No. 43682-5-II

COURT OF APPEALS
DIVISION II
OF THE STATE OF WASHINGTON

CITY OF VANCOUVER, Respondent

v.

ALBERT MCCLURE, Petitioner.

BRIEF OF RESPONDENT

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I.

ISSUE

Whether the district court judge's introduction of the alleged facts of the case—given to the jury panel prior to initiating voir dire—violated Wash. Const. art. IV, § 16.

II.

STATEMENT OF THE CASE

Between April and August of 2010, Erika Hamilton (the victim) worked at a Subway restaurant located in the City of Vancouver, WA. RP 113, 168. At the time, Ms. Hamilton was 17 years old. RP 115. Almost immediately after she began working there, Albert McClure (the petitioner) began coming in to the Subway restaurant at least 3 times per week. RP 114. Mr. McClure was "much older" than Ms. Hamilton—reportedly about 40 years old at the time. RP 118, 170. In the beginning, Mr. McClure appeared to be "acting flirty" towards Ms. Hamilton, asking her if she had a boyfriend, for example. RP 114. On one occasion, Ms. Hamilton found Mr. McClure waiting in his car outside the restaurant about 40 minutes after he had eaten and left the restaurant. RP 115-16. When Ms. Hamilton exited the store, Mr. McClure exited his car, approached Ms. Hamilton, and engaged her in conversation—an incident Ms. Hamilton described as being "odd." RP 116. Mr. McClure often came

in to the restaurant right around the time Ms. Hamilton was closing, and there were other incidents where Ms. Hamilton saw Mr. McClure outside the restaurant as well. *Id.* On another occasion, Mr. McClure told Ms. Hamilton that his kid would think she was pretty. RP 117. On another occasion, Mr. McClure asked Ms. Hamilton if she'd ever been stalked before, which she described as "kind of alarming." *Id.* Later, Mr. McClure asked Ms. Hamilton for her cell phone number. *Id.*

As time went on, Ms. Hamilton felt "more alarmed and more frightened" as a result of Mr. McClure's contacts with her. *Id.* Ms. Hamilton felt that the encounters became "more odd," noting that Mr. McClure would be there almost an hour after coming in and eating his sandwich, and would be waiting outside. *Id.* Ms. Hamilton felt "alarmed," and thought the behavior "sent up red flags." *Id.* At this point, Mr. McClure also alluded to wanting to take Ms. Hamilton out on a date, which she rebuffed. RP 117-18.

In response to her growing concerns about Mr. McClure, Ms. Hamilton was alarmed enough to write down Mr. McClure's license plate number and took a picture of his car "in case anything happened" to her. RP 118. Ms. Hamilton ultimately informed her coworkers and managers of her concerns. *Id.* Ms. Hamilton also informed her grandparents of her

concerns, whose alarm resulted in her grandfather parking and waiting for her outside of the restaurant on nights when she closed alone. *Id.* During one contact, Mr. McClure told Ms. Hamilton that his ex-girlfriend was a gold digger and that he hated her, and then told Ms. Hamilton that she "[didn't] seem like that at all," that she would "never do that" to him, and that she was "perfect." RP 119.

In response to these contacts, Ms. Hamilton tried to switch shifts so she wouldn't be working late alone, and would sometimes lock up early in hopes of preventing Mr. McClure from coming in to the restaurant. *Id.* Ms. Hamilton felt concerned that Mr. McClure appeared to be "sinking" and "wasn't in the same reality." RP 120. She was worried that he would get upset as a result of her turning him down, was concerned that he might "get aggressive" towards her, that he may "lash out" if she continued turning him down, that he may "assault" her or get upset and "take [her] somewhere," and that she was "scared." *Id.* At one time, Mr. McClure asked Ms. Hamilton for her phone number and invited her out on his boat; when she refused Mr. McClure became angry. RP 120-21.

Mr. McClure began driving by the restaurant at times when Ms. Hamilton was closing, and Ms. Hamilton began having other employees take Mr. McClure's orders while she waited in the back until he left the

restaurant. RP 121. On one occasion, Ms. Hamilton suspected that Mr. McClure had followed her home, and then suspected that Mr. McClure had driven through her neighborhood late at night on occasion afterwards. RP 122-23. One such incident concerned Ms. Hamilton to the point that she woke up her grandfather, told him to get the gun, and walked around the perimeter of her home as a precaution. RP 123. Later, Ms. Hamilton received a call at work after closing from a man who appeared to be attempting to disguise his voice that she suspected to be Mr. McClure. RP 123, 125. The caller told Ms. Hamilton that he had been "thinking about [her] all the time," that he was "going to go crazy if [he] can't have [her]," and that he "[didn't] know what [he was] going to do." RP 123. The phone call "shook up" Ms. Hamilton to the point that she was physically shaking, almost crying, and was afraid to even go outside. RP 123-24. As a result, Ms. Hamilton said she was "very, very scared," "was having panic attacks at that point closing shop," and that she was "terrified." RP 125. Ms. Hamilton also stated she was scared that Mr. McClure may hurt her. RP 145.

