

65334-2

65334-2

NO. 65334-2-I

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

REC'D

DEC 21 2010

King County Prosecutor
Appellate Unit

STATE OF WASHINGTON,

Respondent,

v.

ANTONNIO SMITH,

Appellant.

A handwritten signature in black ink is written over a faint circular stamp. The stamp contains the text "APPELLANT" and "ANTONNIO SMITH" around the perimeter.

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

The Honorable J. Wesley Saint Clair, Judge

BRIEF OF APPELLANT

CYNTHIA B. JONES
CHRISTOPHER H. GIBSON
Attorneys for Appellant

NIELSEN, BROMAN & KOCH, PLLC
1908 E Madison Street
Seattle, WA 98122
(206) 623-2373

TABLE OF CONTENTS

	Page
A. <u>ASSIGNMENTS OF ERROR</u>	1
<u>Issues Pertaining to Assignments of Error</u>	1
B. <u>STATEMENT OF THE CASE</u>	1
1. <u>Procedural Facts</u>	1
2. <u>Substantive Facts</u>	2
C. <u>ARGUMENT</u>	4
1. PROVIDING JURORS WITH NOTEBOOKS ONLY AFTER THE FIRST WITNESS TESTIFIED CONSTITUTED AN IMPROPER JUDICIAL COMMENT ON THE EVIDENCE THAT DEPRIVED SMITH OF A FAIR TRIAL.	4
2. THE FAILURE TO PROVIDE JURORS WITH NOTEBOOKS UNTIL AFTER KAHLEY TESTIFIED CONSTITUTES SUCH AN EGREGIOUS TRIAL IRREGULARITY THAT REVERSAL IS REQUIRED.....	8
D. <u>CONCLUSION</u>	12

TABLE OF AUTHORITIES

	Page
 <u>WASHINGTON CASES</u>	
<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).....	5
<u>State v. Davenport</u> 100 Wn.2d 757, 675 P.2d 1213 (1984).....	9
<u>State v. Escalona</u> 49 Wn. App. 251, 742 P.2d 190 (1987).....	9, 10
<u>State v. James</u> 63 Wn.2d 71, 385 P.2d 558 (1963).....	5, 7
<u>State v. Knapp</u> 14 Wn. App. 101, 540 P.2d 898 <u>review denied</u> , 86 Wn.2d 1005 (1975)	5
<u>State v. Lampshire</u> 74 Wn.2d 888, 447 P.2d 727 (1968).....	5
<u>State v. Levy</u> 156 Wn.2d 709, 132 P.3d 1076 (2006).....	5
<u>State v. Vaughn</u> 167 Wash. 420, 9 P.2d 355 (1932)	6, 7, 8
<u>State v. Weber</u> 99 Wn.2d 158, 659 P.2d 1102 (1983).....	9, 10, 11
 <u>RULES, STATUTES AND OTHER AUTHORITIES</u>	
ER 404	10
ER 609	10

TABLE OF AUTHORITIES (CONT'D)

	Page
RCW 26.50.110	1
Wash. Const. art. IV, § 16.....	1, 5, 6

A. ASSIGNMENTS OF ERROR

1. The trial court violated Wash. Const. art. IV, § 16 and deprived Appellant of his due process rights to a fair trial when it provided notebooks to jurors only after the first witness had testified.

2. Providing jurors with notebooks for all but the first witness constitutes such an egregious trial irregularity that reversal is warranted.

Issues Pertaining to Assignment of Error

1. Did the trial court improperly comment on the evidence when it de-emphasized the testimony of the first witness by providing notebooks to the jurors only after the first witness had testified?

2. Even if providing jurors with notebooks only after the first witness testified does not constitute an improper judicial comment on the evidence, did it nonetheless constitute such an egregious trial irregularity that it deprived Appellant of a fair trial such that reversal is warranted?

B. STATEMENT OF THE CASE

1. Procedural Facts

On September 2, 2009, the King County Prosecutor charged appellant Antonnio Marquis Smith with one count of Domestic Violence Felony Violation of a Court Order pursuant to RCW 26.50.110(1) and (4) and RCW chapter 10.99. CP 1, 42, 54. A jury trial was held January 27-

29, 2010 before the Honorable J. Wesley Saint Clair. 1RP 1.¹ The jury found Smith guilty. CP 36.

Smith was sentenced to six months in jail with 60 days work release, an alternative conversion of 120 days of confinement to 240 hours of community service, and 90 days in CCAP plus a five-year no-contact order with Crudup. CP 58; 7RP 43. Smith appeals. CP 60.

