

65334-2

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NO. 65334-2-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

ANTONNIO SMITH,

Appellant.



APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE J. WESLEY SAINT CLAIR

BRIEF OF RESPONDENT

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A. ISSUES

1. Article IV, section 16 of the Washington State Constitution prohibits judges from conveying their personal opinions about the merits of a case or instructing a jury that matters of fact have been established as matters of law. The trial court mistakenly failed to provide the jury with notebooks for the first witness's testimony. Without commenting on the error, the court provided the jury with notebooks for the remaining witnesses' testimony. Has Smith failed to show that the court's oversight amounted to a comment on the evidence?

2. A trial irregularity warrants reversing a defendant's conviction when the irregularity is serious, not cumulative of other evidence properly admitted, and its prejudicial effect cannot be cured by a jury instruction. Although the court did not provide the jury with notebooks until after the first witness testified, the jury had notebooks when they heard the first witness's 911 call reporting the incident. Smith did not request a curative instruction, or move for a mistrial, based on the court's delay in providing the jury with notebooks. Has Smith failed to show that the court's delay constituted a serious trial irregularity requiring reversal?

B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS

The State charged Antonnio Smith with Domestic Violence Felony Violation of a Court Order. CP 98-99. The jury convicted Smith as charged and the trial court imposed a standard range sentence. CP 63, 107-13; 7RP 43-44.¹ Smith timely appealed. CP 114-16.

2. SUBSTANTIVE FACTS

On June 30, 2009, Smith signed a no-contact order prohibiting him from having contact with Kerrainn Crudup. Ex. 10. Two months later, witnesses called 911 to report Smith "pushing [Crudup] around" in the parking lot at the Fred Meyer in Kent. Ex. 1. The first caller, Mark Kahley, waited to call police until he saw Smith escalate from arguing with Smith to "throttling her." 3RP 23. As soon as Smith started strangling Crudup, another male

¹ The Verbatim Report of Proceedings consists of seven volumes, designated as follows: 1RP (1/21/10), 2RP (1/26/10), 3RP (1/27/10), 4RP (1/28/10 - Morning Session), 5RP (1/28/10 - Afternoon Session), 6RP (1/29/10), and 7RP (3/22/10 and 4/5/10).

who was with Smith left and pulled his car around. 3RP 24. Smith got inside the car and drove off, leaving Crudup behind. 3RP 24. Police arrived within minutes of the call and spoke with Crudup, who appeared angry and upset.² 4RP 20.

Officers located Smith a few blocks away at his cousin's apartment. 4RP 29-30. Although Smith initially gave police a false name, police determined his true identity and advised him of his Miranda³ rights. 4RP 31, 33-34. Smith admitted that he had "smashed [Crudup] up" by grabbing her clothes and shaking her while they were arguing. 4RP 39-40. According to Smith, Crudup had thrown a glass bottle at him earlier in the night, striking the front driver's door of his car. 4RP 39. Afterward, Smith followed Crudup to Fred Meyer where a physical argument ensued. 4RP 39. Although police later examined Smith's car, they never found any damage to it. 4RP 41.

² Crudup did not testify at trial.

³ Miranda v. Arizona, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

C. ARGUMENT

**1. ALLOWING THE JURY TO TAKE NOTES
COMPLIED WITH CrR 6.8 AND DID NOT AMOUNT
TO A COMMENT ON THE EVIDENCE.**

Smith argues that the trial court erred by providing the jury with notebooks after the first witness, Kahley, had testified. Smith contends that the court's failure to provide the jury with notebooks at the beginning of trial constituted a comment on the evidence that "likely influenced" the jury and deprived him of a fair trial.

Appellant's Br. at 8. Smith, however, cannot show that the trial court's delay in providing notebooks to the jury amounted to a comment on the evidence, given the case law and the fact that the jury had notebooks when they heard Kahley's 911 call. Even if the trial court's delay amounted to a comment on the evidence, the record affirmatively shows that Smith was not prejudiced.

