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Division III
State of Washington
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No. 35111-4-III

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

Emanuel Hubbart,

Appellant.

Benton County Superior Court Cause No. 15-1-01373-8

The Honorable Judge Bruce A. Spanner

Appellant's Reply Brief

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ARGUMENT

I. THE EVIDENCE INCLUDED AN UNCONSTITUTIONAL JUDICIAL COMMENT.

Over objection,¹ the judge admitted a signed Superior Court order indicating C.W.'s date of birth as "10/26/88." Ex. 6; CP 14-15; RP 33-43. This violated Mr. Hubbard's right to a trial free of judicial comment and his right to a jury determination of the facts necessary for conviction. Wash. Const. art. I, §§21 and 22; Wash. Const. art. IV, §16; U.S. Const. Amend. VI, XIV; *see Alleyne v. United States*, 570 U.S. 99, 133 S. Ct. 2151, 186 L. Ed. 2d 314 (2013); *State v. Williams-Walker*, 167 Wn.2d 889, 896, 225 P.3d 913 (2010).²

This case is controlled by *State v. Jackman*, 156 Wn.2d 736, 132 P.3d 136, 140 (2006), *as corrected* (Feb. 14, 2007). The Superior Court order admitted in this case is equivalent to the instruction in *Jackman*, which listed dates of birth of the alleged victims in that case. *Id.*, at 740-745.

¹ Respondent erroneously asserts that the exhibit was admitted without objection. Brief of Respondent, p. 7. This is incorrect. Counsel objected and argued relevance, confusion of the issues, and prejudice. CP 14-15; RP 33-43.

² Judicial comments invade a fundamental right, and thus can always be raised for the first time on review. RAP 2.5 (a)(3); *State v. Becker*, 132 Wn.2d 54, 64, 935 P.2d 1321 (1997); *State v. Levy*, 156 Wn.2d 709, 720, 132 P.3d 1076 (2006). In addition, defense counsel objected to the admission of Ex. 6, arguing relevance, confusion, and prejudice. CP 14-15; RP 33-43. The objection should have prompted the court to consider redacting objectionable material from the exhibit.

Arguments regarding judicial comments can always be raised for the first time on review. RAP 2.5(a)(3); *Becker*, 132 Wn.2d at 64; *Levy*, 156 Wn.2d at 720. Respondent erroneously suggests otherwise and does not address the authority cited by appellant.³ Brief of Respondent, p. 7.

The error requires reversal unless the record affirmatively shows an absence of prejudice. *Levy*, 156 Wn.2d at 725. Respondent fails to address this heightened standard. Brief of Respondent, pp. 7-8.

Even undisputed evidence corroborating a judicial comment does not establish harmless error. *Jackman*, 156 Wn.2d at 743, 745. Respondent's reliance on corroborating evidence is misplaced: Respondent fails to deal with this aspect of *Jackman*. Brief of Respondent, pp. 7-8.

In *Jackman*, undisputed evidence established each child's date of birth. The defendant did not challenge that the children were minors. Despite this, the court reversed, finding it "conceivable that the jury could have determined the boys were *not* minors." *Id.*, at 745.

The judicial comment violated Mr. Hubbard's constitutional rights. *Id.*; *Alleyne*, 570 U.S. at ___; *Williams-Walker*, 167 Wn.2d at 895-96. His

³ See Appellant's Opening Brief, p. 7 n. 4.

convictions must be reversed, and the case remanded. *Levy*, 156 Wn.2d at 725.

II. THE PROSECUTOR COMMITTED MISCONDUCT THAT PREJUDICED MR. HUBBART.

Mr. Hubbart relies on the arguments set forth in the Opening Brief.

CONCLUSION

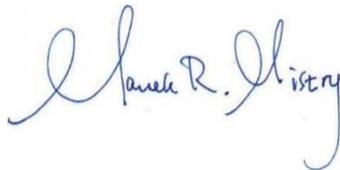
The convictions must be reversed. Mr. Hubbart must be afforded a new trial.

Respectfully submitted on December 21, 2017,

BACKLUND AND MISTRY



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CERTIFICATE OF SERVICE

I certify that on today's date:

I mailed a copy of Appellant's Reply Brief, postage prepaid, to:

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Airway Heights, WA 99001

With the permission of the recipient(s), I delivered an electronic version of the brief, using the Court's filing portal, to:

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I filed the Appellant's Reply Brief electronically with the Court of Appeals, Division III, through the Court's online filing system.

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

Signed at Olympia, Washington on December 21, 2017.



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