

63142-0

63142-0

No. 63142-0-I

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

STATE OF WASHINGTON,

Respondent,

v.

EDO ASLANYAN,

Appellant,

2009 OCT 23 AM 9:35

~~FILED
COURT OF APPEALS DIVISION ONE
STATE OF WASHINGTON~~

APPELLANT'S OPENING BRIEF

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I. INTRODUCTION

Edo Aslanyan and Tigran Koshkaryan agreed to meet at a tavern in Auburn, Washington, to talk about a fight that had taken place at Edo's house two days earlier. Both had consumed alcohol before their arrival, and their meeting soon turned into a barrage of verbal insults aimed at one another. Both said the other man started the ensuing fight. It was undisputed that at some point Tigran head-butted Edo and he fell to the ground. His gun, tucked in his waistband, fell to the ground as well. He grabbed it, and shot Tigran three times.

Tigran survived, and the State charged Edo with one count of Assault in the first degree. At trial Edo asserted self defense. The jury found Edo guilty.

On appeal Edo claims errors made by the prosecutor, defense counsel, and the trial court denied him a fair trial. He seeks reversal of his conviction, and the chance for a new trial.

II. ASSIGNMENTS OF ERROR

1. Prosecutor engaged in prosecutorial misconduct when he made flagrant and ill-intentioned references to anti-Semitism in closing argument to engender sympathy and bolster credibility of victim.
2. Defense counsel engaged in ineffective assistance of counsel by failing to object to flagrant and factually inaccurate statements made by the prosecutor in closing argument.

3. Trial court erred in failing to grant a mis-trial after the defense brought to the court's attention inaccuracies with Armenian interpretation of the victim's testimony, and was denied the opportunity to re-question victim concerning this testimony.

III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Does a prosecutor engage in misconduct, requiring reversal of conviction, where he repeatedly seeks testimony regarding anti-Semitic comments made at the defendant's party two days prior to the shooting, testifies to evidence of anti-Semitic behavior through his own questioning of witnesses, argues the defendant is responsible for such comments, and tells the jury examples of anti-Semitic statements that were never testified to during the trial, for the purpose of appealing to jurors' passions and prejudice and attempting to bolster the credibility of the victim? (Assignment of Error 1)
2. Does defense counsel engage in ineffective assistance of counsel where he fails to object to the prosecutor's flagrant statements concerning anti-Semitism during closing argument? (Assignment of Error 2)
3. Whether the trial court erred in failing to grant defendant's motion for mis-trial after the court learned the Armenian interpreter had failed to accurately interpret the victim's testimony, specifically failing to translate the victim's animosity towards defense counsel? (Assignment of Error 3)
4. Does cumulative error warrant a new trial? (Assignments of Error 1,2,3)

IV. STATEMENT OF THE CASE

Edo Aslanyan is Armenian, a husband, father to two children, and the owner of a small business in Auburn, Washington. On December 2, 2007, he held a party at his home and invited many family and friends

from within the Armenian community. Tigran Koskharyan is also Armenian, and was invited to the party. Tigran was new to the Seattle area, and had been working with a friend of Edo's, Konstantin Aslanian. (11/25/08 RP 321)

During this party an argument broke out amongst several older gentlemen, including Konstantin and another of Edo's friends – Hamlet Vardanyan. (11/25/08 RP 336; 11/26/08 RP 582; 715) The subject matter at some point turned ugly, and anti-Semitic comments were ultimately made. Exactly what was said is not known, but at some point the comments were directed at a Jewish man, named Simon, who was at the party. The argument stopped, and some people left the party.

Soon thereafter, a fight broke out between Tigran and Hamlet's son, Eduard (also referred to as Eddie, Jr.). (11/25/08 RP 339; 11/26/08 RP 572; 711). This fight dispersed, and Eduard left as well. (11/26/08 RP 711) He later returned, and it was alleged that Tigran grabbed a knife to confront Eduard. (12/1/08 RP 82; 196.) This fact, however, was disputed. (11/25/08 RP 341-342; 11/26/08 RP 601) He was restrained, and finally all confrontations came to an end. (12/1/08 RP 89)

Two days later, December 4, 2007, Edo contacted both Eduard and Tigran to make sure there was no longer any animosity between them.

(11/25/08 RP 346; 12/1/08 RP 90) When speaking to Tigran, Tigran said he was embarrassed for his behavior at the party. (11/25/08 RP 347-348; 12/1/08 RP 91) Tigran also said he wanted to meet with Edo, but declined Edo's invitation to come back over to the house. (11/25/08 RP 347) Tigran did not say why he wanted to talk to Edo. (11/25/08 RP 349-351) They agreed to meet at a tavern near Edo's business. (11/25/08 RP 352)

They met in the parking lot next to Tigran's truck. (11/25/08 RP 355) Edo owns a jewelry store nearby. (12/1/08 RP 27) He always carries a firearm for protection, and possesses a lawful concealed weapons license. (12/1/08 RP 96) Edo and Tigran provided different versions of how the proceeding events transpired. There was a verbal argument, which turned physical. Tigran said Edo disrespected him and tried punching him. (11/25/08 RP 360-363) Tigran said he stopped Edo's punches by grabbing his hands, and then head-butted Edo causing him to fall to the ground where his gun fell out of his waistband. (11/25/08 RP 363-364) Edo said Tigran disrespected him and tried to rip a piece of jewelry from his chest and then was head-butted causing Edo to fall to the ground where his gun fell out. (12/1/08 RP 102-104) Tigran said he saw the gun, shamed Edo for bringing it, and turned and walked away when he was shot. (11/25/08 RP 368) Edo said he was disoriented on the ground and saw Tigran put his

hand to his waist area. (12/1/08 RP 103-104) Thinking he might be reaching for a weapon, Edo grabbed the gun and shot. (12/1/08 RP 104-105) Afterwards, Tigran walked away, realized he was shot, and barely made it to the nearby tavern before collapsing. (11/25/08 RP 371-372) Edo called 911. (12/1/08 RP 106)

The State charged Edo with Assault in the first degree. (CP 61(sub. 64)) At trial, Edo raised a self defense claim. (CP 22(sub. 59)) The State began its case calling law enforcement officers and civilian witnesses detailing the events that transpired after the shooting. (11/24/08 RP 139-317) Patrons at the tavern saw two men in a scuffle outside and heard gunshots. (11/24/08 RP 184-188; 214) Edo called 911 and did not resist arrest. (11/24/08 RP 177) He told Auburn police he shot Tigran believing he was being robbed and assaulted. (11/24/08 RP 271-272)

It was clear, however, that the events that occurred at Edo's party would play a major role in the trial.

A. Prosecutor's Use of Anti-Semitism Testimony and Argument.

The prosecutor started in his opening statement:

Prosecutor: During the course of this a lot of vodka was drunk, a lot of wine was drunk, and Hamlet starts making anti-Semitic comments about another guest there, a person by the name of Simon, who is Jewish. And this set Konstantin off, the person who helped

Tigran, and he went after Hamlet for that. (11/24/08
RP 156-157)

Defense counsel also addressed the issue, stating:

Attorney: And so as this barbeque unfolds, as counsel points out, Konstantin and Hamlet Vardanyan have a history and there is some discourse, and there is anti-Semitic comments directed toward the guy, Hamlet Vardanyan. (11/24/08 RP 167)

The prosecutor called Tigran to testify. (11/25/08 RP 318-439) His testimony began detailing the events of the party prior to the shooting. Specifically, the prosecutor asked questions about the dispute between Konstantin and Hamlet that lead to anti-Semitic comments.

