

FILED
Apr 05, 2012
Court of Appeals
Division III
State of Washington

No. 29924-4-III
IN THE COURT OF APPEALS
FOR THE STATE OF WASHINGTON
DIVISION III

STATE OF WASHINGTON,

Plaintiff/Respondent,

vs.

ERIK JON CSIZMAZIA,

Defendant/Appellant.

Appellant's Brief

DAVID N. GASCH
WSBA No. 18270
P.O. Box 30339
Spokane, WA 99223-3005
(509) 443-9149
Attorney for Appellant

TABLE OF CONTENTS

A. ASSIGNMENTS OF ERROR.....5

B. ISSUES PERTAINING TO ASSIGNMENT OF ERROR.....5

C. STATEMENT OF THE CASE.....6

D. ARGUMENT.....16

 1. The trial court abused its discretion in allowing self-
representation because Mr. Csizmazia was misinformed about the
seriousness of the charges and the possible penalties, and the
Court’s inquiry to determine his competency was insufficient.....16

 2. Mr. Csizmazia was denied a fair trial because judicial
comments on the evidence conveyed to the jury the Court’s attitude
that the State had proven its case.....23

E. CONCLUSION.....27

TABLE OF AUTHORITIES

<u>Cases</u>	<u>Page</u>
<i>Adams v. United States ex rel. McCann</i> , 317 U.S. 269, 279, 63 S.Ct. 236, 87 L.Ed. 268, 143 A.L.R. 435 (1942).....	18
<i>Faretta v. California</i> , 422 U.S. 806, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975).....	16, 18
<i>Von Moltke v. Gillies</i> , 332 U.S. 708, 68 S.Ct. 316, 92 L.Ed. 309 (1948).....	17, 20
<i>City of Bellevue v. Acrey</i> , 103 Wn.2d 203, 691 P.2d 957 (1984).....	16, 18, 19
<i>In re Det. of Turay</i> , 139 Wn.2d 379, 397, 986 P.2d 790 (1999).....	17
<i>State v. Bebb</i> , 108 Wn.2d 515, 525, 740 P.2d 829 (1987).....	16
<i>State v. Becker</i> , 132 Wn.2d 54, 64, 935 P.2d 1321 (1997).....	24
<i>State v. Bogner</i> , 62 Wn.2d 247, 252, 382 P.2d 254 (1963).....	24, 25
<i>State v. Buelna</i> , 83 Wn.App. 658, 660, 922 P.2d 1371 (1996).....	18, 19
<i>State v. Carpenter</i> , 52 Wn.App. 680, 687, 763 P.2d 455 (1988).....	23
<i>State v. Chavis</i> , 31 Wn.App. 784, 789, 644 P.2d 1202 (1982).....	20
<i>State v. DeWeese</i> , 117 Wn.2d 369, 377, 816 P.2d 1 (1991).....	16, 20
<i>State v. Francisco</i> , 148 Wn.App. 168, 179, 199 P.3d 478 (2009).....	24
<i>State v. Hemenway</i> , 122 Wn.App. 787, 792, 95 P.3d 408 (2004).....	16
<i>State v. James</i> , 138 Wn.App. 628, 636, 158 P.3d 102 (2007).....	20, 23

<i>State v. Lampshire</i> , 74 Wn.2d 888, 893, 447 P.2d 727 (1968).....	24
<i>State v. Lane</i> , 125 Wn.2d 825, 838, 889 P.2d 929 (1995).....	24
<i>State v. Levy</i> , 156 Wn.2d 709, 723, 132 P.3d 1076 (2006).....	24
<i>State v. Ortiz</i> , 104 Wn.2d 479, 482, 706 P.2d 1069 (1985).....	21
<i>State v. Vermillion</i> , 112 Wn.App. 844, 855, 51 P.3d 188 (2002).....	16
<i>State v. Walters</i> , 7 Wash. 246, 250, 34 P. 938 (1893).....	24

Constitutional Provisions and Statutes

Washington Constitution, Article IV, § 16.....	23
RCW 10.77.010(6).....	21
RCW 10.77.020(1).....	17

Court Rules

CrR 4.1.....	17
CrR 4.1(c).....	18

A. ASSIGNMENTS OF ERROR

1. The trial court erred in finding Mr. Csizmazia competent and able to represent himself without first having him evaluated by mental health professionals.

