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No. 63444-5-I

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

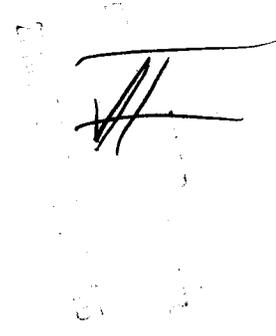
STATE OF WASHINGTON,

Respondent,

v.

AZAZI YOHANNES,

Appellant.



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

APPELLANT'S OPENING BRIEF

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TABLE OF CONTENTS

A. **SUMMARY OF ARGUMENT** 1

B. **ASSIGNMENTS OF ERROR**..... 2

C. **ISSUES PERTAINING TO ASSIGNMENTS OF ERROR**..... 2

D. **STATEMENT OF THE CASE** 4

E. **ARGUMENT** 9

 1. THE PROSECUTOR'S IMPROPER APPEALS TO THE JURORS' CULTURAL BIASES DEPRIVED MR. YOHANNES OF A FAIR TRIAL..... 9

 a. The prosecutor committed misconduct by appealing to the jurors' ethnic and cultural biases 9

 b. The prosecutor's improper comments were prejudicial and denied Mr. Yohannes a fair trial 14

 2. THE PROSECUTOR VIOLATED MR. YOHANNES' STATE CONSTITUTIONAL RIGHTS BY ACCUSING HIM OF LYING AND TAILORING HIS TESTIMONY BASED ON THE EXERCISE OF THOSE RIGHTS..... 18

 a. Unfounded accusations violated Mr. Yohannes' rights under article 1, section 22 of the Washington Constitution 19

 b. The Washington Constitution offers broader protections in this regard than the United States Constitution 20

 i. *Significant differences in the texts of article 1, section 22 and the Sixth Amendment show the former is more protective* 21

 ii. *State constitutional and common law history and preexisting Washington law show the framers' intent that article 1, section 22 be more protective than the Sixth Amendment* 28

c. Reversal is required	30
3. THIS COURT SHOULD EXERCISE ITS INHERENT SUPERVISORY POWER TO BAR SUCH ACCUSATIONS.....	33
a. This Court has the power to supervise the lower courts and fashion rules for the administration of fair trials	33
b. To ensure sound practice and fair trials, this Court should prohibit prosecutors from implying a defendant lied in his testimony based on the exercise of his rights	35
4. THE STATE DID NOT PROVE THE ELEMENT OF FORCIBLE COMPULSION, WHERE THE EVIDENCE SHOWS THAT, IF A RAPE OCCURRED, IT OCCURRED WHILE THE COMPLAINING WITNESS WAS UNCONSCIOUS AND THEREFORE INCAPABLE OF RESISTANCE	43
F. <u>CONCLUSION</u>	47

TABLE OF AUTHORITIES

Constitutional Provisions

Const. art. 1, § 3.....	11, 44
Const. art. 1, § 7.....	23, 24
Const. art. 1, § 22...1, 2, 3, 19, 20, 21, 22, 23, 24, 25, 26, 28, 29, 48	
U.S. Const. amend. 4.....	23, 24
U.S. Const. amend. 5.....	20, 22
U.S. Const. amend. 14.....	2, 11

Washington Supreme Court

<u>State v. Barber</u> , 118 Wn.2d 335, 823 P.2d 1068 (1992)	11
<u>State v. Belgarde</u> , 110 Wn.2d 504, 755 P.2d 174 (1988)..	10, 14, 30
<u>State v. Bennett</u> , 161 Wn.2d 303, 165 P.3d 1241 (2007).....	35
<u>State v. Bonds</u> , 98 Wn.2d 1, 653 P.2d 1024 (1983).....	35
<u>State v. Brown</u> , 132 Wn.2d 529, 940 P.2d 546 (1997).....	14, 41
<u>State v. Easter</u> , 130 Wn.2d 228, 922 P.2d 1285 (1996).....	30
<u>State v. Eide</u> , 83 Wn.2d 676, 682, 521 P.2d 706 (1974)	43
<u>State v. Evans</u> , 96 Wn.2d 1, 633 P.2d 83 (1981)	30
<u>State v. Fields</u> , 85 Wn.2d 126, 530 P.2d 284 (1975).....	35
<u>State v. Fitzsimmons</u> (" <u>Fitzsimmons I</u> "), 93 Wn.2d 436, 441, 610 P.2d 893 (1980), <u>remanded by Washington v. Fitzsimmons</u> , 449 U.S. 977, 101 S.Ct. 390, 66 L.Ed.2d 240 (1980)	34
<u>State v. Fitzsimmons</u> (" <u>Fitzsimmons II</u> "), 94 Wn.2d 858, 620 P.2d 999 (1980)	34, 37

<u>State v. Green</u> , 94 Wn.2d 216, 616 P.2d 628 (1980)	45
<u>State v. Gunwall</u> , 106 Wn.2d 54, 20 P.2d 808 (1986)	21, 23, 25
<u>State v. Michielli</u> , 132 Wn.2d 229, 937 P.2d 587 (1997)	25
<u>State v. Pugh</u> , 167 Wn.2d 825, 225 P.3d 892 (2009).....	25
<u>State v. Rafay</u> , 167 Wn.2d 644, 222 P.3d 86 (2009).....	23, 26, 29
<u>State v. Reed</u> , 102 Wn.2d 140, 684 P.2d 699 (1984).....	10
<u>State v. Shafer</u> , 156 Wn.2d 381, 128 P.3d 87 (2006).....	26
<u>State v. Smith</u> , 84 Wn.2d 498, 502, 527 P.2d 674 (1974)	34
<u>State v. Warren</u> , 165 Wn.2d 17, 195 P.3d 940 (2008)	10

Washington Court of Appeals

<u>City of Seattle v. Brenden</u> , 8 Wn. App. 472, 506 P.2d 1314 (1973)	30
<u>State v. Al-Hamdani</u> , 109 Wn. App. 599, 36 P.3d 1103 (2001)	47
<u>State v. Johnson</u> , 80 Wn. App. 337, 908 P.2d 900 (1996) 20, 36, 37	
<u>State v. King</u> , 75 Wn. App. 899, 878 P.2d 466 (1994).....	25
<u>State v. Martin</u> , 151 Wn. App. 98, 210 P.3d 345 (2009), <u>rev.</u> <u>granted</u> , 226 P.3d 781 (2010).....	20, 22, 24, 29, 33, 35
<u>State v. McKnight</u> , 54 Wn. App. 521, 774 P.2d 532 (1989).....	45
<u>State v. Montgomery</u> , 105 Wn.App. 442, 17 P.3d 1237 (2001).....	30
<u>State v. Perez-Mejia</u> , 134 Wn. App. 907, 143 P.2d 838 (2006).....	11
<u>State v. Rich</u> , 63 Wn.App. 743, 821 P.2d 1269 (1992).....	25
<u>State v. Silva</u> , 107 Wn.App. 605, 27 P.3d 663 (2001)	23, 25

State v. Smith, 82 Wn. App. 327, 917 P.2d 1108 (1996)... 20, 36, 37

State v. Suarez-Bravo, 72 Wn. App. 359, 864 P.2d 426 (1994).... 10

United States Supreme Court

Apprendi v. New Jersey, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000) 44

Arizona v. Fulminante, 499 U.S. 279, 111 S.Ct. 1246, 113 L.Ed.2d 302 (1991) 30

Chapman v. California, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967) 30

Davis v. Alaska, 415 U.S. 308, 94 S.Ct. 1105, 39 L.Ed.2d 347 (1974) 22, 28

Faretta v. California, 422 U.S. 806, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975) 22, 23

Ferguson v. Georgia, 365 U.S. 570, 81 S.Ct. 756, 5 L.Ed. 783 (1961) 22

Fox Film Corp. v. Muller, 296 U.S. 207, 80 L.Ed.158, 56 S.Ct. 183 (1935) 37

In re Winship, 397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970) 44

Jackson v. Virginia, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979) 44, 45

Rock v. Arkansas, 483 U.S. 44, 107 S.Ct. 2704, 97 L.Ed.2d 37 (1987) 22, 28

Taylor v. Kentucky, 436 U.S. 478, 98 S.Ct. 1930, 56 L.Ed.2d 468 (1978) 11

United States v. Gagnon, 470 U.S. 522, 105 S.Ct. 1482, 84 L.Ed.2d 486 (1985) 22, 28

<u>Washington v. Fitzsimmons</u> , 449 U.S. 977, 101 S.Ct. 390, 66 L.Ed.2d 240 (1980).....	34
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Statutes