Prosecutor: Okay. Now, there is another person who was there by the name of Simon?

Koshkaryan: Yes.

//

Prosecutor: Okay. And do you know what his religious beliefs are?

Koshkaryan: He's Jewish.

Prosecutor: So, without turning this into a history lesson, has there been some conflict between the Armenians and Jewish people in the past?

Koshkaryan: No.

Prosecutor: Would you consider some Armenians to be anti-Semitic? Do you know what I mean by that?

Koshkaryan: I don't know.

//

Prosecutor: Would you consider some Armenians to not think very well of the Jewish people and the Jewish faith?

Koshkaryan: I don't know about that.

Prosecutor: But, at some time during the party, was there something happening regarding Simon? Were people saying things about him?

Koshkaryan: Yes.

Prosecutor: Could you tell us about that?

Koshkaryan: Hamlet was talking about it, because Armenia has a genocide. 1915, the Turkish brought genocide, and we were trying to prove that, Armenians and – you know, not every nationality could prove that, you know, like French did, Canada did, I believe United States not.

So, Jew people, they don't even – like, they don't understand that. So they they start – Hamlet, he start to, like, what, you guys don't say that? Wouldn't you guys prove that, you know? Jew people? And he goes, like – and he start to put the bad words in there. And he says, like, come on, I'm the only one who is a Jew here, in this house, and I'm sitting with Armenians, and I don't have no problem with that, and that problem is not only – it's not, like – I can't do anything about it, you know? That's the state, the country. That's a country problem. It's not my problem, you know?

//

Prosecutor: So Hamlet was upset with Simon because Simon wouldn't acknowledge that the Armenians also had a genocide?

Koshkaryan: I don't – no, no.

//

Koshkaryan: The point was, like – the point was, like he was trying to say, like, why not Jew people prove the genocide? (11/25/08 RP 335-337)

The testimony continued detailing the events that occurred at the party, including the fight with Eduard Vardanyan. The prosecutor then asked about Tigran's conversation with Edo two days later.

Prosecutor: And then why did you want to meet up some place?

Koshkaryan: So we can talk.

Prosecutor: Talk about what had happened at his house, or talk about what?

Koshkaryan: Not actually talk about what – his house. I was trying to talk about Simon. (11/25/08 RP 349)

Tigran explained he wanted to talk to Edo about getting together to meet with Simon because Simon had been so nice to them in the past. (11/25/08 RP 350-351) He did not tell Edo this. (11/25/08 RP 351)

The following day the defense began its case by calling Sergo Adamyan. (11/26/08 RP 560-602) He was present at the party two days before the shooting. Defense counsel asked for testimony related to

Tigran's behavior at that party as well as Sergo's observations of Tigran fighting with Eduard Vardanyan. (11/26/08 RP 560-581; 596-602) No questions were asked about anti-Semitic comments made by anyone at the party.

On cross examination, the prosecutor immediately questioned Sergo about anti-Semitic comments.

Prosecutor: So this whole fight was over Eddie Jr.'s dad making pretty nasty anti-Semitic remarks about another guest, huh?

Adamyanyan: I don't know. I wasn't at the – at that scene. I was outside at the time. (11/26/08 RP 582)

The prosecutor questioned Sergo regarding comments attributed to him in a defense investigator's report.¹ Sergo clarified that he saw Hamlet and Konstantin in an argument, but he never heard what the argument was about. (11/26/08 RP 583)

Despite this response, the prosecutor read directly from the report:

Prosecutor: Yeah. One of the comments in the investigative report was that of Hamlet, Eddie Jr.'s father, verbally attacking Simon, making numerous anti-Semitic and personally demeaning remarks to him in a Russian language. (11/26/08 RP 583)

The prosecutor then stated:

¹ This document was never marked or admitted.

No one I interviewed was able to give me a direct word for it, but I was told it was much worse than someone calling you a motherfucker in the English language. (11/26/08 RP 583) [Emphasis added]

Finally, the prosecutor asked a question:

Prosecutor: So were you there when Hamlet was making these remarks to Simon?

Adamyán: I'm sorry. I don't know anything about anti-Semitic, you know, argument. (11/26/08 RP 583)

The defense called Eduard Vardanyan. (11/26/08 RP 704-731) He testified concerning his interaction with Tigran the night of the party.

During the course of his testimony he was asked about the initial argument his father Hamlet had with Konstantin.

Vardanyan: I was just – we were outside by the barbeque. They were in front of the house. It was just, like, probably five, six feet away.

And so we heard some arguments. We didn't – I wasn't facing that way, so I went in, and tried to grab my dad to pull him away, and so I pulled my dad away. They were arguing to each other.
(11/26/08 RP 707)

The prosecutor began his cross examination asking about Hamlet's anti-Semitic statements.

Prosecutor: Well, Tigran was upset because your dad was making disparaging comments towards Simon, wasn't he?

Vardanyan: Simon? Yeah. I think that's where it started from. I didn't know about Simon. I find out he was – first it started from Simon. I only heard the part when he was arguing about Konstantin outside. He came out of the house, and he was being loud.

Prosecutor: Who was arguing with Konstantin outside?

Vardanyan: My dad.

Prosecutor: But you didn't know that your dad was making these comments about Simon because he was Jewish?

Vardanyan: No.

Prosecutor: All right. Well, you also spoke to a defense investigator by the name of Mike Carlucci about this, didn't you?

Vardanyan: Yes.

Prosecutor: And he writes in his report that, "Hamlet turned his attention to another party guest named Simon. Hamlet verbally attacked Simon, making numerous anti-Semitic comments about him. Hamlet's verbal attack on Simon then continued until he and Simon – until he, Simon, and his wife departed."

So you told all that to Mr. Carlucci? Why don't you tell us about that?

Vardanyan: I told – I told him what I heard, where it started from.

Prosecutor: Okay.

Vardanyan: I didn't tell him that I heard Simon's argument with my dad. I heard – Konstantin was arguing with my dad. That's when I jumped in.

Prosecutor: Okay. Why was your dad making these comments to Simon?

Vardanyan: I don't know. (11/26/08 RP 715-716)

Edo Aslanyan testified. (12/1/08 RP 25-203) In the course of his testimony he was asked whether there was any anti-Semitic argument at his party.

Attorney: You have some memory of that?

Aslanyan: It was mostly – they were talk about politics, mostly politics. And I don't care too much about politics. I was kind of going in, you know, staying inside the house, going outside the house, and coming back. And I'm the host, so kind of a little bit of everywhere.

Attorney: Now, I think there had been earlier testimony there might have been some anti-Semitism. Were you present during that?

Aslanyan: No, no, sir, I never heard anything anti-sematic (sic). (12/1/08 RP 38-39)

The prosecutor did not ask Edo any questions related to the argument between Hamlet and Konstantin, or involving Simon.

In closing argument, the prosecutor went to considerable length to explain the importance, according to him, anti-Semitism played in this case.

Prosecutor: So what did Tigrin (sic) tell us? Well, evidently, as part of the Armenian culture, they like to have parties. I think – I talked about it earlier in opening statement, that it is kind of like My Big Fat Greek Wedding. Well, when you listen to the way the defendant described what went on there, I think it is pretty much more like Animal House.