2. Substantive Facts

On June 30, 2009, a no-contact order initiated by Smith's then-girlfriend, Kerrainn Crudup, was entered against Smith. CP 54, 58; 4RP 84-85. Two months later, on August 30, 2009, Smith was at his cousin's apartment standing outside when Crudup drove by in her car. 4RP 39. She allegedly threw a glass bottle that struck Smith's car. Smith and Crudup argued and then Crudup drove away. Smith, along with his cousin, got into Smith's car and followed Crudup to the Fred Meyer parking lot in Kent. 3RP 19; 4RP 22, 39. Smith and Crudup argued some more in the parking lot and Smith grabbed Crudup, shook her and then drove away with his cousin. 4RP 39-40.

Christopher Kahley was on a smoke break during his shift at Fred Meyer and witnessed Smith and Crudup arguing. 3RP 19-20. He called

¹ The Verbatim Report of Proceedings is referenced as follows: 1RP – January 21, 2010; 2RP – January 26, 2010; 3RP – January 27, 2010; 4RP – January 28, 2010 morning session; 5RP – January 28, 2010 afternoon session; 6RP – January 29, 2010; and 7RP – March 22 and April 5, 2010.

911. 3RP 19. Kahley could not make out what Smith and Crudup were saying to each other, but Kahley, who was the first witness on the stand at trial, did testify about his observations. 3RP 19, 22. At no time before or during Kahley's testimony did the court provide notebooks to the jury. See 4RP 7-8 (notebook provided to jurors only after Kahley testified).

The second trial witness was Officer Travis Wilson of the Kent Police Department, who was dispatched to the Fred Meyer in response to Kahley's 911 call. 4RP 15. Jurors were provided notebooks just before Wilson testified. 4RP 7-9.

Wilson testified that he learned of the no-contact order entered against Smith and attempted to locate Smith after interviewing witnesses. Smith was at his cousin's apartment seven blocks away from the Fred Meyer. 4RP 29. Wilson found Smith standing in front of his cousin's apartment building. 4RP 30. Wilson further testified about the circumstances of Smith's arrest. 4RP 31-40.

The third witness was Mark Guisasola who, at about the same time that Kahley was on a smoke break, was with Jordan Coughlin walking in the Fred Meyer parking lot when they saw Smith and Crudup arguing. 4RP 75. They got in Guisasola's car and Coughlin called 911 as they left parking lot. 4RP 77. Both Guisasola and Coughlin (the fourth witness)

testified at trial about their observations. 4RP 73-79. The jury had notebooks during Guisasola's and Coughlin's testimony. 4RP 7-9.

The jury also had notebooks during the testimony of the fifth and final witness, Detective Philip Johnson. 4RP 82. Detective Johnson testified about his investigation of Appellant's case, though he never met or had direct contact with Appellant. 4RP 82-91.

After Kahley's testimony but before Officer Wilson took the stand, Smith's counsel objected to the fact that the jurors were not given notebooks during the testimony of the first witness, Kahley, and argued that the jury should not be given notebooks for the sum of the witnesses. 4RP 7-8. The court overruled Smith's objection and allowed the use of notebooks by the jurors for the remaining witnesses. 4RP 9-10.

C. ARGUMENT

1. PROVIDING JURORS WITH NOTEBOOKS ONLY AFTER THE FIRST WITNESS TESTIFIED CONSTITUTED AN IMPROPER JUDICIAL COMMENT ON THE EVIDENCE THAT DEPRIVED SMITH OF A FAIR TRIAL.

Smith's counsel alerted the court to the fact that jurors did not have notebooks during the testimony of the first witness, Kahley, and requested therefore that they not be given notebooks at all. 4RP 7-8. The court denied counsel's request and provided notebooks to the jurors for the

remaining witnesses. 4RP 9-10. This constituted an improper judicial comment on the evidence that requires reversal.

Wash. Const. art. IV, § 16 provides:

Judges shall not charge juries with respect to matters of fact, nor comment thereon, but shall declare the law.

The purpose of this constitutional prohibition is to prevent the jury from being influenced by knowledge conveyed to it by the court as to the court's opinion of the evidence. State v. Lampshire, 74 Wn.2d 888, 892, 447 P.2d 727 (1968). The prohibition is strictly applied. Seattle v. Arensmeyer, 6 Wn. App. 116, 120, 491 P.2d 1305 (1971). The court's opinion violates the prohibition whether express or implied. State v. Levy, 156 Wn.2d 709, 721, 132 P.3d 1076 (2006). Thus, a court's actions or words can constitute an improper judicial comment on the evidence. State v. Knapp, 14 Wn. App. 101, 113, 540 P.2d 898, review denied, 86 Wn.2d 1005 (1975).