RCW 9A.44.010(6).....	44, 45
RCW 9A.44.050(1).....	4, 44, 46, 47

Rules

CrR 3.4.....	24, 42
CrR 4.7.....	24
CrR 7.5(b)	8

Other Jurisdictions

<u>Commonwealth v. Beauchamp</u> , 424 Mass. 682, 677 N.E.2d 1135 (1997)	40
<u>Commonwealth v. Ewing</u> , 67 Mass. App. Ct. 531, 854 N.E.2d 993 (2006)	41
<u>Commonwealth v. Gaudette</u> , 441 Mass. 762, 808 N.E.2d 798 (2004)	40
<u>Commonwealth v. Person</u> , 400 Mass. 136, 508 N.E.2d 88 (1987)	40
Hawai'i Const. art. 1, § 14	27
Ky. Stat., ch. 45, § 1646 (1899).....	29
<u>People v. Bolden</u> , 82 A.D.2d 757, 440 N.Y.S.2d 202 (1981).....	43
<u>People v. Brown</u> , 26 A.D.3d 392, 812 N.Y.S.2d 561 (N.Y.A.D. 2 Dept.,2006)	41
<u>People v. Figueroa</u> , 161 A.D.2d 486, 555 N.Y.S.2d 752, <u>rev.</u> <u>denied</u> , 76 N.Y.2d 856 (1990).....	43

<u>People v. Lewis</u> , 177 A.D.2d 421, 576 N.Y.S.2d 262 (1991).....	42
<u>People v. Washington</u> , 278 A.D.2d 517, 718 N.Y.S.2d 385 (2000)	42
<u>People v. World</u> , 157 A.D.2d 567, 550 N.Y.S.2d 310 (1990)	43
<u>Prokop v. State</u> , 148 Neb. 582, 28 N.W.2d 200, 172 A.L.R. 916 (1947)	46
<u>State v. Daniels</u> , 182 N.J. 80, 861 A.2d 808 (2004)	37, 38, 39, 43
<u>State v. Davis</u> , 735 N.W.2d 674 (Minn., 2007)	40
<u>State v. Feal</u> , 194 N.J. 293, 944 A.2d 599 (2008)	37
<u>State v. Mattson</u> , 226 P.3d 482, 2010 WL 971791 (2010)	26, 43
<u>State v. Mayhorn</u> , 720 N.W.2d 776 (Minn., 2006)	39
<u>State v. Swanson</u> , 707 N.W.2d 645 (Minn., 2006)	39
Tenn. Code Ann., ch. 4, § 5601 (1896).....	29
<u>United States v. Cruz</u> , 981 F.2d 659 (2nd Cir. 1992)	11
<u>United States v. Vue</u> , 13 F.3d 1206 (8th Cir. 1994).....	10

Other Authorities

3 C. Torcia, <u>Wharton's Criminal Law</u> § 288 (14th ed. 1980).....	45
3 J. Wigmore, Evidence §§ 1841, 1869 (1904)	28
Robert F. Utter, <u>Freedom and Diversity in a Federal System: Perspectives on State Constitutions and the Washington Declaration of Rights</u> , 7 U. Puget Sound L. Rev. 491 (1984)...	28

A. SUMMARY OF ARGUMENT

The prosecutor below questioned the complaining witness and the defendant, over defense objection, about the patriarchal attitudes and practices of Eritrean society. By doing so, the prosecutor injected ethnicity into the trial and improperly encouraged the jury to convict Azazi Yohannes based on his status as an Eritrean.

In addition, in closing argument, the prosecutor repeatedly portrayed Mr. Yohannes as a liar who tailored his testimony to fit the evidence presented. The prosecutor's comments unfairly burdened Mr. Yohannes' exercise of his rights to view the discovery, be present at trial, confront the State's witnesses, and testify, in violation of article 1, section 22 of the Washington Constitution.

Finally, in this prosecution for second degree rape, the State did not prove beyond a reasonable doubt that Mr. Yohannes used force to overcome the complaining witness's resistance, where the evidence showed that, if a rape occurred, it occurred while she was unconscious and therefore incapable of resistance.

B. ASSIGNMENTS OF ERROR

1. The prosecutor made several comments during direct examination of the complaining witness, cross-examination of Mr. Yohannes, and closing argument, which improperly appealed to the jurors' biases and cumulatively prejudiced Mr. Yohannes, denying him a fair trial and due process of law.

2. The prosecutor's cross-examination of Mr. Yohannes and comments during closing argument, explicitly arguing that he tailored his testimony to fit the State's evidence, violated Mr. Yohannes' rights to appear at trial, to present a defense, to testify on his own behalf, and to confront witnesses, in violation of article 1, section 22 of the Washington Constitution.

3. The evidence was insufficient to sustain the conviction, in violation of Mr. Yohannes' state and federal constitutional right to due process.

4. The trial court abused its discretion in denying Mr. Yohannes' motion for new trial.

C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. During direct examination of the complaining witness and cross-examination of Mr. Yohannes, the prosecutor deliberately elicited testimony, over defense objection, that Mr. Yohannes'

country of origin, Eritrea, is a patriarchal society that subjugates women. Later, during closing argument, the prosecutor argued at length that Mr. Yohannes committed the alleged rape in order to subjugate his wife. Did the prosecutor improperly encourage the jury to return a verdict based on disapproval of Eritrean patriarchal culture and Mr. Yohannes' status as an Eritrean, rather than the evidence?

2. The prosecutor implied Mr. Yohannes tailored his testimony to the State's evidence simply because he exercised his rights to view the discovery, be present at trial, confront the State's witnesses, and testify. Do such accusations violate the rights guaranteed by article 1, section 22 of the Washington Constitution?

3. The Court of Appeals may exercise its inherent supervisory powers to maintain sound judicial practice. Do accusations of tailoring based on the defendant's review of discovery and presence at trial undermine the administration of fair trials, requiring the Court to fashion a rule to forbid such questioning?

4. In order to prove the charged crime of second degree rape by forcible compulsion, the State was required to prove beyond a reasonable doubt that Mr. Yohannes used force to

overcome the victim's resistance. Did the State fail to meet this burden where the evidence shows that, if a rape occurred, it occurred while the victim was unconscious and therefore incapable of resistance?

D. STATEMENT OF THE CASE

The State charged Yohannes with one count of rape in the second degree-domestic violence (RCW 9A.44.050(1)(a)). CP 1. The State alleged that Yohannes, "by forcible compulsion did engage in sexual intercourse with another person, named Lia Yoisef Araya." CP 1. Lia Araya is Mr. Yohannes' wife. 2/24/09RP 104-05.

On October 10, 2008, at around 1:30 p.m., Seattle police officers were dispatched to a residence in South Seattle. 2/19/09RP 28-29. When they arrived, they found Ms. Araya standing outside, wearing only a T-shirt and crying. 2/19/09RP 31. She had blood on her face but no obvious injuries to her face. 2/23/09RP 47, 56, 58. She had a few scratches on her arms. 2/24/09RP 21. She told police and paramedics that her husband raped her and ejaculated on her face. 2/19/09RP 36; 2/23/09RP 49. Police arrested Mr. Yohannes, who was inside the couple's residence. 2/19/09RP 38-40.

Ms. Araya was taken to Harborview Medical Center where she was examined by a sexual assault nurse. 2/24/09RP 7-8. The nurse obtained swabs of cells from Ms. Araya's mouth and ear and inside her vagina, and from her external genital area and around her anus. 2/24/09RP 35. All of the swabs tested positive for semen. 2/26/09RP 14-15, 18-21.

Ms. Araya testified she is 26 years old and was born in Eritrea. 2/24/09RP 99. She and Mr. Yohannes met and married in Eritrea shortly before moving to the United States in 2006. 2/24/09RP 104-05. In October 2008, the couple were not getting along well and she was planning to move out. 2/24/09RP 106-07. On October 9, Mr. Yohannes went out and did not come home until early the next morning. 2/24/09RP 109-10. He came into the bedroom and lay down on the bed; he was intoxicated and soon dozed off. 2/24/09RP 110. When Ms. Araya picked up his pants to put them away, two condom packages fell out of the pocket and onto the floor—one was open and the other was closed. 2/24/09RP 110. Ms. Araya became angry and confronted him, but he denied knowing where the condoms came from. 2/24/09RP 111. She became more angry and argued with him; she threw a baby bottle at him, which hit his lip and caused it to bleed.

2/24/09RP 113-15. She then went outside, taking a glass of wine and her cell phone with her. 2/24/09RP 118. She smoked cigarettes outside while drinking the wine. 2/25/09RP 77-78.

