

63444-5

63444-5

NO. 63444-5-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

AZAZI YOHANNES,

Appellant.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE JUDGE MICHAEL FOX

BRIEF OF RESPONDENT

DANIEL T. SATTERBERG  
King County Prosecuting Attorney

DENNIS J. McCURDY  
Senior Deputy Prosecuting Attorney  
Attorneys for Respondent

King County Prosecuting Attorney  
W554 King County Courthouse  
516 3rd Avenue  
Seattle, Washington 98104  
(206) 296-9650

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COURT OF APPEALS  
DIVISION I

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**A. ISSUES PRESENTED**

1. Could a rational trier of fact have found the defendant guilty of rape in the second degree?

2. Should this Court rule contrary to its own recently decided case, State v. Martin,<sup>1</sup> that the constitution prohibits a prosecutor from arguing that a testifying defendant may be treated just like any other witness; that a factor that the jury may consider in assessing the credibility of a defendant's testimony is the fact that he heard the testimony of the other witnesses before testifying?

3. In the event this Court rejects the defendant's constitutional argument in regards to issue 2 above, should this Court also reject the defendant's alternative argument that the Court should create a "rule" preventing the prosecutor from making the argument that the constitution allows?

4. Did the prosecutor seek a conviction based on racial and cultural prejudices as the defendant claims, or, as the trial court found, is the defendant's allegation unsupported by the facts?

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<sup>1</sup> 151 Wn. App. 98, 210 P.3d 345 (2009), rev. granted, 226 Wn.2d 781 (2010).

**B. STATEMENT OF THE CASE**

**1. PROCEDURAL FACTS**

A jury convicted the defendant of second-degree rape. CP 1-4, 28. He received a standard range minimum term sentence of 78 months. CP 48-57.

**2. SUBSTANTIVE FACTS**

Twenty-six-year-old Lia Araya was born in Eritrea East Africa. 4RP<sup>2</sup> 99. Her husband, 29-year-old Azazi Yohannes, the defendant, was born in Saudi Arabia and began living in the United States when he was just one-and-a-half years old. 6RP 65; 7RP 17. Lia and the defendant met in Eritrea and began dating in 2005, communicating by phone and e-mail when the defendant was living in the United States.<sup>3</sup> 4RP 104.

In 2006, the defendant went to Eritrea and the two were married. 4RP 104-05. Lia immediately moved to the United States,

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<sup>2</sup> The verbatim report of proceedings shall be cited as follows: 1RP--2/18/09, 2RP--2/19/09, 3RP--2/23/09, 4RP--2/24/09, 5RP--2/25/09, 6RP--2/26/09, 7RP--2/26/09 & 2/27/09, 8RP--3/25/09, and 9RP--4/10/09.

<sup>3</sup> It is unclear from the record how much time the defendant spent in Eritrea. Lia testified that the two first met in high school in Eritrea. 4RP 103. Other than this reference to high school, there does not appear to be any testimony about the defendant living in Eritrea or his actual ancestry; whether he is of Saudi decent, Eritrean decent or otherwise.

with the two ultimately moving into a three-bedroom house on Beacon Hill in Seattle. 4RP 105. At the time of this incident, Lia and the defendant had a six-month-old child in common. 4RP 102.

By October of 2008, Lia admitted that she saw no future with the defendant, that the defendant drank a lot, they would fight, and their relationship was "on and off." 4RP 106-07. In fact, Lia mostly slept in another bedroom, had decided to move out, and already had her things packed. 4RP 107.

On the morning of October 10, 2008, Lia was home in bed with her baby when the defendant came home drunk from a night out. 4RP 109-10. The defendant climbed in bed with Lia despite her pleas to go sleep in the other room because he smelled and was drunk. 4RP 110. The defendant ignored her. 4RP 110.

Sometime later Lia got up and picked up the defendant's pants to put them away. 4RP 110. However, in the defendant's pocket were two condoms. 4RP 110. Lia, admitting during trial her anger, confronted the defendant. 4RP 111-12. The defendant began calling Lia foul names and professed that he did not know how the condoms got into his pocket. 4RP 112. The defendant would testify at trial that he was sleeping with another woman. 6RP 76.

At one point the defendant, who stands 6 foot 3 and is 230 pounds approached the 5 foot 5, 115 pound Lia, whereupon Lia threw a plastic baby bottle at the defendant. 4RP 113-15; 6RP 65. The bottle hit the defendant in the lip causing a minor cut. 4RP 113. This angered the defendant and he started "going crazy" trying to grab and hit Lia. 4RP 116-17. Finally, Lia was able to leave the room, going outside to sit in the car with her cell phone and a glass of wine. 4RP 117-19. She warned the defendant that if he touched her, she would call the police. 4RP 120.