A violation of Wash. Const. art. IV, § 16 may be raised for the first time on appeal. The failure to object or to move for mistrial does not preclude review. Levy, 156 Wn.2d at 719-720; State v. Becker, 132 Wn.2d 54, 64, 935 P.2d 1321 (1997); Lampshire, 74 Wn.2d at 893.

In State v. James, 63 Wn.2d 71, 385 P.2d 558 (1963), the court held the defendant was deprived of a fair trial under Wash. Const. art. IV,

§ 16 when the trial court commented on the credibility of a witness. Two defendants, William James and Richard Topper, were charged for three separate crimes and tried in the same trial. During the course of the trial, Topper pled guilty and became the State's key witness. The jury was informed by the court that Topper was being discharged from the trial to be a witness for the State "providing that he testify fully as to all material matters within his knowledge[.]" *Id.* 74. The appellate court found that this inferential statement by the trial court was significant to the jury:

The die was cast when Topper left the courtroom; his counsel took no further part in the trial, and the court, in its final instructions, reiterated that Topper had been discharged. The jury could draw only one conclusion; the court was satisfied that Topper had testified fully as to all material matters within his knowledge. We conclude...that the court's remarks constituted a comment upon the evidence and an approval of the credibility of the witness[.]

63 Wn.2d at 76.

Similarly, in State v. Vaughn, 167 Wash. 420, 9 P.2d 355 (1932), the court held the defendant was deprived of a fair trial under Const. art. IV, § 16 because the trial court commented on the credibility of a witness. Two defendants, William Vaughn and George Miller, were charged with grand larceny and were tried in the same trial. During trial, Miller testified against Vaughn and received a suspended sentence. Vaughn suspected a secret agreement was made between the prosecuting attorney

and Miller. Vaughn's counsel called the prosecuting attorney as a witness to prove the alleged secret agreement. The prosecutor, after he was examined by the Vaughn's counsel, stated:

Prosecutor: "I will ask myself a question on cross examination."

Trial Court: "You needn't ask the question, [prosecutor] Foley."

Vaughn's Counsel: "Just wait a minute. Ask yourself the question first."

Prosecutor: "His Honor said I didn't need to."

Vaughn's Counsel: "Well, he has got to ask his question if he wants to answer it. I want to know what he is going to state."

Trial Court: "It seems to be a senseless procedure, Mitchell [Vaughn's counsel], to ask yourself a question. I dare say [the prosecutor] wouldn't answer anything that he shouldn't."

167 Wash. at 424.

The appellate court found the fact that prosecutor Foley

not only testified as a witness but was the attorney representing the State made it doubly important that no statement be made by the court calculated or which might result in influencing the jury. The court, in effect, vouched for the veracity and rectitude of the witness. The conclusion is irresistible that the statement of the learned trial court was clearly a comment upon the weight of the testimony and the credibility of the witness, and hence in violation of the Constitution.

167 Wash. at 426.

Here, as in both James and Vaughn, the court improperly commented on the evidence when it decided to not give notebooks to the

jurors at any time before or during the testimony of the first witness but did provide notebooks to the jurors after the second and subsequent witnesses took the stand. As in James, here the jury could draw but one conclusion from the trial court's inference: that the testimony of the first witness, Kahley, was less important than the testimony of other witnesses. "The object of the constitutional provision, doubtless, is to prevent the jury from being influenced by knowledge conveyed to it by the court of what the court's opinion is on the testimony submitted." James, 63 Wn.2d at 75.

Smith's jury was likely influenced by knowledge conveyed to it by the trial court act of providing notebooks only after Kahley testified, that his testimony was less important than the testimony of witnesses. As in Vaughn, the conclusion here is irresistible that the inference of the trial court was a comment upon the weight of the testimony and hence in violation of the constitution depriving Smith of a fair trial. State v. Vaughn, 167 Wash. at 426.

2. THE FAILURE TO PROVIDE JURORS WITH NOTEBOOKS UNTIL AFTER KAHLEY TESTIFIED CONSTITUTES SUCH AN EGREGIOUS TRIAL IRREGULARITY THAT REVERSAL IS REQUIRED.