Ms. Araya sat in the car listening to the radio. 2/24/09RP 121. After a period of time, Mr. Yohannes came outside and took the car key and cell phone from her, throwing the cell phone to the ground, causing it to break. 2/24/09RP 122. Ms. Araya went back into the house and began arguing again with her husband. 2/24/09RP 122, 127. At that point, according to Ms. Araya, Mr. Yohannes held her hands as she tried to fight back, pulled her down on the bed, and hit her on the face or head. 2/24/09RP 127-30, 139. The blow knocked her unconscious immediately. 2/24/09RP 127-28, 132. It also caused her nose to bleed, leaving blood on her face and on the bed. 2/24/09RP 127-29, 133; 2/25/09RP 38, 40, 42.

Ms. Araya testified that when she woke up, she was lying on the bed naked and Mr. Yohannes, who was also naked, was standing next to her, calling her name and touching her to see if she was still breathing. 2/24/09RP 127-28, 132-35. She did not know how long she had been unconscious. 2/24/09RP 135. She felt a warm fluid on her face and in her ear, which she believed was

ejaculate. 2/24/09RP 132-35. She also believed Mr. Yohannes had raped her while she was unconscious, because there was semen outside her "private stuff," and she felt "a little pain down there," the same that she feels every time after having intercourse. 2/24/09RP 140, 142. But Ms. Araya never felt or observed Mr. Yohannes having intercourse with her. 2/24/09RP 140, 142.

Ms. Araya grabbed a T-shirt and put it on, and then ran to her neighbor's house to call 911. 2/24/09RP 136, 144.

Mr. Yohannes disputed his wife's version of events. He agreed the couple were not getting along well in October 2008. 2/26/09RP 66. He explained that the night before the alleged incident, he went out with his brother and did not come home until early the next morning. 2/26/09RP 67-69. Ms. Araya woke up when he came into the bedroom, and the couple argued for awhile about his being out late. 2/26/09RP 69, 72. But they soon made up and had consensual sex. 2/26/09RP 73-74. The couple then went to sleep.

Mr. Yohannes woke up in the morning to find Ms. Araya slapping and yelling at him. 2/26/09RP 75-76. She was angry because she had found condoms in his pocket. 2/26/09RP 76. Ms. Araya threw things at him and tried to bite and scratch him; he

grabbed her arms and placed her on the bed and she stopped. 2/26/09RP 77, 112, 114-15. Ms. Araya then went outside with a wine bottle in her hand and smoking a cigarette. 2/26/09RP 80-81. They argued for awhile more, then she drove away and soon came back with more wine and cigarettes. 2/26/09RP 83. He went to the car and took the keys but did not take her cell phone. 2/26/09RP 84.

Ms. Araya came back in the house, yelling and drunk. 2/26/09RP 85-86. She became hysterical. 2/26/09RP 87. Mr. Yohannes called his father and Ms. Araya's sister several times, asking for their help in managing her, but they were not available to help. 2/26/09RP 87-89. Finally, Ms. Araya "got drastic," yelled at him again, and walked out the front door, saying, "You are going to see." 2/26/09RP 89. She walked to the neighbor's house, saying, "Watch, I am going to call the police on you," which she did. 2/26/09RP 89. He never punched her and did not rape her. 2/26/09RP 91.

The jury found Mr. Yohannes guilty of second degree rape as charged. CP 28.

Prior to sentencing, Mr. Yohannes filed a motion for new trial under CrR 7.5(b). CP 29-40. Mr. Yohannes argued he was entitled

to a new trial on the basis of prosecutorial misconduct. CP 31-32.

After a hearing, the motion was denied. 3/25/09RP 9-10; CP 47.

Mr. Yohannes received a standard-range indeterminate sentence. CP 48-52.

E. ARGUMENT

1. THE PROSECUTOR'S IMPROPER APPEALS TO THE JURORS' CULTURAL BIASES DEPRIVED MR. YOHANNES OF A FAIR TRIAL

During direct examination of the complaining witness, and cross-examination of the defendant, the prosecutor deliberately elicited testimony, over defense objection, that the witnesses' country of origin, Eritrea, was a patriarchal society that subjugates women. 2/24/09RP 100-01; 2/26/09RP 120-21. In this way, the prosecutor improperly encouraged the jury to return a guilty verdict based on Mr. Yohannes' status as a member of Eritrean culture and as a means of expressing its disapproval of that culture. Because the comments were prejudicial, the conviction must be reversed.

a. The prosecutor committed misconduct by appealing to the jurors' ethnic and cultural biases. To prevail on a claim of prosecutorial misconduct, a defendant must show first that the prosecutor's comments were improper and second that the

comments were prejudicial. State v. Warren, 165 Wn.2d 17, 26, 195 P.3d 940 (2008).

At trial, "[c]ounsel are permitted latitude to argue the facts in evidence and reasonable inferences" in their closing arguments. State v. Smith, 104 Wn.2d 497, 510, 707 P.2d 1306 (1985). But appeals by the prosecutor to the jury's passions and prejudice are inappropriate. See, e.g., State v. Belgarde, 110 Wn.2d 504, 507, 755 P.2d 174 (1988). The prosecutor has a duty to seek a fair trial. State v. Suarez-Bravo, 72 Wn. App. 359, 367, 864 P.2d 426 (1994). "In the interests of justice, a prosecutor must act impartially, seeking a verdict free of prejudice and based upon reason." Id. at 368. It is improper for a prosecutor to make statements that are calculated to align the jury with the prosecutor and against the defendant. State v. Reed, 102 Wn.2d 140, 146-47, 684 P.2d 699 (1984).

Encouraging the jury to consider ethnic-based patterns of behavior is contrary to the "formal equality under the law" that is a bedrock legal principle. United States v. Vue, 13 F.3d 1206, 1213 (8th Cir. 1994). For example, it is "highly improper" for the prosecutor to elicit evidence that Hmong individuals are often involved in opium smuggling when the defendants are of Hmong

ethnic descent. Id. This "injection of ethnicity into the trial clearly invited the jury to put the Vues' racial and cultural background into the balance in determining their guilt." Id.

Race-based arguments are not tolerated as a means of encouraging a conviction. State v. Perez-Mejia, 134 Wn. App. 907, 918, 143 P.2d 838 (2006) (State's argument about "machismo" was "clearly designed to call attention to" defendant's ethnicity and thus an "unquestionably improper" appeal to ethnic prejudice).

Fundamental to constitutional due process is the requirement that a finding of guilt rest on the evidence presented at trial rather than on a defendant's status. Taylor v. Kentucky, 436 U.S. 478, 486-88, 98 S.Ct. 1930, 56 L.Ed.2d 468 (1978); U.S. Const. amend. 14; Const. art. 1, § 3. Given this, it is no surprise courts have uniformly condemned as antithetical to the Constitution a prosecutor's appeals to racial bias as a distraction from the merits of the evidence. See, e.g., United States v. Cruz, 981 F.2d 659, 663-64 (2nd Cir. 1992) ("Injection of a defendant's ethnicity into a trial as evidence of criminal behavior is self-evidently improper"). Washington's courts have also condemned the injection of racial or ethnic stereotypes into criminal cases. See, e.g., State v. Barber, 118 Wn.2d 335, 346-47, 823 P.2d 1068 (1992) ("distinctions

between citizens solely because of their ancestry are odious to a free people whose institutions are founded upon the doctrine of equality").

Here, the prosecutor improperly injected ethnicity into the trial and encouraged the jury to convict Mr. Yohannes based on his status as an Eritrean. In cross-examining Mr. Yohannes, the prosecutor questioned him about Eritrean views about women who smoke, over defense objection:

Q. It upsets you when Lia smokes cigarettes, doesn't it?

A. Yes.

Q. And in Eritrea it is not acceptable for women to smoke cigarettes; isn't that right?

A. No.

Q. Women aren't allowed to smoke cigarettes, are they?

A. Yes, they are.

Q. They are not allowed to smoke in public, are they?

A. Yes.

MR. GARRETT: Objection.

Q. (By Ms. Woo) Women aren't allowed to smoke cigarettes in Eritrea, are they?

A. Yes, they are.

Q. Women who do are not thought very much of, are they?

A. They do look down on them, yes.

Q. Who looks down on them?

A. Society.

Q. What does that mean, that they are looked down on?

A. You mean, a woman smoking a cigarette, older people like my parents and everybody else, they don't like it.

- Q. Do you like it? No?
- A. No, I do not.
- Q. How about drinking alcohol? Is drinking alcohol looked down upon?
- A. No.
- Q. By women?
- A. No.
- Q. Okay. Is it looked down upon for a woman to consume alcohol?
- A. No.
- Q. Only smoking cigarettes?
- A. Yes. Or chewing, too.
- Q. Does it make a difference if a woman smokes one cigarette or more than one how looked down upon it is?
- A. No.
- Q. Just smoking in general is not very well respected?
- A. In our community back home, yes.