A short time later, the defendant came outside, took the car keys from Lia, broke her cell phone, threw part of the phone into a neighbor's yard, and then went back into the house. 4RP 121-22. Lia then went to a neighbor's house, told the neighbor that her husband was drunk and that if she heard any screaming, to call the police. 4RP 122. Lia then went back to the house and she and the defendant started arguing again. 4RP 122.

Lia told the defendant that they were still married and asked why he was cheating on her. 4RP 127. The defendant grabbed Lia and Lia tried to fight back. 4RP 127. The defendant then forced Lia onto the bed and hit her in the head with his fist, bleeding her nose and knocking her unconscious. 4RP 127-29, 133.

The next thing Lia remembers is waking up on the bed naked. 4RP 128. There was something warm on her face and in her ear and blood was all over the bedding. 4RP 132-33. The defendant, also now naked, was touching Lia's neck as if to see if she was still breathing. 4RP 132-33. The fluid on Lia's face and in her ear turned out to be semen. 4RP 134. There was also semen on Lia's crotch area and Lia testified that she had pain in her vagina that felt just like after having intercourse. 4RP 140.

Initially, Lia did not move, being both dizzy and scared. 4RP 135, 137. Ultimately, Lia grabbed a t-shirt and ran to the neighbor's house where she called 911. 4RP 136, 146.

Officer Mark Mullens was the first to arrive on the scene. When he arrived in front of the house, Lia, wearing only a t-shirt, was crying hysterically as she collapsed on to the sidewalk and curled up in a fetal position. 2RP 31. Mullens observed some blood and minor cuts on Lia's face. 2RP 32. Lia told Officer Mullens that she had been knocked unconscious by the defendant and awoke to find him on top of her having intercourse with her. 2RP 36. In providing statements to various individuals that day, Lia was very inconsistent about the timing of events. See e.g., 3RP 20, 77, 93-94; 4RP 51-52; 5RP 53.

Officers contacted the defendant at the door of the residence. 2RP 39. The defendant, who was on the phone, appeared nervous and told the officers that he was calling his attorney. 2RP 39-40. He appeared to be slightly intoxicated. 2RP 44. He was taken into custody after a brief struggle. 2RP 40.

In the bedroom, officers found money on the floor, blood on the floor, blood on the bed, blood on the pillows, blood smeared on the sheets, bloody clothing, a broken phone, and various things knocked over indicative of a struggle having taken place. 2RP 42; 3RP 6; 5RP 149.

Lia was transported to Harborview Medical Center for a sexual assault examination. Although the defendant would testify that the extensive quantity of blood found throughout the bedroom was the result of Lia being on her period--and not from being punched and having a bloody nose--the medical examination showed that Lia was not menstruating at the time of the incident. 4RP 56, 71; 6RP 80.

At the time of the examination, Lia had blood on her face, scratches on her arms and neck, she suffered from a headache and nausea consistent with a blow to the head, and she had fluid that would later test positive for semen on her face, ear, genital

area and anus. 4RP 21, 31-33, 35; 6RP 8-9, 13-15, 18-20. Later that same day while at the local police precinct, Lia began shaking badly, curled up in a fetal position and threw up multiple times. 4RP 91-92.

The defendant testified as the only witness on his behalf. He testified that on the evening of October 9<sup>th</sup>, after Lia went to bed with their son, he and his brother went out for some food and drinks. 6RP 67-68. When he arrived home around 2:00 a.m., Lia was in bed wearing underwear and a bra. 6RP 71. The defendant undressed and climbed in bed with Lia. 6RP 72. The two talked for approximately five minutes about Lia's disappointment with the defendant having gone out drinking. 6RP 72-73.

Shortly thereafter, according to the defendant, the two began kissing, the defendant removed Lia's bra, she removed her underwear, and they engaged in intercourse. 6RP 73-74. Asked about the semen found on Lia's face, the defendant explained that because of the problems with their relationship, he did not want to have another child so he would pull out and ejaculate on Lia, on this occasion, her face. 6RP 74-75. The defendant did not explain how it was that his semen was all over Lia's face some ten hours after he professed they had consensual intercourse.

