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65334-2

NO. 65334-2-I

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

STATE OF WASHINGTON,

Respondent,

v.

ANTONNIO SMITH,

Appellant.

REC'D

APR 15 2011

King County Prosecutor
Appellate Unit

FILED
APR 15 2011
CLERK OF COURT
JESSE

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

The Honorable J. Wesley Saint Clair, Judge

REPLY BRIEF OF APPELLANT

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TABLE OF CONTENTS

	Page
A. <u>ARGUMENT IN REPLY</u>	1
PROVIDING JURORS WITH NOTEBOOKS ONLY AFTER THE FIRST WITNESS TESTIFIED CONSTITUED AN IMPROPER JUDICIAL COMMENT ON THE EVIDENCE.....	1
B. <u>CONCLUSION</u>	3

TABLE OF AUTHORITIES

	Page
<u>WASHINGTON CASES</u>	
<u>State v. Eisner</u> 95 Wn.2d 458, 626 P.2d 10 (1981).....	2, 3
<u>State v. Levy</u> 156 Wn.2d 709, 132 P.3d 1076 (2006).....	1, 2
<u>RULES, STATUTES AND OTHER AUTHORITIES</u>	
Wash. Const. art. IV, § 16.....	1, 2, 3

A. ARGUMENT IN REPLY

PROVIDING JURORS WITH NOTEBOOKS ONLY AFTER THE FIRST WITNESS TESTIFIED CONSTITUED AN IMPROPER JUDICIAL COMMENT ON THE EVIDENCE.

In response to Smith's claim the trial court violated Wash. Const. art. IV, § 16, the State argues that because note-taking by jurors was a matter of judicial discretion prior to 2002, failing to provide notebooks to the jury for some witnesses but not others is not a comment on the evidence. Brief of Respondent (BOR) at 6. This argument fails for two reasons. First, because CrR 6.8 requires judges to distribute note-taking materials to jurors for "all cases... regarding the evidence presented to them[,]" it follows that a court does not have the discretion to withhold distribution of notebooks to jurors for some witnesses and not others. The court must distribute notebooks to jurors for all witnesses. The State concedes and the record shows that the court failed to do so here.

Second, when a court emphasizes one witness over another through treatment of note-taking, the court is, by implication, commenting on the evidence, i.e., that the first witness was not as important as the subsequent witnesses. A judge need not expressly convey his or her personal feelings; it is sufficient if they are merely implied. State v. Levy, 156 Wn.2d 709, 721, 132 P.3d 1076 (2006).

The State further argues that a court's comment on the evidence must be made verbally. BOR at 8. The State is wrong. As held in Levy, it is sufficient if a court merely implies its personal feelings. Id. See also State v. Eisner, 95 Wn.2d 458, 462, 626 P.2d 10 (1981) ("It is, of course, possible that the personal opinion of a trial judge may be conveyed both directly and by implication."). Here, the court failed to give notebooks to the jury during the testimony of the first witness. 4RP 7-8. By the time the second witness, a law enforcement officer, took the stand to testify, the jurors had been given notebooks. 4RP 7-9; 15. The jury could draw but one conclusion: the court inferred to the jurors that it felt the officer's testimony was more important than the first lay witness. It follows that this action by the court was an impermissible comment on the evidence in violation of Wash. Const. art. IV, § 16.

The court may have pursued an alternate course by instructing the jury that failure to provide notebooks for the first witness was a mere oversight - if that was what occurred. However, the record on this point is silent. The sudden appearance of notebooks right before the officer took the stand coupled with the court's silence on the matter was tantamount to the court instructing the jury to pay attention because the next witness, a law enforcement officer, is about to testify. The court's silence on the

matter emphasizes the implication that the court conveyed its personal feelings regarding the weight of the witness' testimony. This is the exact judicial behavior prohibited by Wash. Const. art. IV, § 16. State v. Eisner, 95 Wn.2d 458, 462, 626 P.2d 10 (1981) (prohibition exists to prevent juries from being unduly influenced by the judge's assessment of the credibility, weight or sufficiency of the evidence).

B. CONCLUSION

For the reasons stated herein and in Smith's opening brief, this Court should reverse his conviction and remand for a new trial.

DATED this 15th day of April, 2011.

Respectfully submitted,

NIELSEN, BROMAN & KOCH

A handwritten signature in black ink, appearing to be 'C. Jones', written over a horizontal line. To the right of the signature, the text 'WSBA 25097' is handwritten.

CYNTHIA B. JONES
WSBA No. 38120

A handwritten signature in black ink, appearing to be 'C. Gibson', written over a horizontal line.

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

STATE OF WASHINGTON,)	
)	
Respondent,)	
)	
v.)	COA NO. 65334-2-1
)	
ANTONNIO SMITH,)	
)	
Appellant.)	

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 15TH DAY OF APRIL, 2011, I CAUSED A TRUE AND CORRECT COPY OF THE **REPLY BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] ANTONNIO SMITH
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KING COUNTY CORRECTIONAL FACILITY
620 WEST JAMES STREET
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SIGNED IN SEATTLE WASHINGTON, THIS 15TH DAY OF APRIL, 2011.

x. *Patrick Mayovsky*