2/26/09RP 120-21.

In direct examination of Ms. Araya, the prosecutor further elicited testimony about Eritrea's patriarchal society:

- Q. Is there a lot of difference between living here and living in Eritrea?
- A. Yes.
- Q. Like what?
- A. The economy. The women, we get a lot of freedom here than in Africa. Jobs, if you get a job there you don't make very much money.
- Q. Where?
- A. Eritrea. And the way they respect a woman is very different.
- Q. What do you mean by that?
- A. In my country, being a woman, especially when you get married, you always stay at the house. And some of the guys they put you down, the husband. And if anything happens the woman have to deal with. If something happens in

your marriage life they always blame the woman.

2/24/09RP 100-01.

In sum, the prosecutor plainly injected Mr. Yohannes' ethnicity into the trial by questioning the witnesses about the patriarchal beliefs and practices of Eritrean society. In this way, the prosecutor improperly encouraged the jury to find Mr. Yohannes guilty based on his membership in that ethnic group.

b. The prosecutor's improper comments were prejudicial and denied Mr. Yohannes a fair trial. In general, prosecutorial misconduct requires a new trial when there is a substantial likelihood that the misconduct affected the jury's verdict. Belgarde, 110 Wn.2d at 508. Any allegedly improper statements should be viewed within the context of the prosecutor's entire argument, the issues in the case, the evidence discussed in the argument, and the jury instructions. State v. Brown, 132 Wn.2d 529, 561, 940 P.2d 546 (1997).

As stated, defense counsel objected when the prosecutor asked Mr. Yohannes on cross-examination whether Eritrean society disapproved of women who smoke and whether Mr. Yohannes adhered to those beliefs. 2/26/09RP 120-21.

When viewed within the context of the prosecutor's entire argument, the issues in the case, and the evidence presented, the prosecutor's improper injection of ethnicity into the trial was prejudicial. The prosecutor's theory at trial was that Mr. Yohannes raped his wife in order to "put her in her place," because she "was acting a little bit too big for her britches." 2/27/09RP 23. In closing argument, the prosecutor asserted that Mr. Yohannes became angry when Ms. Araya confronted him about the fact he was having an affair and carrying condoms in his pocket. 2/27/09RP 23. Ms. Araya was "stand[ing] up for herself," and Mr. Yohannes "ha[d] to knock her back down and put her in her place." 2/27/09RP 23. He did not see her as "a human being" at that point, but merely as "an orifice for him to serve his perverse desire to demean her and disrespect her." 2/27/09RP 25. Further, "to show her just what he thought of her, he ejaculated all over her face, in her ear." 2/27/09RP 26.

The prosecutor's comments during closing argument encouraged the jury to view Mr. Yohannes through the lens of the cultural stereotype that was earlier established through the witnesses' testimonies. By arguing at length that Mr. Yohannes committed the alleged rape in order to subjugate his wife and "put

her in her place," 2/27/09RP 23, 25-26, the prosecutor encouraged the jury to return a guilty verdict as a way of expressing its disapproval of Eritrean patriarchal culture. The prosecutor's comments also encouraged the jury to conclude that Mr. Yohannes must share the patriarchal views of his countrymen and was therefore more likely to have committed the crime.

In light of the weaknesses of the State's evidence, there is a substantial likelihood the prosecutor's improper comments affected the jury's verdict. The State's principal evidence was Ms. Araya's testimony, yet her testimony and hearsay statements contained many inconsistencies, undermining her credibility. For example, Ms. Araya told the responding police officer that Mr. Yohannes punched her, that she lost consciousness, and that she awoke to find Mr. Yohannes having sexual intercourse with her against her will. 2/19/09RP 36. She told the responding medic that she was sexually assaulted, blacked out, and awoke to find her assailant ejaculating on her face. 2/23/09RP 49. She told the hospital social worker that she *might* have lost consciousness after her husband hit her. 2/23/09RP 77. She told the sexual assault nurse that she blacked out and awoke to find her husband on top of her, holding her down and raping her. 2/24/09RP 16.

But at trial, Ms. Araya testified that she was unconscious during the rape and never felt or observed Mr. Yohannes having intercourse with her or ejaculating on her face. 2/24/09RP 127-28, 132-35, 140, 142.

Similarly, Ms. Araya's statements about the pain in her genitals was also inconsistent. At first, she testified that she knew she was raped because she felt "a little pain down there," the same that she feels every time after having intercourse. 2/24/09RP 140, 142. The pain was gone by that evening. 2/24/09RP 176. But later, when pressed on cross-examination, she testified the pain was a 10 out of 10. 2/25/09RP 100-01.

Ms. Araya's statements regarding the timing of the rape relative to the timing of the 911 call were also inconsistent. Police were dispatched to the neighbor's house at around 1:30 p.m. 2/19/09RP 29. Ms. Araya told the responding officer that the rape occurred early that morning or late the previous night. 2/23/09RP 20. She told the social worker and the sexual assault nurse that the rape occurred at around 7:00 or 8:00 a.m. 2/23/09RP 95; 2/24/09RP 51. But her testimony at trial indicated that the rape occurred soon before she awoke after losing consciousness. When she awoke, the semen on her face and in her ear was still warm

and wet. 2/24/09RP 132. She could feel semen outside her "private stuff." 2/24/09RP 140-41. Her nose was still bleeding. 2/25/09RP 38. She testified she ran to the neighbor's house immediately after waking up, 2/24/09RP 140, 142, calling into question her many statements that the rape occurred early that morning.

In sum, Ms. Araya's statements contained many inconsistencies, suggesting she was either not telling the truth, or not telling the whole truth. In light of these problems with the complaining witness's credibility, it is likely the jury was affected by the prosecutor's suggestion that Mr. Yohannes likely committed the crime because he wanted to control his wife and put her in her place, and came from a society where such attitudes are commonplace. Because the prosecutor's improper comments about Mr. Yohannes' ethnicity and culture were prejudicial, the conviction must be reversed.

2. THE PROSECUTOR VIOLATED MR. YOHANNES' STATE CONSTITUTIONAL RIGHTS BY ACCUSING HIM OF LYING AND TAILORING HIS TESTIMONY BASED ON THE EXERCISE OF THOSE RIGHTS¹

In closing argument and cross-examination of Mr. Yohannes, the prosecutor repeatedly and explicitly portrayed him as a liar who

tailored his testimony to fit the evidence presented. 2/26/09RP 15; 2/27/09RP 34, 40-41, 87, 92-93. By doing so, the prosecutor implied Mr. Yohannes tailored his testimony simply because he exercised his rights to view the discovery, be present at trial, confront the State's witnesses, and testify. The prosecutor thereby commented on and unfairly burdened Mr. Yohannes' exercise of those rights, in violation of article 1, section 22 of the Washington Constitution.

a. Unfounded accusations violated Mr. Yohannes' rights under article 1, section 22 of the Washington Constitution.

Article 1, section 22 guarantees a criminal defendant the right to be present at trial, to present a defense, to testify, and to confront and cross-examine the witnesses against him.

Previously, Washington courts held the State violated the Sixth Amendment by implying that a defendant tailored his testimony to the State's evidence. State v. Johnson, 80 Wn. App. 337, 340, 908 P.2d 900, rev. denied, 129 Wn.2d 1016 (1996); State v. Smith, 82 Wn. App. 327, 334-35, 917 P.2d 1108 (1996). The United States Supreme Court overruled Johnson in Portuondo v. Agard, 529 U.S. 61, 120 S.Ct. 1119, 146 L.Ed.2d 47 (2000).

¹ This issue is currently pending in the Washington Supreme Court in State v. Martin, No. 83709-1. Oral argument has not yet been scheduled.

There, the prosecutor argued the defendant had the "benefit" and the "advantage" of hearing all the evidence before testifying, enabling him to decide how to "fit" his testimony "into the evidence." Portuondo, 529 U.S. at 64. The Court held these remarks did not violate the rights to be present, confront witnesses, and testify under the Sixth and Fifth Amendment and were proper for the purposes of impeaching the defendant's credibility. Id. at 67, 69.