2. The trial court erred in denying the State's motion for a mental health evaluation.

3. Mr. Csizmazia's waiver of his right to the assistance of counsel was an uninformed and unintelligent waiver, because he was misinformed of the seriousness of the charge and the possible penalties.

4. The trial court erred in improperly commenting on the evidence.

B. ISSUES PERTAINING TO ASSIGNMENT OF ERROR

1. Did the trial court abuse its discretion in allowing self-representation where Mr. Csizmazia was misinformed about the seriousness of the charges and the possible penalties, and the Court's inquiry to determine his competency was insufficient?¹

2. Was Mr. Csizmazia denied a fair trial because judicial comments on the evidence conveyed to the jury the Court's attitude that the State had proven its case?²

¹ Assignments of Error Nos. 1-3.

² Assignment of Error No. 4.

C. STATEMENT OF THE CASE

Erik Csizmazia was convicted of first degree malicious mischief. CP 21. The various allegations for which the State presented evidence included Mr. Csizmazia damaging a door at a holding cell at the county jail while yelling, screaming and banging on the door and walls (RP³ 75, 126-27); rubbing his own feces on himself and the walls and windows of another holding cell while sitting naked and chanting (RP 76, 130); flooding a holding cell by clogging the toilet containing feces (RP 79-80); and tearing up the floor around a drain in a holding cell, which caused toilet water and feces to enter the jail cook's office on the floor below. RP 81-98.

At his first appearance Mr. Csizmazia said he did not want an attorney and would represent himself. The Court said it would discuss this matter further with Mr. Csizmazia at a later date. 2/24/11 RP 5.

At his arraignment eleven days later, the following exchange occurred:

THE COURT: Mr. Csizmazia, I'm going to try to talk you out of representing yourself one more time. And we have to go through this.--

³ "RP" refers to citations to the originally filed transcript of the trial, pretrial motion and sentencing. Citations to the supplemental transcript of the first appearance and arraignment will include the date of those hearings (e.g. 2/24/11 RP) followed by the page number.

DEFENDANT: But--

THE COURT: If I can't talk you into it, then--

DEFENDANT: Thus far in all my experience in this court I believe I'm the -- I've filed the only two legal documents I've ever seen in the court. I believe I'm the only viable attorney in the state, to tell you the truth, at this point. I'm still confident that I--

THE COURT: Okay.

DEFENDANT: --can represent myself.

THE COURT: Okay. Have you ever studied law?

DEFENDANT: I'm -- I probably am the world's best knowledge on Latin and foreign languages, so I can handle legalese and -- pretty fairly easily.

THE COURT: Have you ever represented yourself or anyone else in a criminal action?

DEFENDANT: Just -- on that prior case, where I'm now 1 and 0.

THE COURT: It's 1 and 0. You won. Okay. You mean the case right here in this court; is that right?

DEFENDANT: What's that?

THE COURT: You mean the case--

DEFENDANT: Yes,--.

THE COURT: --we just finished--

DEFENDANT: Yes, sir.

THE COURT: Okay. We went through the information before.

You're charged with malicious mischief in the first degree. And that is, like I informed you, a Class B felony punishable by up to ten years imprisonment and/or a \$20,000 fine. You're also charged with escape in the second degree, and that's a Class C felony punishable by up to five years imprisonment and/or a \$10,000 fine. Do you understand that if you represent yourself you're on your own? I can't help you?

DEFENDANT: Yes . . .

3/7/11 RP 14-16.

THE COURT: I must advise you that in my opinion you would be far better defended by a trained lawyer than you can be by yourself. I think it is unwise for you to try to represent yourself. You are not familiar with the law in my opinion, you are not familiar with the Rules of Evidence, and you are not familiar with court procedure. I would strongly urge you not to try to represent yourself. Now, considering the dangers and disadvantages of self-representation is it still your desire to represent yourself and to give up your right to be represented by a lawyer?

DEFENDANT: It is, your Honor.

THE COURT: Has anyone promised you anything or threatened you, to get you to waive your right to a lawyer?

DEFENDANT: No, sir.