For goodness gracious, at a family barbeque, we have Jew bashing, we have people throwing up in the living room, we have people saying that other people are chasing people around with knives. This is not My Big Fat Greek Wedding, that is an out of control, out of hand party at the defendant's residence. The defendant is responsible for that. But what is the defendant doing? He doesn't do anything. He doesn't kick anybody out. I guess he does rub the one guy's back while he is throwing up in his toilet, but "Come on, come back and party, everybody come back to the party."

So Tigrin (sic) is in that situation. Tigrin told you that he was there, that he was sitting right there when Simon, who Tigrin describes as a very nice man, who also happens to be Jewish, was there. And all the sudden Eddie Jr.'s dad is laying into him about whether or not there was actually a Holocaust. (12/16/08 RP 13-14) [Emphasis added]

Only a few sentences later, the prosecutor laid out his argument why Tigran wanted to meet with Edo, but more importantly, why the jury should sympathize with Tigran.

Prosecutor: Tigrin told you why he wanted to meet with the defendant, it is because of Simon. Yeah, he felt bad about what happened in that residence, and he wanted to make amends to the defendant's family for that. But he had another motive. He wanted to make it right for Simon. He wanted Simon to feel like he was part of them. No, not that he was the **token Jew** hanging out with the Armenians, but that he was part of them as a person. (12/16/08 RP 15-16)[Emphasis added]

No objections were made to any of these comments made during trial or closing. In closing argument, defense counsel made no reference to the prosecutor's use of anti-Semitism in the State's case, except to make an odd reference to the Turkish genocide in Armenia.

Attorney: But there are anti-Semitic comments that are made. Historically, there were the Turks that came in to Armenia, and there was the Holocaust. Historically, the Germans may have, at one point in time before that, sent some of the German Jews down there to help the Turks. (12/16/08 RP 50)

B. Trial Court's Denial of Mis-Trial Motion Due to Interpreter's Improper Interpretation.

When Tigran testified he initially answered the prosecutor's questions without assistance from an interpreter. (11/25/08 RP 318-365)

The interpreter arrived in court, was sworn by the judge, and sat next to Tigran for the remaining time he testified both on direct and cross examination. (11/25/08 RP 365-438)

After a lunch break defense counsel brought to the court's attention his concern the interpreter did not accurately translate responses from Tigran. (11/25/08 RP 441) Counsel told the court bi-lingual (Armenian/English) courtroom observers told him of the problems. These persons were watching the trial in support of the defendant. (11/25/08 RP 444) The court asked for briefing on the issue. (11/25/08 RP 445)

The court addressed the issue again briefly on December 1st; (12/1/08 RP 2-3) and again at the end of the day. (12/1/08 RP 231-235) The court had received a taped copy of the testimony and was trying to find an interpreter to translate the Armenian testimony to review the issue. The court was concerned the case could not be given to the jury for deliberation if there were problems with the translation. (12/1/08 RP 235)

The court addressed the problem again on December 2nd. The trial testimony was completed, and the case was placed on hold until a translation of the testimony could occur. (12/2/08 RP 30-35)

The court was not able to resolve the issue until December 15th. The court's attempts to obtain a translation failed. (12/15/08 RP 3)

However, defense counsel produced an enhanced version of the recording and was able to create a translation. (12/15/08 RP 3-6) The court accepted the defense transcript for purposes of making a record for appeal.

(12/15/08 RP 31-32) (CP 69) The defense raised several issues related to inaccurate translation, and moved for mis-trial. (CP 69) The court noted at least two significant errors with the translation. One, the interpreter failed to translate Tigran's annoyance towards defense counsel during cross examination, and then shortly thereafter when Tigran made another comment towards defense counsel that was not translated. (12/15/08 RP 36-37) The court denied the motion for mis-trial, but ruled she would read the omissions to the jury. (12/15/08 RP 37-38)

The following day, the court read to the jury the omitted statements prior to closing argument. (12/16/08 RP 4-5)

IV. ARGUMENT

1. Does a prosecutor engage in misconduct, requiring reversal of conviction, where he repeatedly seeks testimony regarding anti-Semitic comments made at the defendant's party two days prior to the shooting, testifies to evidence of anti-Semitic behavior through his questioning of witnesses, argues the defendant is responsible for such comments, and tells the jury examples of anti-Semitic statements that were never testified to during the trial, for the purpose of appealing to jurors' passions and prejudice and attempting to bolster the credibility of the victim?

Edo Aslanyan argues prosecutorial misconduct occurred in the following ways:

- (1) The prosecutor sought testimony from witnesses relating to anti-Semitic comments made at a party between two men not involved in the shooting in this case.
- (2) The prosecutor testified to the jury when he questioned witnesses about anti-Semitic comments made at the party, adding to his questions prejudicial information from sources outside the record.
- (3) The prosecutor argued to the jury the defendant was somehow responsible for the fact anti-Semitic comments were made at his party.
- (4) The prosecutor used terms like “Jew bashing” and “token Jew” and made reference to denying the existence of the Holocaust in closing argument when such things were never said in trial.
- (5) The prosecutor used anti-Semitism at trial to prejudice the defendant before the jury.
- (6) The prosecutor used anti-Semitism as a means to bolster sympathy and credibility for the shooting victim since, the prosecutor argued, he went to confront the defendant the night of the shooting to complain about the way a Jewish person at the party was treated by the defendant’s friends.

A. Standards for Establishing Prosecutorial Misconduct.

To establish prosecutorial misconduct, a defendant must show the prosecutor's conduct was both improper and prejudicial in the context of the entire record and the circumstances at trial. State v. Magers, 164 Wn.2d 174, 191, 189 P.3d 126 (2008). Conduct is improper where it seeks to procure a conviction at all hazard, and ceases to represent the public

interest. State v. Reed, 102 Wn.2d 140, 147, 684 P.2d 699 (1984); quoting People v. Fielding, 158 N.Y. 542, 547, 53 N.E. 497 (1899) To establish prejudice, the petitioner must show a substantial likelihood that the misconduct affected the jury's verdict. In re Pers. Restraint of Pirtle, 136 Wn.2d 467, 481-82, 965 P.2d 593 (1998). The defendant bears the burden of showing both prongs of prosecutorial misconduct. State v. Hughes, 118 Wn. App. 713, 727, 77 P.3d 681 (2003).

Failure to object to a prosecutor's improper remark constitutes waiver unless the remark is deemed to be so flagrant and ill intentioned that it evinces an enduring and resulting prejudice that could not have been neutralized by an admonition to the jury. State v. Belgarde, 110 Wn.2d 504, 507, 755 P.2d 174 (1988). If misconduct is so flagrant that no instruction can cure it, there is, in effect, a mistrial and a new trial is the only and the mandatory remedy. State v. Case, 49 Wn.2d 66, 74, 298 P.2d 500 (1956).

A prosecutor has “wide latitude” in making arguments to the jury and prosecutors are allowed to draw reasonable inferences from the evidence in closing arguments. State v. Gregory, 158 Wn.2d 758, 860, 147 P.3d 1201 (2006). A reviewing court reviews a prosecutor's comments during closing argument in the context of the total argument, the issues in

the case, the evidence addressed in the argument, and the jury instructions. State v. Carver, 122 Wn. App. 300, 306, 93 P.3d 947 (2004).