In State v. Martin, 151 Wn. App. 98, 210 P.3d 345 (2009), rev. granted, 226 P.3d 781 (2010), this Court declined to conduct an independent analysis to determine whether this practice violates the broader provisions of article 1, section 22 of the Washington Constitution. Given the Washington Supreme Court's grant of review in Martin, this Court should reconsider its holding in Martin.

b. The Washington Constitution offers broader protections in this regard than the United States Constitution. An analysis of Gunwall² factors—in particular, the first four—reveals that article 1, section 22 provides greater protection for the rights to

² State v. Gunwall set forth six factors to guide the Court in determining whether a state constitutional protection affords greater rights than a similar federal provision: (1) the textual language of the state constitution; (2) significant differences in the texts of parallel provisions of the federal and state constitutions; (3) state constitutional and common law history; (4) preexisting state law; (5) differences in structure between the federal and state constitutions; and (6) matters of particular state interest or local concern. 106 Wn.2d 54, 61-62, 20 P.2d 808 (1986).

appear, defend, testify, and confront than the Sixth and Fifth Amendments.

i. Significant differences in the texts of article 1, section 22 and the Sixth Amendment show the former is more protective. Article 1, section 22 expressly guarantees the rights "to appear and defend in person[,] to testify in his own behalf, to meet the witnesses against him face to face, [and] to have compulsory process to compel the attendance of witnesses in his own behalf." Of these, only the rights to compel and confront witnesses are explicitly included in the United States Constitution.³ The federal rights to appear and to present a defense are not explicit, but derived from the rights to confrontation and due process. United States v. Gagnon, 470 U.S. 522, 526, 105 S.Ct. 1482, 84 L.Ed.2d 486 (1985); Davis v. Alaska, 415 U.S. 308, 320, 94 S.Ct. 1105, 39 L.Ed.2d 347 (1974). Similarly, the federal right to testify is not spelled out in any amendment but derived from the Sixth and Fourteenth Amendments and as a corollary to the Fifth Amendment's guarantee of freedom from self-incrimination. Rock v. Arkansas, 483 U.S. 44, 51, 107 S.Ct. 2704, 97 L.Ed.2d 37 (1987)

³ The Sixth Amendment provides, "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence."

(citing Faretta v. California, 422 U.S. 806, 819, n. 15, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975); Ferguson v. Georgia, 365 U.S. 570, 602, 81 S.Ct. 756, 5 L.Ed. 783 (1961)). Thus, a stark textual difference is apparent as to all three.

Martin dismissed the textual difference as a "distinction of no moment." Martin, 151 Wn. App. at 111. But it is precisely distinctions of this sort which merit an independent analysis:

The text of the state constitution may provide cogent grounds for a decision different from that which would be arrived at under the federal constitution. *It may be more explicit or it may have no precise federal counterpart at all.*

Gunwall, 106 Wn.2d 54 at 61 (emphasis added).

Recently the Washington Supreme Court (finding article 1, section 22, unlike the Sixth Amendment, provides the right to self-representation on appeal), relied on a textual distinction that is functionally identical to the one at issue here:

The very deliberate choice to include a right to appeal among the panoply of other personally held rights . . . provides some historical evidence favoring recognition of a right of self-representation on appeal.

State v. Rafay, 167 Wn.2d 644, 651, 222 P.3d 86 (2009). Logically, an implied right has a different character than an explicit right:

Because an implied right is a matter of interpretation, it is not immune from further interpretation and modification. Indeed, the Supreme Court has engaged in considerable reinterpretation of the rights of those accused of crimes

since Faretta. By contrast, the right of self-representation under the Washington Constitution is clear and explicit. We conclude that *the differences in the text of the constitutional provisions have great significance in determining what is required to effectuate those rights.*

State v. Silva, 107 Wn. App. 605, 619, 27 P.3d 663 (2001) (finding greater right to self-representation under article 1, section 22) (emphasis added).

The Supreme Court employed the same analysis in Gunwall itself. There, this Court held the express protection of “private affairs” in article 1, section 7 was greater than the Fourth Amendment’s implied privacy protections. Gunwall, 106 Wn.2d 54 at 65. The explicit guarantee of “the right to testify in [one’s] own behalf” and to “appear and defend in person” in article 1, section 22 is at least as specific as the “private affairs” protected by article 1, section 7. Both sections expressly protect rights that are implied but not explicitly stated in the federal constitution. While this distinction in Gunwall led to the conclusion that article 1, section 7 suggests broader protections than the Fourth Amendment, the Court of Appeals in Martin failed to explain why the same type of distinction should not suggest that article 1, section 22 also provides broader protection than the Sixth Amendment.

The Court of Appeals did not consider the textual differences regarding the rights to be present and present a defense. But these rights are distinct from the right to testify and just as central to this appeal. Mr. Yohannes heard the testimony of all the State's witnesses and had access to discovery not because he devised a nefarious scheme or manipulated the court, but because that is how our criminal justice system is organized. See, e.g., CrR 3.4,⁴ 4.7(a).⁵ If a defendant were prohibited from viewing discovery, required to leave the courtroom during the testimony of the State's witnesses, or compelled to testify first, the Supreme Court would surely find article 1, section 22 was violated—but he would have avoided accusations of tailoring. He could have also avoided accusations of tailoring by choosing, for example, to appear but not to testify, or to testify but not to view the discovery—the classic "Hobson's choice."⁶

⁴ CrR. 3.4(a) generally requires the defendant's presence "at every stage of trial" (with some exceptions). CrR 3.4(c) also provides for issuance of a bench warrant if the defendant is not present when required.

⁵ CrR 4.7(a) describes the prosecutor's obligation to provide evidence to defendant and to disclose to defense counsel any exculpatory information within in her knowledge. CrR 4.7(h)(3) permits defense counsel to provide a copy of discovery to the defendant after any appropriate redactions are made.

⁶ See, e.g. State v. Michielli, 132 Wn.2d 229, 244-45, 937 P.2d 587 (1997) (forced choice between right to speedy trial and right to present a defense); State v. King, 75 Wn. App. 899, 878 P.2d 466 (1994) (court must balance prejudicial vs. probative effect of prior conviction to prevent "archetypical Hobson's choice"); State v. Rich, 63 Wn. App. 743, 821 P.2d 1269 (1992) (forced

But article 1, section 22 guarantees all of these rights; it cannot require the defendant to choose among them. Mr. Yohannes' exercise of the rights to appear and to present a defense opened him up to accusations of tailoring; they are therefore implicated and should be subjected to Gunwall analysis. The explicit inclusion of these rights in article 1, section 22 and the lack of such language in the Sixth Amendment have "great significance in determining what is required to effectuate those rights." Silva, 107 Wn. App. at 619.

Accusations of tailoring also burden the right to confrontation. While the Sixth Amendment guarantees the right to confront witnesses without describing how it is to be achieved, article 1, section 22 specifies the method of confrontation as "face to face." In State v. Pugh, 167 Wn.2d 825, 835, 225 P.3d 892 (2009), the Supreme Court unequivocally concluded courts must conduct an independent analysis of article 1, section 22's right to confrontation. The problem here was not whether the defendant had a right to confront an absent prosecution witness, as in Pugh, but the cost of confronting witnesses who testified at trial: "an

choice between agreeing to mistrial or continuing under unduly prejudicial circumstances).

automatic burden on his credibility." Portuondo, 529 U.S. at 76, 79 (Ginsberg, J., dissenting).

At the very least, article 1, section 22's express language demonstrates the framers' intent to provide stronger protection to defendants than the Sixth Amendment. The framers of the Washington Constitution were aware of the federal constitution when they adopted more specific language. Foster, 135 Wn.2d. at 485 (Johnson, J., dissenting). In addition to the rights named above, article 1, section 22 lists other rights not included in the Sixth Amendment, such as the right to have a copy of the charge and to appeal. Id. at 485-86; see also Rafay, at 651-52. The greater detail of article 1, section 22 merits a broader interpretation than that given to the Sixth Amendment.

Even without clear textual difference, the Hawai'i Supreme Court recently reached the same conclusion. State v. Mattson, 226 P.3d 482, 2010 WL 971791 (Haw. 2010). The court found generic accusations of tailoring, although permissible under Portuondo, violated article 1, section 14 of the Hawai'i Constitution.⁷ Id. at 496.

⁷ Article 1, section 14 of the Hawai'i Constitution provides:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial by an impartial jury of the district wherein the crime shall have been committed, which district shall have been previously ascertained by law, or of such other district to which the

The court adopted the reasoning of the Portuondo dissent to hold such accusations "burden the defendant's constitutional right to be present at trial and could discourage a defendant from exercising his constitutional right to testify in his own behalf." Id.