THE COURT: All right. I'm making a finding the defendant has knowingly and voluntarily waived his right to counsel, and I will therefore permit him to represent himself in this case.

3/7/11 RP 23-24.

At a status hearing five weeks later, the following exchange occurred:

PROSECUTOR: [T]he state at this time is asking the court for an order for commitment to Eastern State Hospital for evaluation. I've spoken with the staff at Eastern, and we discussed -- not just the issue of competency to stand trial -- And it's in my motion, and as I said, Mr. Csizmazia has received copies of that -- but competency to represent himself in this matter, and also another mental health evaluation. I've had conversations with Ronna Nielson of the Department of Corrections. The 2007 mental health evaluation that was done by Eastern found that Mr. Csizmazia was a danger to himself and others but it attributed much of his issues to what it termed substance abuse. Ms. Nielson pointed out that he has, since his release from incarceration—

MR. CSIZMAZIA: Your Honor-

MS. KREMER: --last year,--

MR. CSIZMAZIA: --my -- this is a bunch of horse—

THE COURT: You will be given a chance, Mr. Csizmazia—

MR. CSIZMAZIA: Okay. I have to put -- do a brief outburst to indicate—

THE COURT: No, you don't—

MR. CSIZMAZIA: --(inaudible) am at this—

THE COURT: --you don't get to do any outburst—

MR. CSIZMAZIA: --at this—

THE COURT: Mr. Csizmazia,-

MR. CSIZMAZIA: --at this line of -- Okay.

THE COURT: Take him away. Take him away. We'll bring him back at 1:30 and see if he's in a better mood.

MR. CSIZMAZIA: I am in a -- I am (inaudible), your Honor. I'm just saying what she was saying was a complete—

THE COURT: One-thirty.

MR. CSIZMAZIA: --most inane drivel of--.

THE COURT: Perhaps we should bring him up alone at 1:30 or sometime this afternoon . . .

RP 3-4.

When Mr. Csizmazia was brought back to court for the afternoon session, the prosecutor again implored the Court to grant her motion for a mental health evaluation. She stated that the staff person she spoke to at Eastern State Hospital was concerned that the 2007 mental health results, which diagnosed drug-related mental issues, might not still be valid since they were so old. The staff person also indicated that Eastern would be willing to send someone to Klickitat County to do the evaluation if that were preferable instead of taking the time necessary to send Mr. Csizmazia to Eastern. RP 6-8. The prosecutor also said she had a plea offer to make to Mr. Csizmazia, but she wanted to ascertain his mental competence before giving that to him. RP 15.

The Court asked the prosecutor if the charged offenses were relatively minor offenses carrying some potential jail time but no prison time. The prosecutor responded, “That’s correct.” The Court then denied the State’s motion for a mental health evaluation and found Mr. Csizmazia competent to represent himself. RP 14-15.

Mr. Csizmazia next expressed concern about his bond being forfeited for being rearrested on these charges after posting bond. RP16-19. The prosecutor pointed out that when Mr. Csizmazia was rearrested

he had a tent stake down the front of his pants. The prosecutor stated, “Mr. Csizmazia told me in front of Corrections Officer Dukes that it was to protect his penis from lasers, he kept it down the front of his pants.” RP

17. The conversation continued as follows:

MR. CSIZMAZIA: Your Honor, it is a tent stake—

THE COURT: It is a tent stake.

MR. CSIZMAZIA: And it -- it’s a metal piece that -- hook over that, with a -- with a -- with tarp—

THE COURT: Yes, I do know what a tent stake is.

MR. CSIZMAZIA: Yeah. And I found that as I was gathering supplies (inaudible), and I had it in the front of my pants. And yes, I -- I used to wear something called “Bling for your thing,” ‘cause the infrared cameras or whatever kind of makes your thing shrink up. So that kind of keeps the -- radar off. It’s -- might be crazy, but -- On the internet today they’re -- the runners are talking about it shrinking up and going -- it almost going inside, because people’s cameras on their houses and stuff. It’s some weird thing.

THE COURT: But the tent stake precludes that.

MR. CSIZMAZIA: But I -- I had it there and -- I had it -- I was carrying it in my back pocket and it poked through my pants—

THE COURT: I see.