It is improper for a prosecutor to invite the jury to decide any case based on emotional appeals. In re Det. of Gaff, 90 Wn. App. 834, 841, 954 P.2d 943 (1998). A prosecutor has a duty to ensure a verdict is free from prejudice and based on reason, not passion. State v. Echevarria, 71 Wn. App. 595, 598, 860 P.2d 420 (1993). A prosecutor has the responsibility to ensure a fair trial by acting impartially, without invoking prejudice or use of vituperative argument to secure a conviction at all hazards. State v. State v. Reed, 102 Wn.2d 140, 147, 684 P.2d 699 (1984); citing People v. Fielding, 158 N.Y. 542, 547, 53 N.E. 497 (1899). A prosecutor's closing argument that appeals to a jury's passions and prejudice by referencing facts not in evidence constitutes prosecutorial misconduct. State v. Clafin, 38 Wn. App. 847, 690 P.2d 1186 (1984).

B. Precedent Supporting Misconduct in Present Case.

Three cases succinctly explain the level of prosecutorial misconduct that occurred in Mr. Aslanyan's trial. See State v. Reed, 102 Wn.2d 140, 684 P.2d 699 (1984); State v. Clafin, 38 Wn. App. 847, 690 P.2d 1186 (1984); and State v. Belgarde, 110 Wn.2d 504, 755 P.2d 174

(1988). These cases further demonstrate the standards by which this issue should be addressed.

In Reed, the defendant was convicted of murdering his wife. He asserted voluntary intoxication and diminished capacity defenses. He had several doctors testify in his defense. In closing argument, the prosecutor attacked the credibility of the defendant and the witnesses. On multiple occasions he called the defendant a liar. He then challenged the jury, “Are you going to let a bunch of city lawyers come down here and make your decision?” “A bunch of city doctors who drive down here in their Mercedes Benz?” He told the jury there was a separate type of education in this jurisdiction, “down here in the woods.” Defense counsel made various objections, some of which were sustained. The defendant was convicted.

The Supreme Court reversed. The Court found the prosecutor’s comments improper. Citing to an 1899 case, the Court defined the proper role a prosecutor plays in a criminal trial. See People v. Fielding, 158 N.Y. 542, 53 N.E. 497 (1899); State v. Reed, 102 Wn.2d at 146-147. The prosecutor is a quasi-judicial officer that must act impartially. The prosecutor must refrain from vituperative argument that appeals to

prejudice, seeking to procure conviction at all hazards. Id. The prosecutor's comments violated this standard.

The prosecutor's comments were prejudicial. The Court found the comments were calculated to align the jurors with the prosecutor and against the defendant. Reed, at 147. Because the Court deemed the defense theory plausible that he lacked the ability to formulate intent to kill, the Court found the improper comments had a substantial likelihood to affect the jury's verdict. Reed, at 147.

In Claflin, the defendant was convicted of several rape and sex related offenses. In closing argument, the prosecutor read a poem written by a rape victim. The poem vividly described the emotional trauma suffered by a rape victim. The defendant's motion for mistrial was denied.

The Court of Appeals reversed. The prosecutor's duty is to ensure a verdict free of prejudice and based on reason. Claflin, at 850. If the State's allegations were true, and the defendant committed a pattern of repulsive sexual abuse on young girls, the poem's vivid imagery describing the emotional effect rape causes its victims was nothing but an appeal to the jury's passion and prejudice. Claflin, at 850. Most important, however, the poem constituted evidence outside the record; it contained many prejudicial allusions to matters outside the record of evidence

against the defendant. Clafin, at 850. The poem was so prejudicial, that reading the poem was misconduct warranting no objection as to require a new trial. Clafin, at 850.

The Court further reached back to nineteenth century case law to describe the limitations lawyers must accept when speaking before a jury in closing. Citing to Evans v. Town of Trenton, 112 Mo. 390, 20 S.W. 614, 616 (Mo. 1892), the Court agreed that

So, too, what a counsel says or does in the argument of a case must be pertinent to the matter on trial before the jury, and he takes the hazard of its not being so. Now, statements of facts not proved, and comments thereon, are outside of the case. They stand legally irrelevant to the matter in question, and are therefore not pertinent. If not pertinent, they are not within the privilege of counsel.

The poem was obviously not a part of the trial record, and yet reading it called upon the jury to view the victim's testimony, and essentially their credibility, through the perspective of the person who wrote the poem. Reading the poem could only prejudice the defendant before the jury.

In Belgarde, the defendant was convicted of murder. Witnesses testified against Belgarde saying he confessed to the crime. In closing, the prosecutor said the defendant said he was strong in AIM. "AIM gets even with people." He then gave his opinion what AIM is. He analogized it to

“Sein Finn,” the political wing of the Irish Republican Army. “It is a deadly group of madmen.” He also made reference [Moamar] Khadafi. He said that people on the reservation are frightened of AIM. He then described the incidents at Wounded Knee. He encouraged the jurors to talk about Wounded Knee in deliberations. He called the members of AIM “butchers” that “killed indiscriminately” ... “Whites and their own.” The AIM group was something to be frightened of if you are Indian and live on a reservation. Witnesses who testified at trial against the defendant lived and worked on the reservation. No objections were made to the argument.

The Supreme Court reversed. The Court considered the prosecutor’s comments inflammatory and a deliberate appeal to the jury’s passion and prejudice and encouraged it to render a verdict based on Belgarde’s associations with AIM rather than properly admitted evidence. Belgarde, at 507-508. The remarks were flagrant, highly prejudicial and introduced facts not in evidence. Belgarde, at 507-508. The Court would not tolerate testimony in the guise or argument, regardless whether the defense objected or not. Belgarde, at 508. The Court cannot assume the jurors did not believe the prosecutor’s description of AIM. Belgarde, at 508. The Court considered the prosecutor’s argument an “egregious departure” from the accepted role of a prosecutor. Belgarde, at 508.

However, most egregious, was the fact the prosecutor used closing argument as a means to enhance credibility to the witnesses who delayed coming forward to testify against the defendant. Belgarde, at 509. The Court clearly rebuked this action, stating the prosecutor, if he wants this testimony, he should “present evidence to that effect.” Belgarde, at 509. The prosecutor stepped far outside his proper role as a quasi-judicial officer and an advocate to give the jury highly inflammatory information. Belgarde, at 509. The prejudice engendered by the prosecutor’s argument warranted a new trial.

These three cases share basic qualities defining prosecutorial misconduct. First, misconduct was established in each case where the prosecutor introduced inflammatory information to the jury during closing argument that did not exist in the trial record: Reed – jury cannot trust out of town lawyers and doctors driving fancy cars; Clafin – jury should feel sympathy towards rape victims as expressed in poem; and Belgarde – jury should believe state witnesses testifying against defendant because defendant is part of AIM organization and may hurt them for coming forward. This information was used for the purpose of appealing to the jurors’ passions and prejudices. As stated in Reed, the statements were “calculated to align the jury” with the prosecutor and against the

defendant. Reed, at 147. This was accomplished in Claflin by linking the poem to the rape victims who testified, and in Belgarde by linking the defendant to a terrorist organization who would intimidate witnesses who testified against the defendant. The prosecutors' statements were prejudicial because they constituted argument that state witnesses should be viewed with sympathy and with credibility at the expense of the defendant and his witnesses.