Importantly, Hawai'i's article 1, section 14 is much more limited than Washington's article 1, section 22. The Hawai'i Constitution includes a right to compulsory process substantially similar to Washington's, but it does not mention the right to appear, to present a defense, or to testify. Even the confrontation right is more narrowly drawn; it does not include "face to face" confrontation as in Washington, and is explicitly curtailed to protect victims' privileged confidential information. If generic accusations of tailoring cannot pass muster in Hawai'i, surely they cannot here.

prosecution may be removed with the consent of the accused; to be informed of the nature and cause of the accusation; to be confronted with the witnesses against the accused, provided that the legislature may provide by law for the inadmissibility of privileged confidential communications between an alleged crime victim and the alleged crime victim's physician, psychologist, counselor or licensed mental health professional; to have compulsory process for obtaining witnesses in the accused's favor; and to have the assistance of counsel for the accused's defense. Juries, where the crime charged is serious, shall consist of twelve persons. The State shall provide counsel for an indigent defendant charged with an offense punishable by imprisonment.

ii. State constitutional and common law history and preexisting Washington law show the framers' intent that article 1, section 22 be more protective than the Sixth Amendment. Article 1, section 22 was copied from the Oregon and Indiana constitutions. Foster, 135 Wn.2d at 474, 485 (citing Robert F. Utter, Freedom and Diversity in a Federal System: Perspectives on State Constitutions and the Washington Declaration of Rights, 7 U. Puget Sound L. Rev. 491, 496-97 (1984)). At that time the Sixth Amendment had not yet been interpreted to guarantee the right to appear, to present a defense, or to testify. Gagnon, 470 U.S. at 526; Davis, 415 at 308; Rock, 483 U.S. at 51-53. The framers chose to model article 1, section 22 not after the Bill of Rights, but after state constitutions which explicitly listed those rights the framers wished to protect.

Although Maine, in 1864, was the first state to make defendants competent witnesses, other states "attempted to limit a defendant's opportunity to tailor his sworn testimony by requiring him to testify prior to his own witnesses." Portuondo, 529 U.S. at 66 (citing 3 J. Wigmore, Evidence §§ 1841, 1869 (1904); Ky. Stat., ch. 45, § 1646 (1899); Tenn. Code Ann., ch. 4, § 5601 (1896)). Yet in 1889, Washington had no such requirements, and the right to be

present and testify at trial was already established in our Constitution.

Martin considered irrelevant the fact that "recognition of a federal constitutional right to testify developed [more] slowly" than the state right. Martin, 151 Wn. App. at 117. But the Washington Supreme Court, examining the history of article 1, section 22, emphasized the fact that

Washington was the first state to set forth an express right to appeal among the rights of the accused From this we may fairly surmise that where an appeal is concerned, the framers of our constitution intended to provide for broader rights under article 1, section 22 than those guaranteed under the Sixth Amendment.

Rafay, 167 Wn.2d at 651 (internal citations omitted). By the same logic, the Washington framers' early and explicit recognition of the rights to appear, to present a defense, and to testify, when the federal constitution did not, also evinces the intent to provide broader protection for that right. Allowing the State to burden these rights offends the framers' purpose.

Washington Courts have repeatedly condemned practices that burden the exercise of other constitutional rights.⁸ For

⁸ See, e.g. State v. Belgarde, 110 Wn.2d 504, 511, 755 P.2d 174 (1988) (prosecutor may not comment on defendant's post-arrest silence); City of Seattle v. Brenden, 8 Wn. App. 472, 474, 506 P.2d 1314 (1973) (no penalty can be imposed for the exercise of the right to appeal under article 1, section 22); State v. Montgomery, 105 Wn. App. 442, 446, 17 P.3d 1237 (2001) (defendant "may

example, when a prosecutor is permitted to comment on a defendant's exercise of his right to silence, "the accused effectively has lost the right to silence." State v. Easter, 130 Wn.2d 228, 238, 922 P.2d 1285 (1996). Such practice is "fundamentally unfair." State v. Evans, 96 Wn.2d 1, 3, 633 P.2d 83 (1981). The same principles compel the same holding here.

c. Reversal is required. Since the accusations violated a bundle of constitutional rights, they are subject to constitutional harmless error review. Arizona v. Fulminante, 499 U.S. 279, 295, 111 S.Ct. 1246, 113 L.Ed.2d 302 (1991). The conviction must be reversed unless the State demonstrates beyond a reasonable doubt the error did not contribute to the verdict. Chapman v. California, 386 U.S. 18, 24, 26 87 S.Ct. 824, 17 L.Ed.2d 705 (1967). If, without the constitutionally forbidden remarks, honest, fair-minded jurors might have acquitted Mr. Yohannes, the error cannot be deemed harmless. Id. at 25-26.

The State cannot meet that burden. The prosecutor's comments implying Mr. Yohannes "lied" on the stand and tailored his testimony to fit the evidence presented, were extensive and seriously undercut the credibility of Mr. Yohannes' testimony. First,

not be subjected to more severe punishment for exercising his constitutional right to stand trial").

during cross-examination of Mr. Yohannes, the prosecutor asked him, "What did you do to prepare for your testimony today?"

2/26/09RP 15. Mr. Yohannes answered that he talked to his lawyer, who reviewed the questions he would be asking.

2/27/09RP 15. The prosecutor then asked, "You had a chance to look over the police reports and everything with your attorney, correct?" 2/27/09RP 15. Mr. Yohannes denied doing so.

2/27/09RP 15.

Second, in closing argument, the prosecutor repeatedly and explicitly portrayed Mr. Yohannes as a liar who tailored his testimony. She argued Ms. Araya was a "credible" witness who "didn't make up answers, unlike the defendant." 2/27/09RP 34. She called Mr. Yohannes a "cheat" and a "bad liar." 2/27/09RP 40. She said his testimony was "a manufactured story tailored to fit the evidence as it came out at trial, just to try to pull the wool over your eyes." 2/27/09RP 40-41. In rebuttal, she repeated this characterization, calling Mr. Yohannes' testimony "a completely manufactured story tailored to fit the evidence." 2/27/09RP 87.

Later, she stated,

Obviously, he is lying. But why would he lie?
Because he knows exactly what happened, exactly what he did, and he can tailor his testimony and mold it around the evidence that was presented at trial to

try to talk his way out of this; talk his way out of what he did to Lia.

2/27/09RP 92-93.

As the prosecutor recognized, the case came down to a credibility contest between the complaining witness and the defendant. As discussed in the previous section, Ms. Araya's testimony and hearsay statements contained numerous inconsistencies, indicating she was not telling the whole truth. Contrary to the prosecutor's representations, she was *not* a "credible" witness who "didn't make up answers." 2/27/09RP 34. The prosecutor's repeated suggestions that Mr. Yohannes tailored his testimony undercut his credibility while bolstering the credibility of the complaining witness.

In the end, the assessment of Mr. Yohannes' credibility was for the jury alone. But the prosecutor tried to tip the scales by emphasizing Mr. Yohannes had seen the discovery, sat through the trial, and heard all the evidence. The sole purpose of these questions and comments was to accuse Mr. Yohannes of lying and tip the balance of credibility towards the State, but it was possible only because Mr. Yohannes exercised his rights. The conviction should be reversed.

3. THIS COURT SHOULD EXERCISE ITS INHERENT SUPERVISORY POWER TO BAR SUCH ACCUSATIONS⁹

a. This Court has the power to supervise the lower courts and fashion rules for the administration of fair trials. In Portuondo, the United States Supreme Court invited the state courts to continue to review whether a prosecutor may argue or imply that a defendant has tailored testimony.

Our decision . . . is addressed to whether the comment is permissible as a constitutional matter, and not to whether it is always desirable as a matter of sound trial practice. The latter question . . . [is] best left to trial courts, and to the appellate courts which routinely review their work.

Id. at 763 n.4; see also id. at 76 (Justice Stevens, concurring, clarifying that decision does not "deprive States or judges of the power either to prevent such argument entirely or to provide juries with instructions that explain the necessity, and the justifications, for the defendant's attendance at trial"). Despite the concerns expressed by the concurring and dissenting Justices, the Supreme Court could not have engaged in such supervision itself, but could invite the States to do so.