MR. CSIZMAZIA: So I put it -- I put it inside my pants, down here, and when I got in the car—

THE COURT: That's -- that's closer to what you wanted to protect anyway.

MR. CSIZMAZIA: Yeah. So I was kind of saying that I had it there for -- for that reason . . .

RP 17-18.

During Mr. Csizmazia's direct testimony at trial the following exchange occurred in front of the jury between the Court and Mr.

Csizmazia:

THE COURT: [responding to Mr. Csizmazia following the State's objection] I'm going to allow you to testify and give you latitude on this, but I want to remind you that -- just so that you're clear and everybody's clear, you were charged with engaging in a course of conduct which caused an interruption or impairment of service. You're not charged with malicious mischief that has to do with dollar amounts.

MR. CSIZMAZIA: Well,--

THE COURT: So -- So,--

MR. CSIZMAZIA: --according to the statute—

THE COURT: And they didn't -- And they didn't—

MR. CSIZMAZIA: --according to the—

THE COURT: --put on evidence about—

MR. CSIZMAZIA: --statute that she gave me it does include the \$5,000 minimum, which I dispute; I believe the statute is \$5,400. It's -- I have damage estimates, and it's damage and service is what she's both going for.

THE COURT: No. Mr. Csizmazia, that -- you are not being charged with any destruction of property in a dollar amount—

MR. CSIZMAZIA: It is—

THE COURT: You are being charged with interrupting service—

MR. CSIZMAZIA: That's not true your Honor. The -- the original charge—

THE COURT: Mr. Csizmazia, I'm telling you what's true. I'm the judge. I'm looking at the information. And I'm in control of this aspect of the case. Actually,--

MR. CSIZMAZIA: Your Honor,--

THE COURT: --you should be—

MR. CSIZMAZIA: --if -- if you -- May I -- (inaudible)—

THE COURT: I'm going to allow you to argue later on if you want. Right now is your opportunity to talk about facts—

MR. CSIZMAZIA: Okay.

THE COURT: The entire day and a half we've been here the state has been putting on facts against you, fact after fact after fact. Now is your opportunity to say whatever you want about those facts.

RP 258-60.

At the close of Mr. Csizmazia's direct testimony the prosecutor stated she had no questions. The Court then said in front of the jury, "Thank you. No cross examination. Mr. Csizmazia having not filed a witness list is not entitled to call witnesses at this time, therefore I assume you rest at this point. Is that correct?" RP 291.

Mr. Csizmazia received a sentence of 43 months based on an offender score of 8 and a standard range of 33-43 months. CP 22-29.

This appeal followed. CP 30.

D. ARGUMENT

Issue. No. 1. The trial court abused its discretion in allowing self-representation because Mr. Csizmazia was misinformed about the seriousness of the charges and the possible penalties, and the Court's inquiry to determine his competency was insufficient.

A defendant has the constitutional right to represent himself at trial. *Faretta v. California*, 422 U.S. 806, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975). The request to proceed pro se must be unequivocal. *State v. DeWeese*, 117 Wn.2d 369, 377, 816 P.2d 1 (1991). A trial court must establish that a defendant, in choosing to proceed pro se, makes a knowing and intelligent waiver of his constitutional right to the assistance of counsel. *State v. Bebb*, 108 Wn.2d 515, 525, 740 P.2d 829 (1987); *City of Bellevue v. Acrey*, 103 Wn.2d 203, 209, 691 P.2d 957 (1984).

Appellate courts review a trial court's grant of a defendant's self-representation request for an abuse of discretion. *State v. Hemenway*, 122 Wn.App. 787, 792, 95 P.3d 408 (2004). A trial court abuses its discretion if its "decision is manifestly unreasonable, or is exercised on untenable grounds, or for untenable reasons." *State v. Vermillion*, 112 Wn.App. 844, 855, 51 P.3d 188 (2002). Appellate courts review the record as a whole in

determining whether a defendant knowingly and intelligently waived counsel. *In re Det. of Turay*, 139 Wn.2d 379, 397, 986 P.2d 790 (1999).