After ejaculating on her face, the defendant claims the two just "cuddled" and fell asleep together. 6RP 75. However, at approximately 7:00 a.m., the defendant claims he was awakened by Lia slapping him after she found the condoms in his pocket. 6RP 76. He says that Lia then started throwing things at him and that he had to grab her to calm her down. 6RP 77-78. Their son then started crying and the argument stopped. 6RP 78. It wasn't until hours later, the defendant professed, that he even noticed all the blood in the bedroom. 6RP 79-80.

During this time period, the defendant claims Lia had gone outside drinking wine and smoking. 6RP 81-82. He claims that later on Lia took his car keys and drove to the store to get more wine and cigarettes. 6RP 83. When she returned, the defendant went outside, took the car keys from a now purportedly drunk and "disrespectful" Lia and went back inside the house. 6RP 84-86; 7RP 8.

Sometime later, Lia came back into the house and hysterically started screaming at the defendant. 6RP 87. She then went out the front door, telling the defendant she was going to call the police on him. 6RP 89. He says that when the police arrived,

they "manhandled" him, slamming his head into the wall. 6RP 90.

He would testify that he was the victim here. 7RP 15.

Additional facts are included in the sections below.

**C. ARGUMENT**

**1. THERE WAS SUFFICIENT EVIDENCE FOR THE JURY TO FIND THE DEFENDANT GUILTY OF RAPE IN THE SECOND DEGREE.**

A person commits the crime of rape in the second degree by engaging in sexual intercourse with another person by forcible compulsion. The defendant argues that the evidence presented at trial was insufficient for any rational trier of fact to have found that he committed rape by forcible compulsion because he had physically rendered his victim unconscious and therefore she was not actively resisting at the very moment he raped her. This argument has no basis in law, is akin to a closing argument at trial, and should be rejected.

Evidence is sufficient to support a conviction if viewed in the light most favorable to the State, the evidence permits a rational trier of fact to find the essential elements of the crime beyond a reasonable doubt. State v. Tilton, 149 Wn.2d 775, 786, 72 P.3d 735 (2003). A reviewing court will draw all reasonable inferences

from the evidence in favor of the State and interpret the evidence most strongly against the defendant. State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). A factual sufficiency review "does not require the reviewing court to determine whether it believes the evidence at trial established guilt beyond a reasonable doubt but rather only whether any rational trier of fact could be so convinced." State v. Smith, 31 Wn. App. 226, 640 P.2d 25 (1982). A reviewing court must defer to the trier of fact on issues of conflicting testimony, credibility of witnesses, and the persuasiveness of the evidence. State v. Walton, 64 Wn. App. 410, 415-16, 824 P.2d 533, rev. denied, 119 Wn.2d 1011 (1992)).

Here, the State was required to prove that the defendant engaged in sexual intercourse with Lia Araya by forcible compulsion. RCW 9A.44.050; CP 1, 22. In pertinent part, the jury was instructed that "[f]orcible compulsion means physical force which overcomes resistance." CP 24; RCW 9A.44.010(6).

For purposes of this issue, there is certainly a dispute about the facts. The defendant focuses solely on the trial testimony of the victim, Lia Araya. According to Lia's trial testimony, the defendant angrily grabbed her, and using his far superior size and strength, he physically forced Lia down onto their bed. The defendant then

rendered Lia unconscious by hitting her in the head with a closed fist. He then stuck his penis in Lia's mouth and vagina and ejaculated on her face while she was still unconscious.

However, in addition to Lia's trial testimony, statements Lia made during the investigation of the case were admitted as substantive evidence. Admitted as an excited utterance was Lia's statement to responding officers that the defendant punched her in the face rendering her unconscious but that she awoke with the defendant still on top of her, having sexual intercourse against her wishes. 2RP 35-36. Admitted as a statement for purposes of medical diagnoses and treatment was Lia's statement to a medical social worker that "he then grabbed her, pushed her on the bed and held her down by her arms and, in quotes, 'Raped me and came on my face.'" 2RP 77. Also admitted as a statement for purposes of medical diagnoses and treatment was Lia's statement to a Harborview examining nurse practitioner that "he punched her right in the face and she blacked out. When she regained consciousness he was on top of her, sexually assaulting her and holding her down with his body weight and his arms." 4RP 16.

Based on Lia's testimony, the defendant contends that because he knocked Lia unconscious prior to engaging in sexual

intercourse with her, he cannot be convicted of rape in the second degree because Lia was not resisting at the moment he raped her. This claim assumes two things.

