury to pay close attention to the State's evidence that was damaging to the defense, and the meaning of which the defense contested.

The State relies on the court's other instructions to render its comments harmless. Its authorities do not support this position. State v. Candia, 159 Wn.2d 918, 937, 155 P.3d 125 (2007), did not involve an unconstitutional judicial comment on the evidence, but expert witnesses who commented on the credibility of the State's witnesses. Reliance on State v. Ciskie, supra, similarly is misplaced. Ciskie involved a challenge to the court instructing the jury, among all its instructions, on the legal definition of "threat." It did not involve, as here, directing the jury to pay close attention to specific evidence.

The Court held an unconstitutional comment was harmless in State v. Lane, supra, because the evidence in that aggravated murder case "overwhelmingly support[ed] every element" of the charge. Unlike Lane, the evidence here was anything but overwhelming.

In fact, the comments here are more egregious than those in State v. Lampshire, 74 Wn.2d 888, 447 P.2d 727 (1968). See App. Br. at 32-35. In Lampshire, the court sustained an objection while commenting that the defendant's testimony on two points was not "material." Thus an issue was raised to the court, the court ruled on the issue, and its reasons for the ruling went beyond what was necessary "implicitly convey[ing] to the jury his personal opinion concerning the worth of the defendant's testimony." Id. at 730. Similarly here, by repeatedly asking the jury to pay close attention to the defendant's statements made outside of court, the judge conveyed to the jury his personal opinion that these statements were more weighty than other evidence, perhaps even the defendant's testimony.

The court's pattern instructions to disregard any inadvertent comments on the evidence cannot cure these very intentional directions to the jury. The error was not harmless.

C: CONCLUSION

For the reasons stated above and in the Brief of Appellant, appellant respectfully asks this

Court to reverse his conviction and remand for a new trial.

DATED this 9th day of January, 2012.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Lenell Nussbaum", written over a horizontal line.

LENELL NUSSBAUM
WSBA No. 11140
Attorney for Ryan Higgins

Declaration of Service

On this date I filed the original and a copy of this document in the Court of Appeals, Division Three, of the State of Washington, by depositing the same, postage prepaid, in the United States Mail, address to:

Ms. Renee S. Townsley, Clerk
Court of Appeals, Div. III
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Spokane, WA 99201

On this date I caused a copy of this document to be served on the following entities by depositing them in the United States Mail Service, postage prepaid, addressed as follows:

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I declare under penalty of perjury under the laws of the State of Washington that the above statement is true and correct to the best of my knowledge.

Jan. 9TH 2012 - SEATTLE, WA
DATE AND PLACE

Alex Fast
ALEXANDRA FAST