The Legislature has provided helpful guidance on the components of an effective waiver of counsel. In 1973, it codified *Von Moltke v. Gillies*, 332 U.S. 708, 723-24, 68 S.Ct. 316, 323, 92 L.Ed. 309 (1948) (plurality opinion of Black, J.) as follows:

A person may waive his right to counsel; but such waiver shall only be effective if a court makes a specific finding that he or she is or was only be effective if a court makes a specific finding that he is or was competent to so waive. In making such findings, the court shall be guided but not limited by the following standards: Whether the person attempting to waive the assistance of counsel, does so understanding:

- (a) The nature of the charges;
- (b) The statutory offense included within them;
- (c) The range of allowable punishments thereunder;
- (d) Possible defenses to the charges and circumstances in mitigation thereof; and
- (e) All other facts essential to a broad understanding of the whole matter.

RCW 10.77.020(1).

CrR 4.1, which governs arraignment procedures, is likewise of assistance in this area. This rule states:

If the defendant chooses to proceed without counsel, the court shall ascertain whether this waiver is made voluntarily, competently and

with knowledge of the consequences. If the court finds the waiver valid, an appropriate finding shall be entered in the minutes....

CrR 4.1(c).

Our Supreme Court has previously discussed what should occur at the trial court in order for the record to establish that the defendant's waiver of his right to counsel was knowing and intelligent:

Although a defendant need not himself have the skill and experience of a lawyer in order competently and intelligently to choose self-representation, he should be made aware of the dangers and disadvantages of self-representation, so that the record will establish that "he knows what he is doing and his choice is made with eyes open." *Adams v. United States ex rel. McCann*, 317 U.S. 269, 279, 63 S.Ct. 236, 242, 87 L.Ed. 268, 143 A.L.R. 435 (1942).

Acrey, 103 Wn.2d at 209, 691 P.2d 957 (quoting *Faretta*, 422 U.S. at 835, 95 S.Ct. at 2541 (adding italics)).

The preferred means of assuring that the defendant understands the risks of self-representation is a colloquy on the record. *State v. Buelna*, 83 Wn.App. 658, 660, 922 P.2d 1371 (1996). At a minimum, the colloquy "should consist of informing the defendant of the nature and classification of the charge, the maximum penalty upon conviction[,] and that technical rules exist [that] will bind defendant in the presentation of his case." *Id.* (quoting *Acrey*, 103 Wn.2d at 211, 691 P.2d 957). Where no colloquy exists, the appellate court may look at any evidence in the record that shows the defendant's actual awareness of the risks of self-representation.

"[R]arely will adequate information exist on the record, in the absence of a colloquy, to show the [defendant's] required awareness of the risks of self-representation." *Acrey*, 103 Wn.2d at 211, 691 P.2d 957.

Mr. Csizmazia was misinformed of the seriousness of the charges and the possible penalties.

In *Buelna*, the court of appeals held that Buelna's waiver of his right to the assistance of counsel was an uninformed and unintelligent waiver, because Buelna said he did not understand the charges and because the record did not establish that Buelna was properly advised of the nature and seriousness of the charges and the possible penalties. The Court reversed Buelna's convictions and remanded the case for a new trial. *Buelna*, 83 Wn.App. at 661-62, 922 P.2d 1371.

The same result should occur in the present case. Here, before deciding whether to grant the prosecutor's motion for a mental health evaluation and whether to allow pro se representation, the Court asked the prosecutor if the charged offenses were in fact relatively minor offenses carrying some potential jail time but no prison time. The prosecutor responded, "That's correct." The Court then denied the State's motion for a mental health evaluation and found Mr. Csizmazia competent to represent himself. RP 14-15.

This information, upon which the trial court based its ruling, was grossly incorrect. In reality, the charges were not minor offenses and carried significant prison time. Mr. Csizmazia was convicted of first degree malicious mischief and received a sentence of 43 months based on an offender score of 8 and a standard range of 33-43 months. CP 22-29. Therefore, the Court's ruling allowing self-representation was based on untenable grounds and constituted an abuse of discretion.

In addition, since Mr. Csizmazia was misinformed of the seriousness of the charges and the possible penalties, the minimum colloquy requirement for self-representation was not met. Therefore, the conviction should be reversed and the case should be remanded for a new trial.

The Court's inquiry to determine competency was insufficient.

