

FILED  
Apr 20, 2015  
Court of Appeals  
Division I  
State of Washington

NO. 72347-2-I

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

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STATE OF WASHINGTON,

Respondent,

v.

GREGORIO OLIVAREZ AGUILAR,

Appellant.

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

The Honorable Susan Amini, Judge

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BRIEF OF APPELLANT

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**TABLE OF CONTENTS**

	Page
A. <u>ASSIGNMENT OF ERROR</u> .....	1
<u>Issue Pertaining to Assignment of Error</u> .....	1
B. <u>STATEMENT OF THE CASE</u> .....	1
C. <u>ARGUMENT</u> .....	5
THE TRIAL COURT IMPERMISSIBLY COMMENTED ON THE EVIDENCE, REQUIRING REVERSAL AND A NEW TRIAL .....	5
D. <u>CONCLUSION</u> .....	10

TABLE OF AUTHORITIES

Page

WASHINGTON CASES

<u>Seattle v. Arensmeyer</u> 6 Wn. App. 116, 491 P.2d 1305 (1971).....	5
<u>State v. Becker</u> 132 Wn.2d 54, 935 P.2d 1321 (1997).....	7
<u>State v. Bogner</u> 62 Wn.2d 247, 383 P.2d 254 (1963).....	6
<u>State v. Coella</u> 3 Wash. 99, 28 P. 28 (1891) .....	6
<u>State v. Lampshire</u> 74 Wn.2d 888, 447 P.2d 727 (1968).....	5, 6, 7
<u>State v. Lane</u> 125 Wn.2d 825, 889 P.2d 929 (1995).....	6
<u>State v. Levy</u> 156 Wn.2d 709, 132 P.3d 1076 (2006).....	6
<u>State v. Trickel</u> 16 Wn. App. 18, 553 P.2d 139 (1976).....	6
<u>State v. Walter</u> 7 Wash. 246, 34 P. 938 (1893) .....	6

RULES, STATUTES AND OTHER AUTHORITIES

CONST. art. IV, § 16 .....	1, 5, 6, 9
CrR 3.5.....	4

A. ASSIGNMENT OF ERROR

The trial court commented on the evidence in the jury's presence, thereby violating article IV, section 16 of the Washington Constitution.

Issue Pertaining to Assignment of Error

The Washington Constitution prohibits judges from commenting on the evidence. A trial judge violates this prohibition when she makes a comment suggesting she believes a witness's testimony or expresses sympathy for the witness for having to testify. Here, after the alleged victim testified, the judge said, "Thank you very much for [being] here. I know it was hard for you." Does this comment on the evidence warrant a new trial?

B. STATEMENT OF THE CASE

The State charged Gregorio Olivarez Aguilar<sup>1</sup> with second degree kidnapping for taking 14-year-old K.M.D.M. to California with him. CP 1. Prior to trial, the State amended its charges to add one count of third degree child rape for having sex with K.M.D.M. and to include a special sexual

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<sup>1</sup> This court's and the trial court's captions have hyphenated Olivarez Aguilar's last names. But there is no hyphen between his last names. In the Spanish-speaking world, persons have two last names—their father's first last name and their mother's first last name. For example, if a man named Olivarez Aguilar had a child with a woman named Garcia Sanchez, their child would have the last name Olivarez Garcia. Spanish speakers often refer to themselves by dropping their mother's name and using only their first last name. Consistent with this shortening convention, this brief refers to Olivarez Aguilar either with his full, unhyphenated name or simply as Olivarez.

motivation allegation with regard to the kidnapping charge. CP 22-23; 1RP<sup>2</sup> 10-12. The State amended the charges a second time to add one count of second degree child rape. CP 24-25. However, with regard to the second amended information, the State indicated it “would not be asking the jury to convict on two counts” of child rape. 3RP 22. Instead, the State would be asking the jury to determine whether the act constituting rape of a child occurred when K.M.D.M. was 13 (to support the second degree count) or 14 years old (to support the third degree count), depending on the evidence adduced at trial. See 8RP 18-19 (prosecutor arguing during closing that the degree of the child rape charged depended on whether the evidence showed K.M.D.M. and Olivarez had sex before or after her 14th birthday).

Olivarez and Adela Moreno Garcia were involved in a one-and-a-half year relationship that ended in February 2014. 6RP 6-7. Olivarez lived with Moreno Garcia during their relationship, along with Moreno Garcia’s four daughters, including K.M.D.M. 6RP 4, 17-18.

Moreno Garcia testified she broke up with Olivarez after he had picked K.M.D.M. up from school when he did not have permission to do so. 6RP 9-12. Moreno Garcia stated this undermined her trust in Olivarez. 6RP 10.

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<sup>2</sup> This brief refers to the verbatim reports of proceedings as follows: 1RP—June 9, 2014; 2RP—June 10, 2014; 3RP—July 7, 2014 (morning); 4RP—July 7, 2014 (afternoon); 5RP—July 8, 2014; 6RP—July 9, 2014; 7RP—July 10, 2014; 8RP—July 14, 2014; 9RP—August 8, 2014.