A new trial is warranted where irregularities in the proceedings may have affected the outcome of the trial, thereby denying the defendant

his right to a fair trial. State v. Davenport, 100 Wn.2d 757, 762, 675 P.2d 1213 (1984); State v. Escalona, 49 Wn. App. 251, 254, 742 P.2d 190 (1987). In deciding whether a trial irregularity deprived a defendant of a fair trial, courts examine (1) its seriousness, (2) whether it involved cumulative evidence, and (3) whether a curative instruction was given capable of curing the irregularity. State v. Weber, 99 Wn.2d 158, 165-66, 659 P.2d 1102 (1983).

In State v. Escalona, 49 Wn. App. 251, 742, 742 P.2d 190 (1987), the court held a trial irregularity deprived the defendant of a fair trial. The defendant was charged with second-degree assault while armed with a deadly weapon, a knife. Prior to trial, the court granted a defense motion in limine to exclude any mention or reference to Escalona's prior conviction for the same crime. Id. at 252.

The key witness for the State testified about his observations and experiences with the defendant, including testimony that "[Escalona] already has a record and had stabbed someone." Defense counsel immediately moved to strike and asked that the jury be excused. The judge ordered the statement stricken and excused the jury. Defense counsel moved for a mistrial, which was denied. When the jury was brought back, the judge instructed the jury to disregard the witness' last answer. The jury returned a verdict of guilty. Id. at 253.

On appeal, the court analyzed the trial irregularity of the witness' statement to determine whether it may have influenced the jury. The court relied on the three factors set out in State v. Weber, 99 Wn.2d at 165-66.

In analyzing the first factor the court characterized the unsolicited statement that the defendant "already has a record and stabbed someone" as extremely serious. The court looked to the rules of evidence and the express policy against the admission of evidence of prior crimes except in very limited circumstances for its analysis. See ER 609, ER 404(b). In analyzing the second factor the court looked to whether the statement was cumulative evidence and found it was not in light of the fact that the trial judge had ruled in limine that the prior conviction could not be admitted. Finally, in analyzing the third factor the court looked at whether the trial court's oral instruction to the jury to disregard the testimony could cure the error and ultimately it decided the statement was too prejudicial. Id. at 255.

Here, as in Escalona, the trial irregularity -providing juror notebooks only after the first witness testified- deprived Smith of a fair trial when properly analyzed under the three factors set out in Weber. First, the tardy distribution of juror notebooks was, as discussed above, an improper comment on the evidence by the trial court. This act likely led the jury to believe the trial judge thought the testimony of the first witness

was less important than that of the remaining witnesses. This constituted a serious trial irregularity.

Second, the evidence was not cumulative. While two other eye-witnesses who were customers at Fred Meyer testified about their observations, the first eye-witness, Kahley, was the only employee on the premises of Fred Meyer that was a witness in the case and his testimony about his observations were from a different proximal point of view than that of the two customers, Guisasola and Coughlin. 3RP 31, 4RP 50, 73.

Third, no curative instruction was given to the jury regarding the tardy distribution of juror notebooks. As such, the trial irregularity was never cured.

As in Escalona, analysis under the three Weber factors warrants reversal of Smith's conviction.

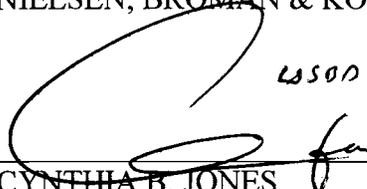
D. CONCLUSION

For the reasons stated, this Court reverse Smith's conviction and remand for a new trial.

DATED this 21st day of December, 2010.

Respectfully Submitted,

NIELSEN, BROMAN & KOCH, PLLC.

 4500 25097

CYNTHIA B. JONES
WSBA No. 38120



CHRISTOPHER H. GIBSON
WSBA No. 25097
Office ID No. 91051

Attorneys for Appellant

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

STATE OF WASHINGTON,)	
)	
Respondent,)	
)	
v.)	COA NO. 65334-2-I
)	
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 21ST DAY OF DECEMBER, 2010, 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] ANTONNIO SMITH
DOC NO. 210022053
KING COUNTY CORRECTIONAL FACILITY
500 5TH AVENUE
SEATTLE, WA 98104

SIGNED IN SEATTLE WASHINGTON, THIS 21ST DAY OF DECEMBER, 2010.

x *Patrick Mayovsky*

2010 DEC 21 PM 4:01
COURT CLERK
JULIA M. HARRIS