"In all cases, jurors shall be allowed to take written notes regarding the evidence presented to them." CrR 6.8. Prior to 2002, CrR 6.8 allowed the trial court to determine whether jurors could take notes. 4A Karl Tegland Washington Practice CrR 6.8 (7th ed. 2008). The rule changed when the Washington State Jury Commission issued a report finding that "Jurors who take notes remember the evidence more accurately, apply the evidence to the

law more accurately, are more attentive during trial, and are more satisfied with jury service." Id.

In this case, the trial court failed to provide the jury with notebooks for Kahley's testimony only. 4RP 8-9. Although the court told the parties on the first day of trial that, "I allow jurors to take notes," the court did not provide the jury with notebooks as intended. 1RP 66. When defense counsel pointed out the court's mistake, the court reminded the parties of its earlier statement and its instruction to the jury that they would be allowed to take notes.⁴ 4RP 9-10.

The court overruled Smith's objection and provided the jury with notebooks for the remaining witnesses, ultimately reasoning that "we want to give as many tools to the trier of fact as possible." 4RP 10. Smith did not move for a mistrial or seek a new trial based on the court's delayed provision of notebooks.⁵ There is no indication in the record that the court ever acknowledged or

⁴ Although not transcribed, the court's opening jury instructions likely followed WPIC 1.01, which provides that the jury will be allowed to take notes and provides specific guidelines for taking notes.

⁵ Instead, Smith moved for a new trial on other grounds. CP 64-84.

explained to the jury its failure to provide the jury with notebooks for Kahley's testimony. 4RP 11.

Article IV, section 16 of the Washington State Constitution prohibits judges from conveying their personal attitudes about the merits of a case or instructing a jury that matters of fact have been established as matters of law. Const. art. IV, § 16; State v. Becker, 132 Wn.2d 54, 64, 935 P.2d 1321 (1997). This prohibition exists to prevent juries from being unduly influenced by the judge's assessment of the credibility, weight, or sufficiency of the evidence. State v. Eisner, 95 Wn.2d 458, 462, 626 P.2d 10 (1981). 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).

A judicial comment in a jury instruction is an error of constitutional magnitude that may be raised for the first time on appeal. Id. at 719-20. The reviewing court evaluates the facts and circumstances of the case to determine whether the trial court's conduct or remarks amounted to a comment on the evidence. State v. Jacobsen, 78 Wn.2d 491, 495, 477 P.2d 1 (1970). A judicial comment on the evidence is "presumed to be prejudicial, and the burden is on the State to show that the defendant was not

prejudiced, unless the record affirmatively shows that no prejudice could have resulted." Levy, 156 Wn.2d at 725.

Washington courts have found Article IV, § 16 violations where the trial judge has remarked on a witness's credibility or given a jury instruction that resolved a contested fact. E.g., Eisner, 95 Wn.2d at 462-63 (reversible error for judge to "enter into the fray of combat" by questioning the victim in a manner that bolstered, rather than clarified, the witness's testimony); State v. Jackman, 156 Wn.2d 736, 744, 132 P.3d 136 (2006) (article IV, § 16 violation where the "to convict" instructions referenced the victims' birth dates, a critical element of the crime). Washington courts have not addressed the issue in this case, whether the trial court's failure to provide the jury with notebooks for a single witness's testimony amounts to a comment on the evidence requiring reversal. Given that note-taking was left up to the trial judge's discretion until 2002, it is unlikely as a general principle that failing to provide notebooks to the jury automatically amounts to a comment on the evidence.

Nonetheless, in this specific case, the trial court did not expressly comment on a witness's credibility, give a jury instruction that resolved a question of fact, or make any remarks that conveyed the judge's opinion of the evidence. On the contrary, the

trial court said nothing to the jury about its failure to provide notebooks for Kahley's testimony:

COURT: Okay. We'll bring in the jury, please.
BAILIFF: Sure.
(Off the record.)
(Jury present.)
COURT: You may call your next witness, please.
STATE: Thank you, your Honor. The State calls Officer Wilson to the stand.