On February 28, 2014, Moreno Garcia phoned police when she got home from work and K.M.D.M. was not home. 6RP 12. K.M.D.M.'s clothes and toiletries were missing from Moreno Garcia's home. 6RP 16.

According to K.M.D.M., she and Olivarez had begun to develop a romantic relationship while Olivarez was dating her mother. 7RP 10-11. This culminated in Olivarez asking K.M.D.M. to be his girlfriend, to which she agreed because she liked him. 7RP 14. K.M.D.M. said she first had sex with Olivarez in January or February of 2014. 7RP 24-25. She could not remember whether she was 13 or 14 (her 14th birthday was January, 27, 2014) when they first had sex. 7RP 4, 28-29.

After Olivarez broke up with Moreno Garcia and left Moreno Garcia's home, K.M.D.M. said she communicated with Olivarez on Facebook. 7RP 31, 33. They made plans to leave for California together. 7RP 31-34. The plan was that Olivarez would pick K.M.D.M. up from school on a Friday. 7RP 32. K.M.D.M. and Olivarez also spoke about getting married given that K.M.D.M. loved Olivarez. 7RP 27, 34.

K.M.D.M. testified they left, consistent with their plan, on a Friday, drove to a bus station in Seattle, and arrived in California the following day via bus. 7RP 33-34, 36-37. K.M.D.M. stayed at Olivarez's cousin's house in California until police found them. 7RP 37-38. K.M.D.M. stated she and

Olivarez had sex perhaps four times while she was staying at Olivarez's cousin's house. 7RP 37-38.

Federal marshal David Dominguez tracked Olivarez to his cousin's home in Port Hueneme, California. 6RP 69. In the early morning hours of March 7, 2014, Dominguez arrested Olivarez. 6RP 71.

At a pretrial CrR 3.5 hearing, the trial court suppressed Olivarez's postarrest statements because interrogating officers had failed to honor Olivarez's rights to silence and to counsel. 2RP 71-72; 3RP 15.

At trial, the evidence conformed to the foregoing recitation of facts. However, after K.M.D.M. testified, the trial court said to her, "Thank you very much for you to be [sic] here. I know it was hard for you. Okay. Thank you. You are free to leave." 7RP 63.

The jury found Olivarez guilty of second degree kidnapping, which included a special verdict form indicating he committed the crime with sexual motivation. CP 41-42; 8RP 38. The jury found Olivarez guilty of third degree child rape but acquitted him of the second degree child rape charge. CP 39-40; 8RP 38.

The trial court imposed a determinate 26-month sentence for the third degree child rape and an indeterminate 17.5-month sentence for the kidnapping charge. CP 71-72; 9RP 11. The court also imposed a consecutive 24-month enhancement for the sexual motivation verdict for a

total term of confinement of 50 months. CP 72; 9RP 11. The trial court also imposed a lifetime no-contact order with regard to Moreno Garcia and K.M.D.M. CP 72. Olivarez Aguilar timely appeals. CP 82.

C. ARGUMENT

THE TRIAL COURT IMPERMISSIBLY COMMENTED ON THE EVIDENCE, REQUIRING REVERSAL AND A NEW TRIAL

The trial court told the alleged victim after she testified, “Thank you very much for you to be [sic] here. I know it was hard for you.” 7RP 63. This was an improper comment on the evidence that deprived Olivarez Aguilar of a fair trial.

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.” This constitutional prohibition on commenting on the facts “prevent[s] the jury from being influenced by knowledge conveyed to it by the court as to the court’s opinion of the evidence submitted.” State v. Lampshire, 74 Wn.2d 888, 892, 447 P.2d 727 (1968). The prohibition against comments on the evidence is strictly applied. Seattle v. Arensmeyer, 6 Wn. App. 116, 120, 491 P.2d 1305 (1971).

Washington courts have held, almost since statehood, that all remarks or observations regarding the facts before the jury are rigorously

prohibited by article IV, section 16. State v. Bogner, 62 Wn.2d 247, 252, 383 P.2d 254 (1963); State v. Walter, 7 Wash. 246, 250, 34 P. 938 (1893); State v. Coella, 3 Wash. 99, 121, 28 P. 28 (1891). “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). That is, a court’s improper comment on the evidence may be either express or implied. State v. Levy, 156 Wn.2d 709, 721, 132 P.3d 1076 (2006). “The touchstone of error is whether or not the feelings of the trial court as to the truth value of the testimony of a witness have been communicated to the jury.” State v. Trickel, 16 Wn. App. 18, 25, 553 P.2d 139 (1976).

A comment on the evidence is presumed prejudicial, and the State bears the burden to show no prejudice resulted. Lane, 125 Wn.2d at 838. Prejudice is presumed even in spite of jury instructions to disregard such comments: “[T]he damage is done when the remark [i]s made and it [i]s not capable of being cured by a subsequent instruction to disregard.” Lampshire, 74 Wn.2d at 892.

A comment on the evidence may be raised for the first time on appeal because it violates the constitution. Levy, 156 Wn.2d at 719-20; State

v. Becker, 132 Wn.2d 54, 64, 935 P.2d 1321 (1997); Lampshire, 74 Wn.2d at 893.