A jury trial was held in Clark County District Court on June 9, 2010. In introducing the case to the entire jury panel, the district court judge stated:

> The charge against Mr. McClure is that of called stalking [*sic*] where it's alleged in the period of time of April 10th, 2010 to August 10th, 2010 without lawful authority he did intentionally and repeatedly harass or follow a person by the name of Erika Hamilton and so you understand again the nature of the case is that Ms. Hamilton works at a Subway sandwich shop. I think she was of age 17 at the time if I remember correctly and allegations are going to be and obviously get more specific as to the times that maybe as much as dozens of times he went into that particular store, chatted with her, asked her I guess for dating purposes I think if she wanted to go on a date with him and at some point in time maybe even asked her if she'd ever been stalked before. So they're going to get into a lot more details but that's sort of what I'll call the flavor of the case that she obviously felt uncomfortable and eventually notified the police and that ended up being charged with the offense of stalking. Okay? And to that particular charge he's entered a plea of not guilty.

RP 1. At the conclusion of trial, the jury found Mr. McClure guilty of the crime of stalking. RP 321.

III.

ARGUMENT

A. The District Court Judge's Introduction of the Case Did Not Amount to an Unconstitutional Comment on the Evidence

"One circumstance reviewing courts consider when evaluating article IV, section 16 claims is whether the trial court's remarks were isolated or cumulative." *State v. Sivins*, 138 Wn. App. 52, 59 (2007). "A trial judge should not enter into the 'fray of combat' nor assume the role of

counsel. … An isolated instance of such conduct may be deemed harmless error, however, if it cannot be said to violate the constitutional bounds of judicial comment." *Id.* (quoting *State v. Eisner*, 95 Wn.2d 458, 462-63 (1981)).

"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 (1995) (citing *State v. Hansen*, 46 Wn. App. 292, 300 (1986)).

Here, the judge's introduction of the case did not amount to an unconstitutional judicial comment on the evidence. The remarks were isolated and occurred prior to the beginning of jury selection. The judge began by informing the jury of the specific charge against Mr. McClure—stalking—and proceeded to summarize some of the alleged facts that gave rise to the criminal charge. The judge began his summary by clearly stating that the facts were "alleged." RP 1. During the summary, the judge again referred to the facts as being "allegations," and told the jury that "they're [referring to the parties] going to get into a lot more details." *Id.* The judge used phrases such as "I think," "if I remember correctly," I guess," and "maybe" throughout the summary. *Id.* The use of such language further illustrated that these were the facts alleged by the

prosecution and not the court's own attitude towards the merits of the case or evaluation of disputed issues. At the conclusion of his introduction, the judge told the jury that Mr. McClure had entered a plea of not guilty to the resulting criminal charge, thereby indicating that those alleged facts were in dispute.

When viewed in context, the judge's introduction of the case did not amount to an unconstitutional comment on the evidence. Therefore, any potential error that resulted from the judge's introduction should be evaluated under the harmless error analysis in *State v. Sivins*.

B. Any Potential Error in the District Court Judge's Summary of the Alleged Facts was Harmless

In *Sivins*, an isolated judicial comment made during the court's summary of the charges to the jury panel was held not to be an unconstitutional comment on the evidence. As a result, the court held that "any potential error was cured by the jury instructions... (an isolated judicial comment may be cured by an instruction)." *Sivins*, 138 Wn. App at 61 (citing *Eisner*, 95 Wn.2d at 463) (quoting *Egede-Nissen v. Crystal Mountain, Inc.*, Wn.2d 127, 141 (1980)). Specifically, the court explained:

> Here, the court instructed the jurors that the charges were simply accusations, not evidence, and they were only to rely on evidence produced in court during trial. The court also instructed the jury to disregard any inadvertent judicial comments on the evidence. Because jurors are presumed to

> follow the instruction of the court, it follows that they did not consider the suppressed items as evidence.