4RP 11. Given the silence in the record on this issue, it appears that the notebooks were placed on the jurors' chairs, without the jury being present, and that the trial resumed without any comment from the court about the newly-appeared notebooks. 4RP 11. This Court should reject Smith's efforts to transform the court's delay in distributing notebooks - without any comment about Kahley, his testimony, or the lack of notebooks - into a comment on the evidence requiring reversal.

Smith wrongly claims that "the court improperly commented on the evidence when *it decided* to not give notebooks to the jurors." *Appellant's Br.* at 8 (emphasis added). There is nothing in the record to support Smith's claim that the trial court intentionally deprived the jury of notebooks for the first witness. Indeed, the trial court indicated on the first day of trial that it allowed jurors to take

notes, and instructed the jury that they would be able to take notes. 1RP 66; 4RP 9-10. The trial court's candid admission that it had not conducted a jury trial in 10 years, having served as "the presiding judge and drug court judge," further suggests that the trial court inadvertently, rather than intentionally, failed to provide the jury with notebooks. 1RP 68.

Smith's attempts to liken this case to cases where the trial court verbally commented on a witness's testimony are misplaced. In State v. James, the trial court improperly commented on the evidence by telling the jury that the prosecutor had moved to discharge the co-defendant, providing that he "testify fully as to all material matters within his knowledge." 63 Wn.2d 71, 74, 385 P.2d 558 (1963). Following his testimony, the co-defendant left the courtroom and the court informed the jury that the co-defendant had been discharged. Id. at 76. Thus, the "jury could draw only one conclusion; the court was satisfied that [the co-defendant] had testified '*fully as to all material matters within his knowledge.*'" Id. (emphasis in original).

Similarly, in State v. Vaughn, the trial court improperly commented on the evidence by telling the jury that the prosecutor, who both represented the State and testified as a witness at trial,

"wouldn't answer anything that he shouldn't." 167 Wn. 420, 424, 9 P.2d 355 (1932) (emphasis in original). The court concluded that the trial court's remark effectively "vouched for the veracity and rectitude of the witness." Id. at 426.

In both James and Vaughn, the trial court expressly commented on the credibility of the witnesses and infringed on the jury's province as the sole judge of a witness's credibility. Here, on the other hand, the trial court did not acknowledge its earlier failure to provide the jury with notebooks or make any comment about the first witness's testimony. 4RP 11. Unlike the trial courts in James and Vaughn, the court here never suggested that Kahley testified "fully," or that he would not "answer anything that he shouldn't." James, 63 Wn.2d at 74; Vaughn, 167 Wn. at 424.

Moreover, contrary to Smith's claim, the jury could draw more than one conclusion from the court's failure to provide them with notebooks at the beginning of trial. While Kahley testified at the end of the first day, the second witness, Officer Wilson, testified the next morning. 3RP 39; 4RP 12. Given the half-day break in testimony, the jury could have inferred that the court did not have the notebooks ready for the first day of trial. Indeed, some jurors might not have even noticed the lack of notebooks since they had

just been impaneled that afternoon. 3RP 3. Contrary to Smith's claim, it is unlikely that the jury would leap to the conclusion, without any verbal cue from the judge, that they were not provided with notebooks because Kahley's testimony was less important.

Nonetheless, if the court's delayed distribution of notebooks amounts to a comment on the evidence, then the record affirmatively shows that Smith was not prejudiced by the error. Kahley's testimony at trial comprised 20 pages of the transcript. 3RP 18-38. Kahley offered brief and uncomplicated testimony about the incident. 3RP 18-38. Because Smith objected to the authenticity of Kahley's 911 call, the jury did not hear his call until later in the trial when they had notebooks.⁶ 3RP 40-42; 4RP 88-89.