No set formula exists for deciding the validity of a waiver of counsel. *State v. James*, 138 Wn.App. 628, 636, 158 P.3d 102 (2007) (citing *DeWeese*, 117 Wn.2d at 378, 816 P.2d 1). Rather, the court should inquire "for as long and as thoroughly as the particular circumstances demand." *Id* (citing *State v. Chavis*, 31 Wn.App. 784, 789, 644 P.2d 1202 (1982) (quoting *Von Moltke v. Gillies*, 332 U.S. 708, 68 S.Ct. 316, 92 L.Ed. 309 (1948))). The test for competency to stand trial is if the

defendant has the capacity to understand the nature of the proceedings against him and to assist in his own defense. *State v. Ortiz*, 104 Wn.2d 479, 482, 706 P.2d 1069 (1985); RCW 10.77.010(6).

Here, the trial court needed additional input before deciding whether Mr. Csizmazia was competent to represent himself. Its inquiry was too short and too cursory. The Court had received numerous indications throughout the various hearings suggesting that Mr. Csizmazia had some mental issues. The Court should have been aware from reading the Affidavit of Probable Cause at the First Appearance of some of the details of the allegations, for which the State later presented evidence at trial. These incidents included Mr. Csizmazia damaging a door at a holding cell at the county jail while yelling, screaming and banging on the door and walls (RP 75, 126-27); rubbing his own feces on himself and the walls and windows of another holding cell while sitting naked and chanting (RP 76, 130); flooding a holding cell by clogging the toilet containing feces (RP 79-80); and tearing up the floor around a drain in a holding cell which caused toilet water and feces to enter the jail cook's office on the floor below. RP 81-98.

A second red flag indicating possible mental issues was Mr. Csizmazia's irrational behavior at the status hearing where he became so

disruptive that the Court had to order the guards to take him away. RP 3-4. A third clue that really speaks for itself was when the Court learned that Mr. Csizmazia had told the prosecutor and a corrections officer that he kept a tent stake down the front of his pants to protect his penis from lasers. RP 17. Responding to further inquiry by the Court, Mr. Csizmazia stated, “And yes, I -- I used to wear something called ‘Bling for your thing,’ ‘cause the infrared cameras or whatever kind of makes your thing shrink up.” RP 17-18.

A fourth indicator was the information relayed to the Court by the prosecutor in her motion for a mental health evaluation. She told the Court that the 2007 mental health evaluation conducted by Eastern State Hospital found that Mr. Csizmazia was a danger to himself and others, that the mental issues were drug-related, and that the staff person she spoke to at Eastern State Hospital was concerned the 2007 mental health results might not still be valid since they were so old. RP 3, 6-7. Given this information and the other indicators of possible mental issues, it was premature for the trial court to declare Mr. Csizmazia competent without obtaining more current information. In that regard, it was error to deny the State’s motion for a mental health evaluation.

Moreover, the staff person at Eastern told the prosecutor she would be willing to send someone to Klickitat County to do the evaluation in order to maintain the scheduled trial date. RP 6-8. Thus, it would have caused no inconvenience to grant the prosecutor's motion. A current evaluation would have settled the competency issue in a timely and thorough manner. By deciding the competency issue prematurely, the court failed to inquire " 'for as long and as thoroughly as the particular circumstances demand' " before allowing self-representation. *James*, 138 Wn.App. at 636, 158 P.3d 102. Therefore, the conviction should be reversed and the case remanded for a new trial.

Issue No. 2. Mr. Csizmazia was denied a fair trial because judicial comments on the evidence conveyed to the jury the Court's attitude that the State had proven its case.

Article IV, section 16 of the Washington Constitution provides: "Judges shall not charge juries with respect to matters of fact, nor comment thereon, but shall declare the law." To determine whether the act constituted a comment on the evidence, the facts and circumstances of each case must be reviewed. *State v. Carpenter*, 52 Wn.App. 680, 687, 763 P.2d 455 (1988). "A statement by the court constitutes a comment on the evidence 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). "The touchstone of error in a trial court's comment on the evidence is whether the feeling of the trial court as to the truth value of the testimony of a witness has been communicated to the jury." *Id.* " 'All remarks and observations as to the facts before the jury are positively prohibited.' " *State v. Francisco*, 148 Wn.App. 168, 179, 199 P.3d 478 (2009) (citing *State v. Bogner*, 62 Wn.2d 247, 252, 382 P.2d 254 (1963) (quoting *State v. Walters*, 7 Wash. 246, 250, 34 P. 938 (1893))). "The purpose of prohibiting judicial comments on the evidence is to prevent the trial judge's opinion from influencing the jury." *Lane*, 125 Wn.2d at 838, 889 P.2d 929.