Id. (citing *State v. Stein*, 144 Wn.2d 236, 247 (2001)). As a result, the court found the comment harmless beyond a reasonable doubt. *Id.* (citing *State v. Lane*, 125 Wn.2d 825, 840 (1995)).

Much like *Sivins*, any potential error resulting from the judge's introduction in the present case was cured by instruction and was therefore harmless. The jurors were specifically told that the facts giving rise to the criminal charge were alleged. The jurors were told that Mr. McClure had entered a plea of not guilty as to the resulting criminal charge. At the conclusion of the trial and immediately prior to deliberation, jurors received the following instruction:

> It is your duty to cite the facts in this case based upon the evidence presented to you during trial. It's also your duty to accept the law for [*sic*] my instructions... You must apply the law from my instructions from [*sic*] the facts that you decide have been proved in this way to decide the case. Keep in mind that a charge is only an accusation. The filing of a charge is not evidence that the charge is true. Your decisions as jurors must be made solely upon the evidence presented during these proceedings. The evidence that you are to consider during deliberations consists of the testimony that you have heard from witnesses, stipulations and the exhibits I have admitted during the trial... You are the sole judges of the credibility of each witness, you're also the sole judges of the value or weight to be given to the testimony of each witness... The evidence is the testimony and the exhibits. The laws [*sic*] contained in my instructions to you. You must disregard any remarks, statement or argument that is not supported by the evidence

> or the law in my instructions...Our State Constitution prohibits a trial judge from making you [*sic*] comment on the evidence. It would be improper for me to express by words or conduct my personal opinion about the value of testimony of [*sic*] other evidence. I've not intentionally done so. If it appeared to you that I have indicated my personal opinion in any way either during the trial or in the giving of these instructions you must disregard that entirely... You must reach a decision based on the facts proved to you and on the law given to you...

RP 275-77. The court further instructed the jury that:

> [The] Defendant has entered a plea of not guilty. That plea puts an [*sic*] issue of every element of the crime charged. The City has the... burden of each element of the crime beyond a reasonable doubt. The defendant has no burden of proving that a reasonable doubt exists as to these elements. A defendant is presumed innocent. This presumption continues throughout the entire trial unless during your deliberations you find it has been overcome by the evidence beyond a reasonable doubt.

RP 278.

The record clearly shows that, just as in *Sivins*, the court instructed the jurors that the charges were merely accusations and not evidence; that they were to rely only on the evidence presented at trial; that they were to disregard any apparent or inadvertent comments on the evidence; that Mr. McClure had entered a plea of not guilty; that such a plea puts every element of the crime charged at issue; and that Mr. McClure is presumed innocent throughout the entire trial until that presumption is overcome by evidence presented at trial. The jury was further advised that any apparent

comments by the court must be disregarded and its verdict must be reached solely based on the facts presented at trial.

Jurors are presumed to follow the instructions of the court. *Sivins*, 138 Wn. App. at 61. In light of the instructions given in the present case, any error resulting from the district court judge's introduction of the case was harmless beyond a reasonable doubt. As a result, Mr. McClure's criminal conviction should be affirmed.

C. Even if the District Court Judge's Introduction of the Case was an Unconstitutional Comment on the Evidence, Overwhelming Untainted Evidence Exists to Support the Conviction.

An unconstitutional comment on the evidence is presumed prejudicial. *Sivins*, 138 Wn. App. at 58-59. As such, "[T]he burden is on the State to show that the defendant was not prejudiced, unless the record affirmatively shows that no prejudice could have resulted." *State v. Jackman*, 156 Wn.2d 736, 743 (2006). To show that the defendant was not prejudiced, "'overwhelming untainted evidence' to support the conviction" is required. *Sivins*, 138 Wn. App. at 61 (quoting *Lane*, 125 Wn.2d at 839). Where overwhelming untainted evidence exists, judicial comments on the evidence constitute harmless error and the conviction will be affirmed. *State v. Lane*, 125 Wn.2d 825, 841 (1995).

To convict Mr. McClure of the crime of stalking, the jury was required to find that, without lawful authority, on the dates and in the jurisdiction alleged in the criminal charge, Mr. McClure a) intentionally and repeatedly harassed or repeatedly followed the victim, b) that the victim reasonably feared that Mr. McClure intended to injure her or her property, and c) that Mr. McClure intended to frighten, intimidate, or harass the victim; or knew or reasonably should have known that the victim was afraid, intimidated or harassed even if Mr. McClure did not intend to place her in fear or to intimidate or harass her. RP 279; R.C.W. 9A.46.110.