Kahley's 911 call not only repeated much of his earlier trial testimony, but it also expanded on his testimony, providing a more detailed description of Smith's height, weight, clothing, and age. Compare 3RP 30 (describing assailant as wearing a striped shirt and black hat, being light-skinned African-American, 5'10" tall, and having a stocky build), with Ex. 1 (describing assailant as wearing a "black baseball hat" and striped shirt, being African-American, 5'8"-

⁶ Although the trial transcript does not specify Kahley as the caller on "track one," Kahley identified himself as such. Ex. 1.

5'11" tall, having a medium build, and in his "late twenties, early thirties"). Any prejudice that might have resulted from the jury not having notebooks at the time of Kahley's testimony was cured by the jury having them for Kahley's 911 call.

Further, the fact that the jury had notebooks for the remaining trial witnesses confirms the lack of prejudice to Smith. For example, the jury had notebooks to record the other two eye-witnesses' accounts, and had notebooks to record Smith's admissions to Officer Wilson that he "smashed [Crudup] up." 4RP 39-40, 52, 75-79. Given that Kahley is the only witness who testified that Smith "strangled," "chok[ed]," and "throttle[d]" Crudup, it is difficult for Smith to argue that he was prejudiced by the jury's inability to record, *verbatim*, Kahley's incriminating statements. 3RP 19, 24, 26. Indeed, Smith claims only that the jury was "likely influenced" by the lack of notebooks. *Appellant's Br.* at 8. This Court should reject Smith's efforts to turn a minor oversight into a comment on the evidence requiring reversal.

2. THE TRIAL COURT'S BRIEF DELAY IN PROVIDING NOTEBOOKS TO THE JURY WAS NOT A SERIOUS TRIAL IRREGULARITY.

Smith further argues that the trial court's failure to provide the jury with notebooks for the first witness constituted a serious trial irregularity warranting reversal. Smith's argument lacks merit. The irregularity was not serious in light of the overwhelming evidence against Smith, and the fact that the jury had notebooks when they heard Kahley's 911 call, recounting and expanding on his earlier trial testimony. Any prejudice that resulted from the irregularity could have been cured by a jury instruction explaining the trial court's delay in passing out notebooks. The fact that Smith did not request such an instruction, nor move for a mistrial, strongly suggests that the irregularity did not appear critically prejudicial in context.

Courts consider three factors when determining whether a trial irregularity warrants a new trial: (1) the seriousness of the irregularity, (2) whether it was cumulative of other evidence properly admitted, and (3) whether a jury instruction could have cured the prejudicial effect. State v. Weber, 99 Wn.2d 158, 166, 659 P.2d 1102 (1983).

Despite significant factual differences, Smith compares the irregularity in this case to the one requiring reversal in State v. Escalona, where the court reversed Escalona's conviction for second-degree assault with a deadly weapon, based on the victim's testimony that Escalona had previously been convicted of the same crime while using the same deadly weapon, a knife. 49 Wn. App. 251, 256, 742 P.2d 190 (1987).

The court characterized the victim's testimony as "extremely serious" given the "paucity of credible evidence" against Escalona and the evidence rules' "express policy" against admitting evidence of prior crimes except in limited circumstances and for limited purposes. Id. at 255. Further, the court noted that the admission of Escalona's prior conviction was neither cumulative, nor repetitive, of other evidence. Id. Although the trial court had instructed the jury to disregard the evidence, the court concluded that the instruction was insufficient to cure its prejudicial effect given the seriousness of the irregularity, the weakness of the State's case, and the logical relevance of the statement. Id. at 256.