C. Misconduct Occurring At Trial.

In this case the prosecutor's questioning during trial and comments made in closing argument constitute prosecutorial misconduct. The prosecutor developed a trial strategy to create the inference the defendant was anti-Semitic – through his association with those who would make anti-Semitic comments. His intent was to foster sympathy, and credibility, for Tigran, the shooting victim, since he asserted at trial he decided to meet the defendant in the parking lot to chastise him for allowing anti-Semitic comments to be made to the face of a Jewish person who was at the defendant's party. Conversely, the prosecutor wanted the jury to despise the defendant for being closely aligned with anti-Semitic persons who would verbally assault a Jewish person with anti-Semitic comments.

The prosecutor's remarks constituted misconduct for the following reasons. First, the fact that anti-Semitic comments were even uttered at the party two days before the shooting was not relevant to why the shooting occurred. It is clear two older men had a disagreement at the party, which at some point led to derogatory comments being made to a third man at the party who was Jewish. Tigran, the shooting victim, ultimately had a confrontation with Eduard Vardanyan and this occurred due to their respective relationships to the two men who initially had a disagreement. But the two older men could have argued over anything – the food, weather, or a football game. The subject matter of their argument was irrelevant to the fact they argued, and irrelevant to the fact Tigran and Eduard later fought.

Despite the lack of relevance, the prosecutor questioned almost every Armenian witness about the anti-Semitic comments made at the party. He asked Tigran if all Armenian people are anti-Semitic? He asked Sergo Adamyan, Eduard Vardanyan, and the defendant exactly what was said. He asked Mr. Vardanyan to speculate why his father, Hamlet, would make anti-Semitic comments. Yet, there was no testimony describing the exact words used. And in fact, the only thing Tigran could add was that Konstantin and Hamlet spoke about a genocide occurring in Armenia in

1915 instigated by the Turkish government; with Tigran adding some countries have refused to acknowledge the atrocity. Since the existence of this information was irrelevant for purposes of the trial, the prosecutor had to have intended a specific purpose for seeking this information and using it in closing argument, which was an appeal to the jurors' passions and prejudices.

Second, reference to anti-Semitic comments was not fleeting or minor in context to the entire trial. The prosecutor discussed anti-Semitism, either in opening, questioning, or closing, on four of the six days of trial.² He also addressed anti-Semitism with Sergo Adamyan and Eduard Vardanyan at the beginning of cross examination; ensuring the jurors would hear the responses he was hoping for.³ Finally, he spoke about anti-Semitism in beginning of his closing argument. His references to anti-Semitic comments at trial were strategically placed so jurors would hear, and remember, what he said.

Third, the references to anti-Semitism in closing argument were inflammatory. While the testimony regarding anti-Semitic comments at

² 11/24/08 – opening statement; 11/25/08 – testimony of Tigran Koshkaryan; 11/26/08 – testimony of Sergo Adamyan and Eduard Vardanyan; and 12/16/08 – closing argument. Only on 12/1 and 12/2 did the prosecutor not address anti-Semitic comments at trial.

³ He addressed anti-Semitism with Tigran Koshkaryan early in his direct examination.

the party was vague and without reference to any particular anti-Semitic phrase, the prosecutor used terms like “Jew bashing,” “token Jew,” and accused Hamlet Vardanyan of denying the existence of the Holocaust. These statements were every much as inflammatory as calling the defendant in Belgarde a terrorist and calling AIM a “deadly group of madmen.” Inflammatory statements are intended to excite or anger the persons hearing them. The prosecutor’s reference to such terms was meant to excite or anger jurors’ passions and prejudices concerning anti-Semitism.

Fourth, the prosecutor’s statements were neither references to the trial record, nor inferences from the testimony given. There was no testimony about “Jew bashing.” The most descriptive testimony came from Tigran, where he said Konstantin and Hamlet argued about the failure of some countries to recognize the Armenian genocide of 1915, and questioned Simon why Jews would not recognize the genocide? (11/25/08 RP 337) The prosecutor failed to get any testimony from any witness concerning what specifically was said to Simon. At best, he offered his own testimony when questioning Sergo Adamyan by saying someone told him Simon was called “motherfucker” in the Russian language. (11/26/08 RP 583) There was no testimony that Simon felt like

a “token Jew” hanging around Armenians. Tigran testified, speculatively, that Simon was offended by Hamlet’s remarks. (11/25/08 RP 337) It is outrageous to say Simon felt marginalized on a racial and religious scale from this statement. Last, and most incredulously, there was no testimony Hamlet denied the existence of the Holocaust.⁴ There is no plausible way to infer from this record actual instances of anti-Semitic rhetoric without stepping over the line into prosecutorial misconduct.

Finally, lacking relevance, these references to anti-Semitism throughout trial and closing argument were meant to appeal to the passions and prejudices of the jurors. As will be discussed below, the jurors heard conflicting testimony from the defendant and Tigran as to how the shooting took place. The defendant’s version justified self-defense; Tigran’s did not. The prosecutor’s references to anti-Semitism were calculated to align jurors with Tigran and against the defendant in the same vein the prosecutor in Reed wanted jurors to not trust out of town doctors, the prosecutor in Clafin wanted the jury to sympathize with rape

⁴ The State may respond this was a mental slip made by the prosecutor referencing the genocide in Armenia in 1915. However, such atrocity was never described as a “holocaust,” and such term is exclusively used to describe the Nazi atrocities of World War II.

victims, and the prosecutor in Belgarde wanted the jury to fear the defendant due to his affiliation with the AIM movement.

D. Substantial Likelihood Misconduct Affected Jury Verdict.

The prosecutor's statements were prejudicial to Mr. Aslanyan's chance for a fair trial. To establish prejudice, the petitioner must show a substantial likelihood that the misconduct affected the jury's verdict. In re Pers. Restraint of Pirtle, 136 Wn.2d 467, 481-82, 965 P.2d 593 (1998). Courts measure possible prejudice by weighing the strength of the State's case and reverse only if there is a substantial likelihood that the misconduct affected the jury's verdict. State v. Avendano-Lopez, 79 Wn. App. 706, 712, 904 P.2d 324 (1995).

In meeting this burden, this case most resembles Belgarde. There, the prosecutor "testified" in closing argument providing a prejudicial description of the AIM movement. The Court wrote,

"An objection and an instruction to disregard could not have erased the fear and revulsion jurors would have felt if they had believed the prosecutor's description of the Indians involved in AIM." At, 508.

This testimony was particularly egregious because it supported several witnesses' delay in reporting the defendant's alleged confession. At 509. The prosecutor's statements amounted to vouching for the State

witness's credibility. At 509. The prosecutor "stepped far outside his proper role as a quasi-judicial officer." At 509. The Court "cannot assume jurors did not believe the prosecutor's description." At 508.

The misconduct in this case likely affected the jury's verdict because the misconduct called for the jurors to view Tigran sympathetically, and view the defendant with disgust. After all, it was not the fact that anti-Semitic comments were made at the defendant's party that was shocking to the prosecutor, it was that the defendant "did nothing about it." (12/16/08 RP 13) The defendant was responsible for what happened at his party, and he did not care that anti-Semitic comments were made towards Simon. However, Tigran was the only person offended by the comments made to Simon. At trial, Tigran described how he wanted to talk to the defendant the night of the shooting about Simon. He wanted the defendant to meet with Simon. (11/25/08 RP 350-351) It is clear the prosecutor intended to portray Tigran as a hero willing to stand up to the defendant and his anti-Semitic friends. Tigran's purpose the night of the shooting was noble; he was going to defend Simon's honor. Thus, the prosecutor told the jury that Tigran, "Wanted to make it right for Simon." (12/16/08 RP 15) Tigran wanted Simon to feel that he was more than a "token Jew" hanging around the defendant and his friends.

