

63668-5

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No. 63668-5-1

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

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STATE OF WASHINGTON,

Respondent,

v.

LAMAR ROCFORD HARRIS,

Appellant.

FILED  
COURT OF APPEALS DIVISION 1  
STATE OF WASHINGTON  
2009 OCT 14 PM 4:51

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

The Honorable Theresa B. Doyle

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BRIEF OF APPELLANT

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A. ASSIGNMENT OF ERROR

The court's instruction 6 constituted an impermissible comment on the evidence in violation of article IV, section 16 of the Washington Constitution.

B. ISSUE PERTAINING TO ASSIGNMENT OF ERROR

Article IV, section 16 of the Washington Constitution bars the court from commenting on the evidence to a jury. A jury instruction which tells the jury that an element had been proven by the State as a matter of law is an impermissible comment on the evidence. The court in Mr. Harris's matter instructed the jury that spitting constituted an assault as a matter of law. Was the court's instruction an impermissible comment on the evidence entitling Mr. Harris to reversal of his conviction and remand for a new trial?

C. STATEMENT OF THE CASE

On October 30, 2008, Lamar Harris was charged with assaulting two different Metro bus drivers on two separate routes three hours apart. CP 1-7. The two Metro drivers testified that, Mr. Harris became disruptive on their bus, was ordered to leave the bus, and upon leaving the bus, was alleged to have spit on the driver. 6/2/09RP 4-10, 24-31.

The court instructed the jury on the definition of assault using a modified WPIC:

An assault is an intentional touching of *or spitting upon* another person that is harmful or offensive regardless of whether any physical injury is done to the person. A touching *or spitting* is offensive if the touching *or spitting* would offend an ordinary person who is not unduly sensitive.

CP 45 (emphasis added).

The jury subsequently convicted Mr. Harris as charged. CP 16-17.

#### D. ARGUMENT

##### COURT'S INSTRUCTION 6 CONSTITUTED AN IMPERMISSIBLE COMMENT ON THE EVIDENCE CONTRARY TO THE WASHINGTON CONSTITUTION

1. The trial court is barred from commenting on the evidence to the jury. Under article 4, section 16 of the Washington Constitution, “[j]udges 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. Jackman*, 156 Wn.2d 736, 743-44, 132 P.3d 136 (2006), quoting *State v. Becker*, 132 Wn.2d 54, 64, 935 P.2d 1321 (1997).

“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). While a trial court “may supplement an instruction with an explanatory instruction if the meaning of the language is unclear or if the language might mislead persons of ordinary intelligence,” *State v. Young*, 48 Wn.App. 406, 415, 739 P.2d 1170 (1987), an instruction “improperly comments on the evidence if it resolves a disputed issue of fact that should have been left to the jury.” *Becker*, 132 Wn.2d at 64-65. “It is thus error for a judge to instruct the jury that ‘matters of fact have been established as a matter of law.’” *State v. Zimmerman*, 130 Wn.App. 170, 174, 121 P.3d 1216 (2005), quoting *Becker*, 132 Wn.2d at 64.

Even though Mr. Harris did not object to the instruction at trial, he may still raise the issue on appeal as it involves a manifest constitutional error that this Court may consider for the first time on appeal. *State v. Levy*, 156 Wn.2d 709, 719-20, 132 P.3d 1076 (2006), citing *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); *State v. Bogner*, 62 Wn.2d 247, 252, 382 P.2d 254 (1963) (even if the evidence is undisputed or overwhelming, comment by the judge violates a constitutional injunction).

2. Court's instruction 6 was a comment on the evidence.

Instruction 6 instructed the jury that as a matter of law spitting constituted an assault. This comment by the court relieved the State of its burden of proof and violated article IV, section 16 of the Washington Constitution.

In *Becker*, a disputed factual issue was whether a "Youth Education Program" was a school. *Becker*, 132 Wn.2d at 56. The special verdict form asked: was the defendant "within 1000 feet of the perimeter of school grounds, to wit: Youth Employment Education Program School at the time of the commission of the crime." *Becker*, 132 Wn.2d at 64. The Supreme Court held that the special verdict form effectively removed a disputed issue of fact from the jury's consideration, relieving the State "of its burden to prove all elements of the sentence enhancement statute." *Becker*, 132 Wn.2d at 65. *Accord Jackman*, 156 Wn.2d at 742-744 (inclusion of victims' birth dates in "to convict" jury instructions, where crimes required victims to be minors, was an impermissible

comment on the evidence); *Levy*, 156 Wn.2d at 716, 718-723 (jury instructions defining “building” as the apartment at issue and “deadly weapon” as a crowbar were impermissible comments on the evidence); *Lane*, 125 Wn.2d at 835-839 (judge's comment regarding the reason for the early release of a prosecution witness from jail was an impermissible comment on the evidence); *State v. Eisner*, 95 Wn.2d 458, 460-63, 626 P.2d 10 (1981) (judge's questioning of prosecution witness, which elicited elements of the charged crime, was an impermissible comment on the evidence); *Lampshire*, 74 Wn.2d at 891-93 (judge's comment when ruling on objection made by the prosecution during direct examination of the defendant was an impermissible comment on the evidence); *Risley v. Moberg*, 69 Wn.2d 560, 561-65, 419 P.2d 151 (1966) (judge's questioning of personal injury plaintiff's physician regarding the cause of her injuries was an impermissible comment on the evidence).