In his introduction of the case, the district court judge only made reference to the victim's age, the fact that Mr. McClure went to the Subway Restaurant multiple times, the fact that Mr. McClure asked the victim out for dating purposes and maybe asked if she'd ever been stalked before, and stated that the victim obviously felt uncomfortable. RP 1.

The age of the victim is immaterial to a conviction under the stalking statute. Consequently, even if evidence regarding the age of the victim could be deemed tainted as a result of the judge's summary, it was not evidence that was required to support a conviction of the crime of stalking. Further, nothing in the record indicates the victim's age was in dispute.

Likewise, the fact that Mr. McClure went to the restaurant in question multiple times was not disputed. Therefore any evidence presented at trial regarding Mr. McClure's frequent visits to the Subway Restaurant would not have been tainted by the judge's summary, as both the prosecution and the defense acknowledged this fact at trial.

Whether or not Mr. McClure asked the victim out for dating purposes and asked if she'd been stalked before was in dispute at trial. However, even if these facts are deemed tainted as a result of the judge's summary, there was overwhelming additional evidence presented at trial to support a conviction. In addition to the victim's testimony regarding those facts, the victim also testified that Mr. McClure waited outside of the restaurant multiple times, approached her after she exited the restaurant, acted flirty towards her, asked her if she had a boyfriend, told her that his kid would think she was pretty, asked her for her cell phone number, waited in the restaurant after eating for an extended period of time, told the victim that his previous girlfriend—who he hated—was a gold digger but she didn't seem like one, told her that she was perfect, became angry when the victim refused an invitation to go out on his boat, and drove by the restaurant at times when the victim was closing. The victim further testified that she suspected that Mr. McClure may have followed her home, and that she received a very alarming phone call that she suspected

was made by Mr. McClure. None of these facts were addressed in the court's summary of the case, and should therefore be considered untainted.

As a result, the record contains overwhelming untainted evidence to support the jury's finding that Mr. McClure intentionally and repeatedly harassed or repeatedly followed the victim, that the victim reasonably feared that Mr. McClure intended to injury her or her property, and that Mr. McClure either intended to frighten, intimidate or harass the victim, or that he knew or reasonably should have known that the victim was afraid, intimidated or harassed regardless of whether or not this was his intent. As a result, if the court finds the judge did comment on the evidence, it should be deemed harmless error, and Mr. McClure's conviction should be upheld.

IV. CONCLUSION

The district court judge's introduction of the case did not amount to an unconstitutional judicial comment on the evidence. The judge began his introduction by informing the jurors that Mr. McClure had been charged with the crime of stalking. The judge then summarized some of the facts alleged by the prosecution that gave rise to the criminal charge, specifically noting for the jury that these were alleged facts. During the summary, the judge repeatedly referenced that he was unsure of, or

guessing at, the allegations. At the conclusion of the summary, the judge informed the jury that Mr. McClure had entered a plea of not guilty, putting those alleged facts at issue. Consequently, the court did not express an attitude towards the merits of the case or give an evaluation relative to a disputed issue that would rise to the level of a judicial comment on the evidence under *Lane*. Therefore, under *Sivins*, any potential error that did result was cured by judicial instruction and harmless beyond a reasonable doubt.

Even if the district court judge's introduction of the case did amount to an unconstitutional comment on the evidence, only a limited amount of evidence was commented on. Further, much of the evidence that was commented on was either not in dispute or not material to a finding of guilt. Any disputed evidence that was material to a finding of guilt and potentially tainted by the district court judge's comment was minimal, and overwhelming untainted evidence was presented at trial to support the jury's finding of guilt.

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For the reasons stated above, the City respectfully requests that this court affirm Mr. McClure's conviction.

RESPECTFULLY SUBMITTED, January 31, 2013

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

CITY OF VANCOUVER, Respondent, v. ALBERT GEORGE MCCLURE, Appellant.	No. 43682-5-II AFFIDAVIT OF MAILING

STATE OF WASHINGTON)
)
COUNTY OF CLARK)

On January 31, 2013, I deposited in the mails of the United States of America a properly stamped and addressed envelope directed to the below-named individuals, containing a copy of the Brief of Respondent.

TO:

Suzanne Lee Elliott
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1300 Hoge Building
705 Second Avenue
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I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Stephanie Wilk

Date: 1/31/13, 2013.
Place: Vancouver, Washington.

VANCOUVER CITY ATTORNEY

January 31, 2013 - 2:53 PM

Transmittal Letter

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Comments:

Brief of Respondent attached.

Sender Name: Jonathan C Schetky - Email: jonathan.schetky@cityofvancouver.us