(12/16/08 RP 15) Considering the role Tigran played the night of the shooting – coming to the rescue of his Jewish friend – it would be impossible for the jury not to feel sympathy for him after he was shot, and thus believe him when he described how he was shot.

This argument was crucial for the prosecutor because there was a paucity of evidence supporting either side's version of facts. The defendant, Edo, said he was assaulted by Tigran and shot in self-defense. Tigran said Edo tried hitting him first, and was shot while walking away. No witness was an eye-witness to the shooting. Jim Shank saw two guys fighting outside the tavern. (11/24/08 RP 181-182) He heard gun shots, but did not observe the shooting. (11/24/08 RP 187-188) Ryan Pate was smoking a cigarette outside the tavern when he heard gunshots, but did not see any of the fighting or shooting. (11/24/08 RP 214) William Faldalen was also smoking a cigarette outside the tavern. (11/25/08 RP 449) He heard gunshots and then looked to the parking lot and saw two men grappling each other – indicating they were in close proximity to one another. (11/25/08 RP 451) Morris White testified he was sitting in a parked car in the parking lot when the shooting occurred. (11/26/08 RP 668) He saw two men meet in the parking lot argue and fight. He heard gun shots and drove away from the parking lot as quickly as possible.

(11/26/08 RP 674-678) But nobody heard what was said, and nobody could say whether the shooting was justified or not. With the lack of corroborating evidence, it was necessary for the jury to decide whether to believe Tigran, or believe Edo. Whomever they believed would determine the verdict.

The prosecutor's use of anti-Semitism to bolster Tigran's testimony was also crucial to the admission of the first aggressor instruction requested by the State. (CP 152(sub. 71); 12/15/08 RP 44) The first aggressor instruction negates a defendant's lawful use of force if the defendant is responsible for creating the need for the use of force. WPIC 16.04. Tigran's testimony the defendant tried hitting him first was the only evidence in the record supporting this instruction. (12/16/08 RP 34-35) The prosecutor argued the defendant threw the first punch and therefore could not be acquitted on self defense grounds because he was the first aggressor. (12/16/08 RP 35) Therefore, it was imperative for the jury to believe Tigran's testimony.

Additionally, courts have found a prosecutor's comments prejudicing a jury's verdict and warrant reversal simply on the basis of the outrageous nature of the comments themselves. This was clear in Belgarde, where the Court said the comments were "every bit as flagrant

and ill-intentioned as the comments in State v. Reed, supra; State v. Charlton, supra; and State v. Claflin, supra.” At 509. The misconduct here was not reference to a single word, like “cuz,” where it was not directly linked to a definition of gang affiliation. See State v. Pedro, 148 Wn. App. 932, 201 P.3d 398 (2009). Statements like “Jew bashing,” “token Jew,” and denying the Holocaust need no further description or analysis. They are derogatory terms stemming from the ideology of anti-Semitism that has no accepted value in our society. It is no different a situation than if Simon were African-American and the prosecutor used certain racist words to describe what might have been said to him. It is not reasonable to believe that such words used in closing argument could not have affected the jury’s view of Tigran’s credibility and ultimately, the verdict.

E. Statements So Flagrant and Ill-Intentioned That No Objection Required.

Defense counsel did not object to the prosecutor’s statements. Failure to object to a prosecutor's improper remark constitutes waiver unless the remark is deemed to be so flagrant and ill intentioned that it evinces an enduring and resulting prejudice that could not have been neutralized by an admonition to the jury. State v. Belgarde, 110 Wn.2d 504, 507, 755 P.2d 174 (1988). If misconduct is so flagrant that no

instruction can cure it, there is, in effect, a mistrial and a new trial is the only and the mandatory remedy. State v. Case, 49 Wn.2d 66, 74, 298 P.2d 500 (1956).

No objection or instruction could have cured the prejudice resulting from the evidence presented and argument made regarding anti-Semitism. As stated above, the prosecutor's statements were intended to bolster Tigran's credibility. The prosecutor chose to use explicit anti-Semitic terminology. He could have merely said someone at the party said inappropriate things. But instead, he chose to say "Jew bashing," "token Jew," and allege someone denied the Holocaust. These comments were meant to inflame the jurors' passions and prejudices. According to the prosecutor's argument, Tigran was mad because he hated those terms too. "He wanted to make it right for Simon." It is clear that the graphic use of anti-Semitic terminology would align the jury with Tigran. No objection or instruction could remove this from jury deliberations.

Cases such as Reed, Clafin, and Belgarde did more than describe a legal standard for prosecutorial misconduct; they set the bar for prosecutorial behavior. There were no objections in Clafin and Belgarde, but the convictions were reversed because the subject matter the prosecutors introduced in closing was too closely related to the subject

matter at trial, and implored jurors to believe and feel sympathy for State witnesses. This is exactly what happened in Mr. Aslanyan's case. There was misconduct and resulting prejudice justifying reversal of the conviction.

2. Does defense counsel engage in ineffective assistance of counsel where he fails to object to the prosecutor's flagrant statements concerning anti-Semitism during closing argument?

To prevail on a claim of ineffective assistance of counsel, a defendant must show that his counsel's performance fell below an objective standard of reasonableness and that the deficient performance prejudiced his trial. Strickland v. Washington, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); State v. McFarland, 127 Wn.2d 322,334-335, 899 P.2d 1251 (1995). If one of the two prongs of the test for ineffective assistance is absent, we need not inquire further. Strickland, 466 U.S. at 697; State v. Foster, 140 Wn. App. 266, 273, 166 P.3d 726 (2007).

The reasonableness inquiry presumes effective representation and requires the defendant to show the absence of legitimate strategic or tactical reasons for the challenged conduct. State v. McFarland, 127 Wn.2d at 336. Legitimate trial tactics and strategy form no basis for an

ineffective assistance of counsel claim. State v. Hendricksen, 129 Wn.2d 61, 77-78, 917 P.2d 563 (1996). The decision of when or whether to object is a classic example of trial tactics and only in “egregious circumstances, on testimony central to the State's case, will the failure to object constitute incompetence of counsel justifying reversal.” State v. Madison, 53 Wn. App. 754,763, 770 P.2d 662 (1989). To demonstrate ineffective assistance of counsel based on the failure to object, the defendant must show (1) that the trial court would have sustained the objection if raised, (2) an absence of legitimate strategic or tactical reasons for failing to object, and (3) that the result of the trial would have been different. State v. Saunders, 91 Wn. App. 575, 578,958 P.2d 364 (1998).

To show prejudice, the defendant must show that but for the deficient performance, there is a reasonable probability that the verdict would have been different. Matter of Pirtle, 136 Wn.2d 467, 487, 965 P.2d 593 (1998).