Unlike the irregularity in Escalona, the irregularity here - failing to provide the jury with notebooks for one witness's testimony - was not "extremely serious." Id. at 255. In Escalona,

the State's evidence boiled down to the victim's word against Escalona's that Escalona had stabbed him with a knife, the very basis of Escalona's prior conviction. Id. In contrast, the evidence here did not pit one person's word against another, or suggest that Smith had previously been convicted of any crime, let alone the same crime for which he was facing trial.

Moreover, Smith admitted to "smash[ing]," grabbing, and shaking Crudup, and eye-witnesses corroborated his account. 4RP 39; Ex. 1. The court admitted the no-contact order entered two months earlier, which prohibited Smith from having any contact with Crudup and bore Smith's signature. Ex. 10; 4RP 84-85. Unlike in Escalona, where the State had a "paucity of credible evidence," the State had overwhelming evidence from which to convict Smith, including his confession. 49 Wn. App. at 255.

The court's delayed distribution of notebooks was not a "serious" irregularity given the strength of the State's case, and the fact that the jury had notebooks for the remaining witnesses' testimony, including when the State played Kahley's 911 call. Contrary to Smith's claims, Kahley's testimony was cumulative. Kahley's 911 call largely recounted his earlier trial testimony, describing the incident, assailant, and location. Ex. 1. Although

Smith points out that Kahley "was the only employee on the premises of Fred Meyer that was a witness in the case," and that "his observations were from a different proximal point of view," Smith fails to explain the significance of these points. *Appellant's Br.* at 11. Indeed, one of the other eyewitnesses, Guisasola, worked at the Burien Fred Meyer. 4RP 52. It is unclear how the witnesses' place of employment bore any relevance in this case.

Smith's failure to request a curative instruction or move for a mistrial strongly suggests that the State's remarks did not appear "critically prejudicial" in context. See State v. Swan, 114 Wn.2d 613, 661, 790 P.2d 610 (1990), cert. denied, 498 U.S. 1046 (1991) (recognizing that the absence of a motion for mistrial at the time of argument strongly suggests to the reviewing court that the argument or event in question did not appear critically prejudicial at the time of trial). A jury instruction explaining the court's inadvertent delay in providing the jury with notebooks could have cured any prejudice caused by the late distribution of notebooks.

Unlike in Escalona, where the admission of the defendant's prior conviction was "inherently prejudicial" because it was for the

same crime using the same weapon, there is nothing "logically" or "seemingly" relevant about the court's delayed distribution of notebooks. 49 Wn. App. at 256. If the jury believed what Smith claims, that Kahley's testimony was less important because they did not have notebooks at the time of his testimony, then the jury would have discounted Kahley's incriminating testimony against Smith, rather than convict him because of it.

In Escalona, the court feared that the jury convicted the defendant based on improperly admitted propensity evidence, and did not follow the court's instruction to disregard the evidence because it was such a "close case." 49 Wn. App. at 256. That same fear does not exist here, where no propensity evidence was admitted and Smith confessed to having assaulted Crudup. The Court should reject Smith's efforts to analogize this case to Escalona, and find that the trial court's failure to provide the jury with notebooks for Kahley's testimony was not a serious trial irregularity requiring reversal.

D. CONCLUSION

For the foregoing reasons, the Court should affirm Smith's conviction.

DATED this 23rd day of March, 2011.

Respectfully submitted,

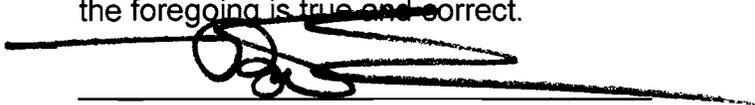
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Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to Cynthia B. Jones and Christopher Gibson, the attorneys for the appellant, at Nielsen Broman & Koch, P.L.L.C., 1908 E. Madison Street, Seattle, WA 98122, containing a copy of the Brief of Respondent, in STATE V. ANTONNIO SMITH, Cause No. 65334-2-I, in the Court of Appeals, Division I, for the State of Washington.

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.



Name
Done in Seattle, Washington

03/23/11
Date