Judicial comments on the evidence are presumed to be prejudicial. The State must show that the defendant was not prejudiced by such comments, unless the record affirmatively shows that no prejudice occurred. *State v. Levy*, 156 Wn.2d 709, 723, 132 P.3d 1076 (2006).

Even if the defendant fails to object at trial, error may be raised on appeal if it "invades a fundamental right of the accused." *State v. Becker*, 132 Wn.2d 54, 64, 935 P.2d 1321 (1997); *State v. Lampshire*, 74 Wn.2d 888, 893, 447 P.2d 727 (1968) (because a comment on the evidence

invades a constitutional provision, failure to object does not foreclose raising the issue on appeal); *Bogner*, 62 Wn.2d at 252, 382 P.2d 254 (even if the evidence is undisputed or overwhelming, comment by the judge violates a constitutional injunction).

Here, the trial court's comments clearly conveyed to the jury its attitude toward the merits of the case. First, during Mr. Csizmazia's direct testimony at trial the Court told Mr. Csizmazia he could not talk about costs of damage because that was not the basis of the malicious mischief charge. When Mr. Csizmazia attempted to disagree, the Court stated in front of the jury, "Mr. Csizmazia, I'm telling you what's true. I'm the judge. I'm looking at the information. And I'm in control of this aspect of the case." Shortly thereafter, the Court stated to Mr. Csizmazia again in front of the jury, "The entire day and a half we've been here the state has been putting on facts against you, fact after fact after fact. Now is your opportunity to say whatever you want about those facts."

RP 259.

The Court should not have conducted this exchange in front of the jury. Its personal rebuke to Mr. Csizmazia conveyed to the jury its exasperation (perhaps justified) toward Mr. Csizmazia. The Court's statement, "the state has been putting on facts against you, fact after fact

after fact,” clearly conveyed to the jury that the State had proven its case. The Court’s comments communicated the feelings of the trial court as to the truth value of the testimony of the State’s witnesses and thereby influenced the jury.

Similarly, at the close of Mr. Csizmazia’s direct testimony the prosecutor stated she had no questions. The Court then said in front of the jury, “Thank you. No cross examination. Mr. Csizmazia having not filed a witness list is not entitled to call witnesses at this time, therefore I assume you rest at this point. Is that correct?” RP 291. This statement, though perhaps accurate, should also not have been made in front of the jury. The jury does not understand the court rules regarding witness lists. By stating that Mr. Csizmazia could not call any witnesses, the Court conveyed hostility toward Mr. Csizmazia as though he had done something wrong, and inferred that the State had proven its case. Since this statement and the preceding ones were improper judicial comments on the evidence, Mr. Csizmazia was denied a fair trial.

E. CONCLUSION

For the reasons stated, the conviction should be reversed and the case remanded for a new trial.

Respectfully submitted April 5, 2012.

s/David N. Gasch, WSBA #18270
Gasch Law Office
P.O. Box 30339
Spokane, WA 99223-3005
(509) 443-9149
FAX: None
gaschlaw@msn.com
Attorney for Appellant

PROOF OF SERVICE (RAP 18.5(b))

I, David N. Gasch, do hereby certify under penalty of perjury that on April 5, 2012, I mailed to the following by U.S. Postal Service first class mail, postage prepaid, or e-mailed by prior agreement (as indicated), a true and correct copy of the brief of appellant:

Erik J. Csizmazia
#859970
191 Constantine Way
Aberdeen WA 98520

E-mail: jessicaf@co.klickitat.wa.us
E-mail: marieb@co.klickitat.wa.us
Jessica M. Foltz
Klickitat County Prosecutor's Office
205 S. Columbus Ave., MS-CH-18
Goldendale WA 98620-9829

s/David N. Gasch, WSBA #18270