Mr. Harris's defense at trial was a general denial putting the State to its burden of proving all of the elements beyond a reasonable doubt. By instructing the jury that spitting constituted an assault, the court relieved the State of proving Mr. Harris assaulted the drivers. The instruction was an impermissible

comment of the evidence. *Levy*, 156 Wn.2d at 726 (“The fundamental question underlying our analysis of judicial comments is whether the mere mention of a fact in an instruction conveys the idea that the fact has been accepted by the court as true”).

The cases cited by the State at trial for the proposition that court’s instruction 6 was proper do not hold *that as a matter of law* that spitting is an assault. In *State v. Humphries*, the defendant was convicted of assault for spitting on a police officer, and over defense objection, the prosecutor argued spitting constituted an assault. 21 Wn.App. 405, 586 P.2d 130 (1978). While this Court concluded spitting *may* constitute a battery and the prosecutor’s argument was not improper, this Court did not conclude that as a *matter of law* spitting is an assault. 21 Wn.App. at 408 (“Under the facts and circumstances of this case, we find no error in the prosecutor characterizing ‘spitting’ as an assault”).

Similarly, in *State v. Jackson*, it was determined that ejaculation onto the body of a child could constitute a *touching* for the purposes of convicting the defendant of second degree child molestation. 145 Wn.App. 814, 820-21, 187 P.2d 321 (2008). *Jackson* did not hold that a court instructing the jury that ejaculation was a touching as a matter of law was proper.

3. The instruction prejudiced Mr. Harris because it relieved the State of its burden of proof. A judicial comment on the evidence is presumed prejudicial, and the State must demonstrate that the defendant was not prejudiced by the comment, unless the record affirmatively shows that no prejudice occurred. *Levy*, 156 Wn.2d at 723, *citing Lane*, 125 Wn.2d at 838-39; *State v. Stephens*, 7 Wn.App. 569, 573, 500 P.2d 1262 (1972), *aff'd in part, rev'd in part*, 83 Wn.2d 485 (1973) (the State has the burden of showing that the jury's decision was not influenced, even when the evidence is undisputed or overwhelming).

In *Levy*, the Supreme Court found the court's comment on the evidence harmless because it did not relieve the jury of determining all of the elements of the offense. *Levy*, 156 Wn.2d at 727. In contrast, here the trial court relieved the jury from finding the assault element *as a matter of law*.

Further, the court instructed the jury that as a matter of law spitting was an assault which was tantamount to a directed verdict on that element. In *Becker*, the Supreme Court ruled the court's comment that the alternative school was a school for enhancement purposes was tantamount to a directed verdict and resulted in reversal of the conviction. *Becker*, 132 Wn.2d at 65. Further, the

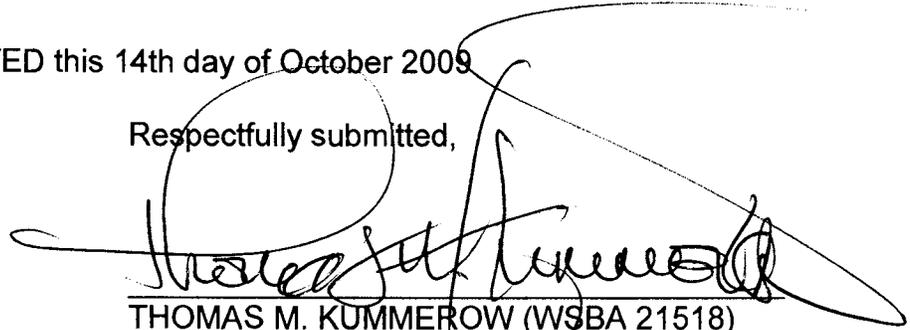
Court noted that whether or not the State produced enough evidence was simply not the issue and did not cure the error. *Id.* Mr. Harris's matter is no different from *Becker* in that in both cases the court instructed the jury that a disputed element had been proven as a matter of law. Mr. Harris is entitled to the same result as in *Becker*: reversal of his convictions.

E. CONCLUSION

For the reasons stated, Mr. Harris submits this Court must reverse his third degree assault convictions and remand for a new trial.

DATED this 14th day of October 2009

Respectfully submitted,



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DIVISION ONE**

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 v. )  
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 Appellant. )

NO. 63668-5-I

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**DECLARATION OF DOCUMENT FILING AND SERVICE**

I, MARIA ARRANZA RILEY, STATE THAT ON THE 14<sup>TH</sup> DAY OF OCTOBER, 2009, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS - DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

- |   |                            |  |
|---|----------------------------|--|
| <p>[X] KING COUNTY PROSECUTING ATTORNEY<br/>         APPELLATE UNIT<br/>         KING COUNTY COURTHOUSE<br/>         516 THIRD AVENUE, W-554<br/>         SEATTLE, WA 98104</p> | <p>(X)<br/>( )<br/>( )</p> | <p>U.S. MAIL<br/>         HAND DELIVERY<br/>         _____</p> |
| <p>[X] LAMAR HARRIS<br/>         768001<br/>         CLALLAM BAY CORRECTIONS CENTER<br/>         1830 EAGLE CREST WAY<br/>         CLALLAM BAY, WA 98326</p>                    | <p>(X)<br/>( )<br/>( )</p> | <p>U.S. MAIL<br/>         HAND DELIVERY<br/>         _____</p> |

**SIGNED** IN SEATTLE, WASHINGTON THIS 14<sup>TH</sup> DAY OF OCTOBER, 2009.

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