Washington courts have a history of using their supervisory powers to maintain sound judicial practice. The Supreme Court

⁹ This issue is also currently pending in the Washington Supreme Court in State v. Martin, No. 83709-1.

has recognized its "inherent rulemaking powers as 'an integral part of the judicial process.'" State v. Fitzsimmons, 94 Wn.2d 858, 859, 620 P.2d 999 (1980) ("Fitzsimmons II") (quoting State v. Smith, 84 Wn.2d 498, 502, 527 P.2d 674 (1974)). In Fitzsimmons, the court initially held that "both justice court rules and constitutional case law" required the defendant be given access to counsel as soon as possible after being arrested and charged. State v. Fitzsimmons ("Fitzsimmons I"), 93 Wn.2d 436, 441, 610 P.2d 893 (1980), remanded by Washington v. Fitzsimmons, 449 U.S. 977, 101 S.Ct. 390, 66 L.Ed.2d 240 (1980). On remand, the court clarified that its "discussion of constitutional law merely helps demonstrate the application and effect of the court rules that provide the rationale for" its earlier ruling, but that the opinion was based on state court rules and the Court's "*inherent rulemaking powers*," not the Constitution. Fitzsimmons II, 94 Wn.2d at 859 (emphasis added).

The Washington Supreme Court has similarly used its supervisory powers to condemn other practices that result in unfair trials. See, e.g. State v. Bennett, 161 Wn.2d 303, 306, 165 P.3d 1241 (2007) (disapproving WPIC jury instruction); State v. Fields, 85 Wn.2d 126, 130, 530 P.2d 284 (1975) (reversing trial court order quashing summons and suppressing evidence obtained thereto);

State v. Bonds, 98 Wn.2d 1, 13, 653 P.2d 1024 (1983) ("If . . . potential liability does not constitute sufficient deterrence of police officers' making unauthorized excursions into another jurisdiction, let it be understood that we will not hesitate in the future to use our supervisory power to exclude the fruits of such unauthorized excursions").

In Martin, this Court illogically declined to consider its supervisory power because it found no "constitutional infirmity." Martin, 151 Wn. App. at 117 n.10. But supervisory power can only be exercised if constitutional error is *not* found. If constitutional error is found, there is no need to reach the alternative argument. If not, the Court must consider whether it should exercise its supervisory powers. Constitutional infirmity or no, courts have a principled basis to adopt rules barring prosecutorial practices that undermine the goal of a fair trial.

b. To ensure sound practice and fair trials, this Court should prohibit prosecutors from implying a defendant lied in his testimony based on the exercise of his rights. Prior to Portuondo, this Court held "a prosecutor's comments about the defendant's unique opportunity to be present at trial and hear all the testimony against him" violated the Sixth Amendment. Johnson, 80 Wn. App.

at 341. This holding was clarified in Smith, 82 Wn. App. at 335. There, unlike in Johnson and the instant case, the prosecutor did not bring attention to the defendant's presence at trial and ability to hear all the testimony, but only asked him about his review of the evidence and accused him of tailoring his testimony to that evidence. Id. at 334. The Court found no misconduct, explaining, "the State may not argue that a defendant, by sitting in the courtroom throughout the trial, has gained the *unique opportunity* to tailor his testimony," but the questions in this case only "raised an inference from Smith's testimony," not the exercise of his rights to be present and testify. Id. at 335 (emphasis in original).

Together, Smith and Johnson held a "prosecutor may comment on a witness's credibility so long as the remarks are based on the evidence and are not a personal opinion" and are not "focused on the exercise of the constitutional right itself." Id. (quoting Johnson, 80 Wn. App. at 339, 341). Portuondo overruled those holdings with regard to the Sixth Amendment, but the reasoning in both opinions recognizes the danger inherent in such loaded accusations based on the exercise of constitutional rights and evinces a concern for protecting the promise of a fair trial from that danger. Even after Portuondo, this reasoning is just as sound.

As in Fitzsimmons II, the constitutional analysis of Johnson and Smith is "persuasive" and "supportive of the 'independent and adequate state ground'" found in this Court's inherent supervisory powers and duties. Fitzsimmons II, 94 Wn.2d at 859 (internal citations omitted).

On similar principles, other courts have taken up Portuondo's invitation to decide whether such accusations are sound trial practice.

The New Jersey Supreme Court affirmed its bright-line rule: "a blanket prohibition against a prosecutor's 'drawing the jury's attention to defendant's presence during trial and his concomitant opportunity to tailor his testimony.'" State v. Feal, 194 N.J. 293, 298, 944 A.2d 599 (2008) (quoting State v. Daniels, 182 N.J. 80, 98, 861 A.2d 808 (2004)). In Daniels, the New Jersey Court acknowledged Portuondo, and declined to address the issue under the state constitution, but nonetheless reversed the conviction. Id. at 88. The Daniels court recognized its responsibility "to exercise its supervisory authority over criminal trial practices in order to curb government actions that are repugnant to the fairness and impartiality of trials," and determined that function was warranted where prosecutorial misconduct interferes with a fair trial. Id. at 96

(internal citations omitted). The court observed that a testifying defendant, like any other witness, is compelled to tell the truth, but at the same time, "a criminal defendant is not simply another witness. Those who face criminal prosecution possess fundamental rights that are essential to a fair trial," including the rights at issue here. *Id.* at 97-98 (internal citations omitted). Relying heavily on the Portuondo concurrence and dissent, the court held:

The defendant's Sixth Amendment right "to be confronted with the witnesses against him" serves the truth-seeking function of the adversary process. Moreover, it also reflects respect for the defendant's individual dignity and reinforces the presumption of innocence that survives until a guilty verdict is returned. The prosecutor's argument in this case demeaned that process, violated that respect, and ignored that presumption. Clearly such comment should be discouraged rather than validated. . . .

Prosecutorial comment suggesting that a defendant tailored his testimony inverts those rights, permitting the prosecutor to punish the defendant for exercising that which the Constitution guarantees. Although, after Portuondo, prosecutorial accusations of tailoring are permissible under the Federal Constitution, *we nonetheless find that they undermine the core principle of our criminal justice system--that a defendant is entitled to a fair trial.*

Id. at 91-92, 98 (citing Portuondo, 529 U.S. at 76, 79 (Stevens, J., concurring; Ginsberg, J., dissenting)) (emphasis added).

The court held that even though the record supported an inference of tailoring, the prosecutor's remarks highlighting the

defendant's opportunity to "craft his version to accommodate" the State's evidence were unfairly prejudicial, requiring reversal. *Id.* at 98-99, 101-02.

The Minnesota Supreme Court also took up Portuondo's invitation:

Although not constitutionally required, the better rule is that the prosecution cannot use a defendant's exercise of his right of confrontation to impeach the credibility of his testimony, at least in the absence of evidence that the defendant has tailored his testimony to fit the state's case. *Without specific evidence of tailoring, such questions and comments by the prosecution imply that all defendants are less believable simply as a result of exercising the right of confrontation.* The exercise of this constitutional right, by itself, is not evidence of guilt.

State v. Swanson, 707 N.W.2d 645, 657-58 (Minn. 2006). The court found the error harmless in Swanson, but reversed a conviction in State v. Mayhorn, 720 N.W.2d 776, 790-91 (Minn. 2006). There, as here, the prosecutor used cross-examination of the defendant to elicit and emphasize the fact that he had reviewed all discovery and heard all the testimony. *Id.* at 790. With "no evidence of actual tailoring," these remarks constituted prejudicial error, requiring reversal. *Id.* In State v. Davis, 735 N.W.2d 674, 682 (Minn. 2007), the court again considered tailoring accusations made during cross-examination, and clarified that the rule announced in Swanson implicates not just the right to confrontation,

but also the rights to appear and present a defense. Finding no evidence of actual tailoring, the accusations were plain error, albeit harmless. Id.

Massachusetts, like Washington, had a firm rule in place before Portuondo. After Portuondo, the Massachusetts Supreme Court used its supervisory authority to reaffirm that rule, holding,

it is impermissible for a prosecutor to argue in closing that the jury should draw a negative inference from the defendant's opportunity to shape his testimony to conform to the trial evidence unless there is evidence introduced at trial to support that argument.

Commonwealth v. Gaudette, 441 Mass. 762, 767, 808 N.E.2d 798 (2004) (citing Commonwealth v. Person, 400 Mass. 136, 140, 508 N.E.2d 88 (1987); Commonwealth v. Beauchamp, 424 Mass. 682, 690-91, 677 N.E.2d 1135 (1997)). The court affirmed the conviction because the evidence supported the accusations, but emphasized the prosecutor's responsibility to argue "within the bounds of evidence" and warned it would not tolerate "generic accusations." Id. at 803. In a case similar to this one, where the prosecutor elicited the defendant's testimony regarding his review of discovery and post-arrest silence, the Court of Appeals held:

We think it is error for a prosecutor to invite the jury to draw the inference that the defendant had used his access to the Commonwealth's evidence before trial

to conform his testimony falsely to fit the evidence against him.