It is difficult to believe that a timely objection to the prosecutor’s statements concerning anti-Semitism would not have been sustained. The prosecutor’s references to “Jew bashing” and denial of the Holocaust were beyond the record and were meant to appeal to the jurors’ passions and prejudice. The reference to Simon being a “token Jew” was speculative at

and a matter that was also beyond the record. A timely objection would have been sustained.

There is no conceivable strategic or tactical justification for not objecting. Defense counsel had to be aware how shocking and disturbing these comments would be for the jury. Particularly by the time the prosecutor said Tigran wanted to “make it right for Simon,” counsel had to be aware the prosecutor was making a plea to the jury to sympathize with Tigran because he was willing to stand up against anti-Semitism. An objection had to be made to let the jury know this argument was improper.

Finally, in a case so dependent on the testimony of the victim to disprove self-defense, the removal of appeals to passion and prejudice and improper arguments supporting Tigran’s credibility might have tipped the scales back to the defendant. Mr. Aslanyan remains committed to the argument made under “prosecutorial misconduct” that this conduct by the prosecutor was too prejudicial to be cured by an objection and curative instruction. However, should the court disagree, then it is fair to challenge that it was ineffective assistance of counsel to fail to make the objection that would have cured the resulting prejudice.

3. Whether the trial court erred in failing to grant defendant’s motion for mis-trial after the court learned the Armenian interpreter had

failed to accurately interpret the victim's testimony, specifically failing to translate the victim's animosity towards defense counsel?

Because the trial court is in the best position to determine if an irregularity at trial caused prejudice, an appellate court reviews the decision to grant or to deny a mis-trial for an abuse of discretion. State v. Weber, 99 Wn.2d 158, 165-166, 659 P.2d 1102 (1983). An irregularity at trial is not prejudicial unless there is a reasonable probability that the trial's outcome would have differed if the error had not occurred. State v. Thomas, 150 Wn.2d 821,871,83 P.3d 970 (2004). A trial court should declare a mistrial when an irregularity in the trial proceedings, viewed in light of all of the evidence, is so prejudicial as to deprive the defendant of a fair trial. State v. Post, 118 Wn.2d 596, 620, 826 P.2d 172 (1992).

A trial court abuses its discretion when its decision is based on untenable grounds or is manifestly unreasonable. Weyerhauser Co. v. Commercial Union Ins. Co., 142 Wn.2d 654, 683, 15 P.3d 15 (2000). A trial court necessarily abuses its discretion if its ruling is based on an erroneous view of the law. Dix v. ICT Group, Inc., 160 Wn.2d 826, 833, 161 P.3d 1016 (2007). Errors of law constitute an abuse of discretion. Council House, Inc. v. Hawk, 136 Wn. App. 153, 159, 147 P.3d 1305 (2006).

A trial court irregularity occurred when it became apparent the interpreter for Tigran Koshkaryan's cross-examination was not accurately translating with words from Armenian to English. (12/15/08 RP 1-38) Mr. Aslanyan contends the trial court erred in denying his motion to re-question Tigran Koshkaryan or in the alternative for mis-trial, where the court acknowledged Tigran's Armenian interpreter omitted words from two responses that were derogatory to defense counsel while being subject to cross examination. The court's alternative ruling, to read the corrected interpretations to the jury, failed to protect Mr. Aslanyan's opportunity to challenge Tigran's credibility before the jury. Where a verdict in a case such as this rests upon the jury's decision which witness to believe, the court's failure, it is reversible error to deny a defendant the opportunity to establish bias through independent evidence.

In Washington, a defendant's right to an interpreter is based on the Sixth Amendment constitutional right to confront witnesses and the right inherent in a fair trial to be present at one's own trial. State v. Gonzales-Morales, 138 Wn.2d 374, 379, 979 P.2d 826 (1999) The Legislature has also declared it is state policy “ ‘to secure the rights, constitutional or otherwise, of persons who, because of a non-English speaking cultural background, are unable to readily understand or communicate in the

English language, and who consequently cannot be fully protected in legal proceedings unless qualified interpreters are available to assist them.’ ”

State v. Gonzales-Morales, 138 Wn.2d at 379.

In Washington, a defendant's right to an interpreter means a right to a competent interpreter. State v. Pham, 75 Wn. App. 626, 633, 879 P.2d 321 (1994). It is long-settled that a competent translation is fundamental to a full and fair hearing. Perez-Lastor v. INS, 208 F.3d 773, 778 (9th Circ. 2000). Interpreters are provided to non-English speakers to secure their rights in legal proceedings. State v. Gonzales-Morales, 138 Wn.2d at 379. Thus, the standard for competence should relate to whether the rights of non-English speakers are protected, rather than whether the interpreting is or is not egregiously poor. State v. Teshome, 122 Wn. App. 705, 712, 94 P.3d 1004 (2004).

The Teshome court adopted a four-part test to measure interpreter competency. State v. Teshome, 122 Wn. App. At 712-713.

(1) what is told [the defendant] is incomprehensible; (2) the accuracy and scope of a translation at a hearing or trial is subject to grave doubt; (3) the nature of the proceeding is not explained to him in a manner designed to insure his full comprehension; or (4) a credible claim of incapacity to understand due to language difficulty is made and the district court fails to review the evidence and make appropriate findings of fact. United States v. Cirrincione, 780 F.2s 620, 634 (7th Circ. 1985).

The court in Teshome focused on the second part of the test in a case where an interpreter failed to adequately translate essential portions of a plea hearing. Examples included:

... when the court asked the defendant, “You are now charged with Assault in the Third Degree-Domestic Violence. Do you understand the elements of that charge?” Teclemaria interpreted, “Do you understand that you are accused something from second degree to third degree? Do you understand that?” Not only did Teclemaria not interpret the court's question completely and accurately, he also added “second degree” to the question. At 711.

... when the court explained that “the State will recommend that you serve three months in custody, that you have a mental health evaluation by a state certified mental health provider, that you follow any treatment recommended including taking prescribed medications,” Teclemaria does not mention anything about following treatment recommendations. Moreover, he does not mention prescribed medications. And he changes “state certified mental health provider” into a “doctor of their choice.” At 713.

The court concluded, “Teshome has a strong argument that her due process rights were violated.” At 714. The court found the interpretation failed the four-part test.

However, the issue in Teshome was not simply the adequacy of the interpretation, but whether Teshome could establish a “manifest injustice” to withdraw a guilty plea. Teshome, at 714. The court found she failed to

meet this burden because there was evidence in the record she had sufficient skills comprehending English such that she could failed to prove she could not understand the consequences of a guilty plea. Teshome, at 716.

The trial court in this case was confronted with allegations the Armenian interpreter failed to properly interpret Tigran Koshkaryan's cross-examination. The record aptly demonstrates the frustrations all parties had to the fact an accurate and comprehensible transcript of the testimony could not be obtained. The defense presented a transcript prepared by the defendant, which the trial court understandably found suspect.

Judge: If I assumed that that translation has some validity,
 and I say its questionable in my mind, because I
 found myself being attributed to expressions that I
 have never used ...

The court however, adopted the transcript for purposes of the hearing. (12/15/08 RP 31) Further, the defense presented approximately 20 instances of poor or inaccurate translation, and the court accepted two instances where the interpreter mis-stated what Tigran said and included omitted some of Tigran's words which were derogatory towards defense counsel. (CP 92-128(sub. 69); 12/15/08 RP 37)

Further, after hearing argument, the trial court adopted the Teshome four part test to determine whether to grant mis-trial.