Just after she had finished testifying, the trial court said to K.M.D.M., “Thank you very much for you to be [sic] here. I know it was hard for you. Okay. Thank you. You are free to leave.” 7RP 63. The judge’s remark, “I know it was hard for you,” was an unconstitutional comment on K.M.D.M.’s testimony.

The trial court’s comment implied the judge believed K.M.D.M. had testified truthfully. K.M.D.M. testified in detail regarding the development of a sexual relationship between her and Olivarez. 7RP 10-14. She stated she and Olivarez made plans to move to California together and had spoken about getting married. 7RP 31-34. She testified that she “loved” Olivarez and that they had had sex once in Kent and perhaps as many as four times in California. 7RP 25-28, 37-38. K.M.D.M.’s testimony detailed her alleged sexual relationship with Olivarez and how she felt about it. By stating, “I know [testifying] was hard for you,” the trial court implied that everything K.M.D.M. had described in her testimony, and which incriminated Olivarez, had been accurate. The trial court confirmed for jurors that K.M.D.M. had to overcome difficulty to testify against Olivarez, which in turn expressed to jurors that the court felt K.M.D.M. was telling the truth about what had happened between her and Olivarez. The trial court’s comment bolstered

K.M.D.M.'s credibility and the value of her testimony, invading the province of the jurors to assess the appropriate weight and credibility to give K.M.D.M.'s testimony.<sup>3</sup> Cf. CP 45 (“You are the sole judges of the credibility of each witness. You are also the sole judges of the value or weight to be given to the testimony of each witness.”). The trial court’s comment was reversible error.

Not only did the comment show the trial court believed K.M.D.M. was truthful, but it also aligned the trial court on the side of victims and against defendants, and implied that jurors should share this view. Indeed, telling K.M.D.M., “I know it was hard for you” to be here and testify was an invocation of sympathy and pity for K.M.D.M. It also suggested jurors should blame Olivarez for placing K.M.D.M. in a difficult position because Olivarez was guilty. In hearing the judge’s expression of sympathy for K.M.D.M., jurors surely would have felt compelled to join it.

The trial court’s comments also directly conflicted with its instruction that jurors “must not let [their] emotions overcome [their] rational thought process. [They] must reach [their] decision based on the facts proved to [them] and on the law given to [them], not on sympathy, prejudice,

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<sup>3</sup> Imagine if Olivarez had taken the stand—professing his innocence—and at the conclusion of his testimony the trial judge said, “Thank you very much for being here. I know it was hard for you.” Such a supportive comment regarding the defendant’s testimony would never be tolerated. Nor should it be tolerated when directed at an alleged rape victim.

or personal preference.” CP 47. The trial court’s expression of concern for K.M.D.M. and perception of K.M.D.M.’s difficulty in testifying invited jurors to base their assessment of K.M.D.M.’s testimony not on a rational thought process but on their emotional responses. The trial court’s remark improperly appealed to jurors’ sympathy and compassion for persons in K.M.D.M.’s position. It was an unconstitutional comment on the evidence and requires reversal.

The State must show that the court’s presumptively prejudicial comment could not have influenced one or more jurors. The State cannot do so here. Every juror heard the trial court judge express empathy and gratitude to K.M.D.M. because the trial court “kn[e]w it was hard for” her to testify. K.M.D.M. was the key prosecution witness and the alleged victim of Olivarez’s crime. The trial court’s comment implied K.M.D.M. was truthful, was a victim of a crime, and that Olivarez was guilty. Under such circumstances, Olivarez was prejudiced and did not receive a fair trial. The trial court’s violation of article IV, section 16 requires reversal and a new trial.

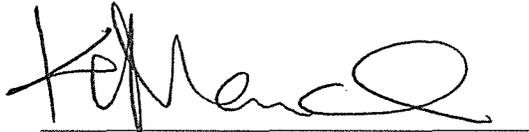
D. CONCLUSION

The trial court's unconstitutional comment on the evidence rendered Olivarez Aguilar's trial unfair. Olivarez Aguilar asks this court to reverse his convictions and remand for a new and fair trial.

DATED this 20<sup>th</sup> day of April, 2015.

Respectfully submitted,

NIELSEN, BROMAN & KOCH, PLLC

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

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STATE OF WASHINGTON	)	
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Respondent,	)	
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v.	)	COA NO. 72347-2-I
	)	
GREGORIO OLVAREZ-AGUILAR,	)	
	)	
Appellant.	)	

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DECLARATION OF SERVICE

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 20<sup>TH</sup> DAY OF APRIL 2015, I CAUSED A TRUE AND CORRECT COPY OF THE **BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] GREGORIO OLVAREZ-AGUILAR  
DOC NO. 375754  
MONROE CORRECTIONS CENTER  
P.O. BOX 777  
MONROE, WA 98272

**SIGNED** IN SEATTLE WASHINGTON, THIS 20<sup>TH</sup> DAY OF APRIL 2015.

x *Patrick Mayovsky*