Commonwealth v. Ewing, 67 Mass. App. Ct. 531, 542, 854 N.E.2d 993 (2006). As in the instant case, "the impermissible questions and comments went directly to the heart of the defendant's defense, i.e., that his version of events, and not the complainant's, should be believed," and therefore the error was not harmless. Id. at 545.

The New York Court of Appeals also held, after Portuondo, that prosecutorial accusations of tailoring required reversal. See People v. Brown, 26 A.D.3d 392, 393, 812 N.Y.S.2d 561 (2006) (misconduct included statement that defendant "had all the time in the world to tailor his testimony"); People v. Pagan, 2 A.D.3d 879, 880, 769 N.Y.S.2d 741 (2003) (defendant accused of "lying"); People v. Washington, 278 A.D.2d 517, 518, 718 N.Y.S.2d 385 (2000) (defendant accused of "fabricat[ing]" his defense after having had "the benefit of counsel").¹⁰

As those courts recognized, this practice burdens not just the defendant but the very process of the trial. The defendant has

¹⁰ These decisions are consistent with New York's pre-Portuondo cases finding error in prosecutorial accusations of tailoring. See, e.g., People v. Lewis, 177 A.D.2d 421, 576 N.Y.S.2d 262 (1991); People v. World, 157 A.D.2d 567, 550 N.Y.S.2d 310 (1990); People v. Figueroa, 161 A.D.2d 486, 555 N.Y.S.2d 752 (1990); People v. Bolden, 82 A.D.2d 757, 440 N.Y.S.2d 202 (1981).

an absolute right to be present at his entire trial; in fact, it cannot begin without him. CrR 3.4. The defendant hears the State's evidence before presenting his defense because the State bears the burden of proof and therefore must try its case first. While a defendant could theoretically attempt to waive these rights – absenting himself from his own trial or testifying before the State's witnesses – the court would be under no obligation to grant such waivers. And this would present an agonizing choice for the defendant, forcing him to waive fundamental rights in order to protect himself from the prosecutor's accusations of dishonesty. To allow these accusations is to penalize the defendant for having a trial that was conducted correctly.

When a defendant testifies, his credibility is at issue, like any other witness, and the prosecutor can and should put it to the test. But as the New Jersey Court recognized, a defendant is not just like any other witness. Daniels, 182 N.J. at 97-98. Unlike other witnesses, the defendant is guaranteed the rights to be present during his entire trial, to confront other witnesses face-to-face, and to choose whether to testify. These rights do not dissipate when he takes the stand. While every defendant has the *theoretical* opportunity to tailor his testimony, this Court should not allow the

State to exploit the procedure whenever a defendant exercises his right to testify. "Legitimate objectives may not be pursued by means that needlessly chill the exercise of basic constitutional rights." State v. Eide, 83 Wn.2d 676, 679, 682, 521 P.2d 706 (1974).

These automatic accusations "cannot sort those who tailor their testimony from those who do not, much less the guilty from the innocent." Mattson, 226 P.3d at 496-97 (quoting Portuondo, 529 U.S. at 78, 88 (Ginsburg, J., dissenting)). They can only sort those who have chosen to testify from those who have not, and such accusations inevitably have a chilling effect that will cause the former category to shrink.

This Court should use its inherent supervisory powers to protect the goal and principle of the fair trial by prohibiting prosecutorial accusations of tailoring based on the defendant's exercise of his rights.

4. THE STATE DID NOT PROVE THE ELEMENT OF FORCIBLE COMPULSION, WHERE THE EVIDENCE SHOWS THAT, IF A RAPE OCCURRED, IT OCCURRED WHILE THE COMPLAINING WITNESS WAS UNCONSCIOUS AND THEREFORE INCAPABLE OF RESISTANCE

It is a fundamental principle of constitutional due process that the State must prove every element of a charged offense

beyond a reasonable doubt. Apprendi v. New Jersey, 530 U.S. 466, 477, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000); In re Winship, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970); U.S. Const. amend. 14; Const. art. 1, § 3.

To prove the charged crime in this case, the State was required to prove beyond a reasonable doubt that Mr. Yohannes engaged in sexual intercourse with Ms. Araya "by forcible compulsion." RCW 9A.44.050(1)(a); CP 1 (information); CP 21-22 (jury instructions). "Forcible compulsion" means

physical force which overcomes resistance, or a threat, express or implied, that places a person in fear of death or physical injury to herself or himself or another person, or in fear that she or he or another person will be kidnapped.

RCW 9A.44.010(6); CP 24 (jury instruction).

In determining whether the evidence was sufficient to prove an element of the crime, the question on appeal is whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found the element beyond a reasonable doubt. Jackson v. Virginia, 443 U.S. 307, 319, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979); State v. Green, 94 Wn.2d 216, 221, 616 P.2d 628 (1980).

The evidence in this case was not sufficient to prove the element of forcible compulsion beyond a reasonable doubt, because the evidence shows that, if a rape occurred, it occurred while Ms. Araya was unconscious and therefore incapable of resistance. As stated, to prove the element of forcible compulsion, the State was required to prove Mr. Yohannes used physical force, or the threat of physical force, to overcome Ms. Araya's resistance. RCW 9A.44.010(6); CP 24. "The *force* to which reference is made in forcible compulsion 'is not the force inherent in the act of penetration but the force used or threatened to overcome or prevent resistance by the female.'" State v. McKnight, 54 Wn. App. 521, 527, 774 P.2d 532 (1989) (quoting 3 C. Torcia, Wharton's Criminal Law § 288 at 34 (14th ed. 1980)). The degree of force necessary to constitute forcible compulsion is relative, depending on the circumstances, but must be enough to overcome the victim and have intercourse against her will. McKnight, 54 Wn. App. at 527 (citing Prokop v. State, 148 Neb. 582, 28 N.W.2d 200, 172 A.L.R. 916 (1947)). Thus, "the evidence must be sufficient to show that the force exerted was directed at overcoming the victim's resistance and was more than that which is normally required to achieve penetration." McKnight, 54 Wn. App. at 528.

Here, Ms. Araya testified that Mr. Yohannes raped her while she was lying unconscious on the bed. 2/24/09RP 127-28, 132, 140-42. She did not know how long she had been unconscious. 2/24/09RP 135. When she woke up, she believed she had been raped due to the presence of semen outside her private parts and the pain she felt in her genitals. 2/24/09RP 140, 142. But she never felt or observed Mr. Yohannes having intercourse with her. 2/24/09RP 140, 142. Thus, if a rape actually occurred, Mr. Yohannes did not use force to commit the rape, and Ms. Araya did not resist the rape. The State therefore did not prove "forcible compulsion" as required to prove the charged crime of second degree rape under RCW 9A.44.050(1)(a).

The second degree rape statute provides several different means by which a person can commit the crime in addition to using "forcible compulsion." RCW 9A.44.050(1). Under RCW 9A.44.050(1)(b), a person commits second degree rape if he engages in sexual intercourse with another person "[w]hen the victim is incapable of consent by reason of being physically helpless or mentally incapacitated." "'Physically helpless' means a person who is unconscious or for any other reason is physically unable to communicate unwillingness to an act." RCW

9A.44.010(5). "There is no requirement under RCW 9A.44.050(1)(b) that the State show any force or threat was used to compel the victim." State v. Al-Hamdani, 109 Wn. App. 599, 607, 36 P.3d 1103 (2001).

Thus, the State could have charged Mr. Yohannes with committing second degree rape under RCW 9A.44.050(1)(b). Under that statutory alternative means, the State would have been required to prove only that Mr. Yohannes engaged in sexual intercourse with Ms. Araya while she was "physically helpless" as a result of being unconscious. But because the State charged Mr. Yohannes with committing second degree rape under RCW 9A.44.050(1)(a), the State was required to prove beyond a reasonable doubt that Mr. Yohannes used physical force to overcome Ms. Araya's resistance to the rape. The State was unable to do so, as the evidence shows that, if a rape actually occurred, it occurred while Ms. Araya was unconscious and therefore incapable of resisting the rape. Thus, the conviction must be reversed and dismissed.

E. CONCLUSION

The State did not prove beyond a reasonable doubt that Mr. Yohannes used forcible compulsion and thus the conviction must

be reversed and dismissed. Alternatively, the prosecutor's comments encouraging the jury to convict Mr. Yohannes based on his Eritrean status and calling Mr. Yohannes a liar who tailored his testimony to fit the evidence presented, denied Mr. Yohannes a fair trial and violated article 1, section 22 of the Washington Constitution. Therefore, the conviction must be reversed and remanded for a new trial.

Respectfully submitted this 24th day of May 2010.



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