Judge: Well, let me begin this way: if I am looking at Teshome, which is a case involving the Constitutional rights of a defendant who requires the services of an interpreter, but I'm assuming that's the analysis the nevertheless the same, we have to look at whether the translation is subject to grave doubt. (12/15/08 RP 36)

The court never expressly stated whether or not the accuracy and scope of the translation was subject to grave doubt. Instead, the court noted that most of the asserted problems with the translation were minor, except for the two instances where Tigran expressed annoyance with defense counsel. Acknowledging defense counsel argued this affected the witness's credibility, the court merely addressed potential remedies short of mis-trial. (12/15/08 RP 36-37) Denying a motion for mis-trial or the alternative of re-questioning Tigran, the court ruled to read the omitted testimony to the jury. (12/15/08 RP 37)

Speaking to the jury the next day, the court said:

Judge: And a question was raised about whether some of the comments between Tigran and the interpreter had been interpreted so that you heard them in English. And we believe that a couple of comments were not interpreted for you, so I'm now going to read to you what we believe those comments between the two were.

And let me set the context: Mr. Smith was asking a question of Tigran about the path of the bullet, where it entered, where it exited. And he asked this question: "Okay, and where did it go in? Where did it go in, if it came from here?" And Tigran answered, "No, no, no, no, no, goes in under my arm pit, comes out my arm." And that part more or less was interpreted to you. And then he said as an aside, "Doesn't dummy get it?"

And then shortly after that, Mr. Smith asked, "And the one that is under the arm pit, this one under here is a bullet coming out or going in?" And apparently as part of an aside with the interpreter, he said to the effect in Armenian, "Oh my God." Then there was a later answer. (12/16/08 RP 4-5)

The trial court erred in failing to only consider the degree of inaccurate translation and not the impact it had on the defendant's theory of the case. As stated previously, this case came down to contrasting version of the events that transpired the night of the shooting. Since the State's case rested on the testimony of Tigran Koshkaryan, it was imperative the defense have the ability to explore any bias or issues of credibility that might arise during the course of his testimony.

The exposure of a witness's motivation is "a proper and important function of the constitutionally protected right of cross-examination." Davis v. Alaska, 415 U.S. 308, 316, 94 S.Ct. 1105, 39 L.Ed. 2d 347 (1974). Thus criminal defendants have a constitutional right to impeach

prosecution witnesses with evidence of bias, Davis v. Alaska, 415 U.S. at 316-318; and it is reversible error to deny a defendant the right to establish the bias of the chief prosecution witness by independent evidence. State v. Spencer, 111 Wn. App. 401, 408, 45 P.3d 209 (2002). Where a case stands or falls on the jury's belief or disbelief of one central witness, that witness's credibility or motive must be subject to close scrutiny. State v. Wilder, 4 Wn. App. 850, 854, 486 P.2d 319 (1971).

In State v. Peterson, 2 Wn. App. 464, 465, 469 P.2d 980 (1970), the defendant sought to establish that allegations of indecent liberties with a minor were a fabrication initiated by the victim's older sister. The trial court limited cross-examination of the mother regarding the older sister's motives and involvement in initiating the complaint. Reasoning that a defendant should be given great latitude in cross-examining a prosecution witness to show motive or credibility, the court reversed, stating: "Failure to permit the defendant reasonably to pursue a valid theory constituted error which seriously jeopardized his defense to a heinous crime." State v. Peterson, 2 Wn. App. at 467; and see State v. York, 28 Wn. App. 33, 34-37, 621 P.2d 784 (1980) (reversible error to exclude evidence probative of chief prosecution's witness's motivation to fabricate allegations, noting

that the witness's questionable credibility was “the very essence of the defense.”).

Here, the trial court’s ruling effectively denied the defendant the opportunity to question Tigran why he would show such disrespect to defense counsel. The defense raised serious doubt concerning Tigran’s version how the shooting occurred. So much so, that the prosecutor in closing admitted Tigran was wrong how many times he said he was shot as well as wrong where he claimed to be shot.

Prosecutor: Tigran thought – Tigran still thinks to this day that he was shot twice in the chest, and both exit wounds in the back. It is apparent from looking at his injuries that he has two holes in his back. Tigran, who doesn’t remember what those other holes – Tigran, who was not thinking about bullets, he was thinking about fleeing for life. He is trying to justify it. How did this happen? He will swear up and down, and he sure did, “He shot me twice in the chest.” Obviously, we all know better than that.
(12/16/08 RP 21)

Tigran made his un-translated remarks while being asked about his opinion where bullets entered and exited his body. Having known these remarks, counsel would have been able to explore why the comments were made. This would have allowed the jury to better see whether Tigran was prone to disrespect persons when challenged. Considering the events of

the house party and the events in the parking lot the night of the shooting, this may have yielded a perception of Tigran more consistent with the defense theory of the case. In this regard, the jury may have viewed Tigran as the primary aggressor in the parking lot.

Defense counsel was not allowed to pursue this line of questioning based on the court's ruling. The ruling, based on Teshome, did not address the impact the translation had on the defense. The Teshome opinion may be helpful addressing some issues of poor translation, but the analysis does not address the problem that faced the court in this case. As such, understanding the un-translated testimony affected the defense's ability to challenge Tigran's credibility, and the trial court not willing to re-call Tigran to the stand, the trial court erred in denying Mr. Aslanyan's motion for mis-trial.

4. Does cumulative error warrant a new trial?

The cumulative error doctrine applies where "there have been several trial errors that standing alone may not be sufficient to justify reversal but when combined may deny a defendant a fair trial." State v. Greiff, 141 Wn.2d 910, 10 P.3d 390 (2000). However, absent prejudicial error, there can be no cumulative error that deprived the defendant of a fair

trial. State v. Saunders, 120 Wn. App. 800, 826, 86 P.3d 232 (2004).

Cumulative error may warrant reversal, even if each error standing alone would otherwise be considered harmless. State v. Weber, 159 Wn.2d 252, 279, 149 P.3d 646 (2006).

Mr. Aslanyan has asserted several errors occurring in trial; all related to the credibility of the victim Tigran Koshkaryan. First, the prosecutor used explicit anti-Semitic statements in closing argument as a direct appeal to the jurors' passions and prejudices; related to establishing the motivation Tigran had to confront Mr. Aslanyan concerning anti-Semitic comments that were made at his party. Second, defense counsel failed to take any action to object to this inflammatory argument. Third, the trial court, upon acknowledging Tigran's interpreter had omitted derogatory statements Tigran made to defense counsel, failed to provide Mr. Aslanyan the chance to re-question Tigran about these comments or to grant a mis-trial. In total, Mr. Aslanyan was convicted at trial in a case where the prosecutor unfairly bolstered the victim's credibility through improper argument, and the trial court denied him the opportunity to refute his credibility when it was revealed he made derogatory comments hidden by improper translation.

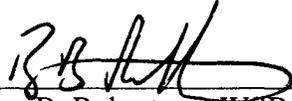
Should these errors, standing alone, fail to create sufficient prejudice warranting a new trial, then the combined prejudice should provide grounds for a new trial.

V. CONCLUSION

For the reasons stated above, Mr. Aslanyan requests this court to reverse his conviction and remand for new trial.

RESPECTFULLY SUBMITTED this 23 day of October, 2009.

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