First, it assumes that the only evidence consists of Lia's trial testimony that she was knocked unconscious and remained unconscious throughout the course of the rape. However, as shown above, substantive evidence was admitted that while Lia was knocked unconscious, she awoke while the defendant was still raping her and using force to hold her down. Under the standard of proof for a sufficiency of the evidence claim, this alone ends the inquiry.

Second, the defendant assumes that there is a statutory requirement that a rape victim must physically resist at the very moment of penetration and/or that the resistance continue throughout the perpetration of the rape. However, the statute contains no such temporal requirement and importing such a requirement into the statute would lead to an absurd interpretation.

By its very words, the statute requires merely that a perpetrator engage in sexual intercourse by forcible compulsion; the forcible compulsion being the use of physical force which overcomes resistance. RCW 9A.44.050; RCW 9A.44.010(6). The

statute does not require that the physical force and resistance must occur at the very moment the act of penetration occurs. Rather, the statute merely requires that the force used is directed at overcoming resistance allowing the perpetrator to have intercourse with the victim.

Here, there is no question that the victim was physically resisting the defendant, that the defendant then rendered the victim unconscious, and that this then allowed him to have intercourse with his victim. In short, the defendant's violent act of striking Lia and knocking her unconscious was the physical force that allowed him to have intercourse with her. The statute requires no more. See State v. McKnight, 54 Wn. App. 521, 527-28, 774 P.2d 532 (1989).

To import the requirement argued by the defendant would lead to an absurd interpretation of the statute. Under the defendant's interpretation, if a perpetrator used minimal force, thus allowing his victim the ability to actively resist, then he could be convicted of second-degree rape by forcible compulsion. However, if a perpetrator's use of force was so great as to render his victim

incapable of further resistance when he actually engages in his act of intercourse, then he cannot be convicted of second-degree rape by forcible compulsion because his victim did not resist at the moment the intercourse occurred. There is nothing about the statute to suggest the Legislature intended such a limitation and the language of the statute does not support such a reading. Rather, the only requirement regarding the degree of force is that the forcible compulsion must be more than the force necessary for the act of penetration. McKnight, 54 Wn. App. at 527.

When the evidence is viewed in the light most favorable to the State, the defendant cannot prevail here. The evidence shows Lia physically resisted the defendant, that he physically forced her down onto his bed, that he then struck her in the head rendering her unconscious, and thus he was able to rape her. The evidence also shows that while still raping Lia, she regained consciousness and was held down by the defendant as he continued to rape her. That is what the State was required to prove and what a reasonable jury could find.

**2. A PROSECUTOR IS PERMITTED TO DISCUSS AND TREAT A DEFENDANT'S TESTIMONY JUST LIKE HE OR SHE CAN DISCUSS AND TREAT THE TESTIMONY OF ANY OTHER WITNESS.**

The defendant contends it was improper for the prosecutor to discuss in closing that the jury could evaluate the defendant's testimony just like any other witness, including the fact that the defendant had the opportunity to observe other witnesses' testimony before he testified. This issue has been waived and the prosecutor's argument is permissible under existing case law.

During closing argument, the prosecutor made the following argument:

Mr. Garrett [defense counsel] is going to get up here and tell you how believable the defendant's story is.

And apply the same instruction, the credibility instruction, when you determine whether or not you think that the defendant's story is credible or whether or not you think it is a manufactured story tailored to fit the evidence as it came out at trial, just to try to pull the wool over your eyes.

7RP 40-41. The prosecutor repeated this argument in rebuttal.

See 7RP 87, 90, 92-93. The prosecutor also asked the defendant during cross whether he had looked over the police reports--an assertion he denied. 7RP 15. The defendant never raised an objection to the State's arguments or questions.

The standard to be applied where a defendant claims that a trial irregularity<sup>4</sup> occurred is concisely articulated in State v. Russell, 125 Wn.2d 24, 882 P.2d 747 (1994).

Where improper argument is charged, the defense bears the burden of establishing the impropriety of the prosecuting attorney's comments as well as their prejudicial effect. Reversal is not required if the error could have been obviated by a curative instruction which the defense did not request.

Allegedly improper arguments should be reviewed in the context of the total argument, the issues in the case, the evidence addressed in the argument, and the instructions given. Remarks of the prosecutor, even if they are improper, are not grounds for reversal if they were invited or provoked by defense counsel and are in reply to his or her acts and statements, unless the remarks are not a pertinent reply or are so prejudicial that a curative instruction would be ineffective.

Lastly, failure to object to an improper remark constitutes a waiver of error unless the remark is so flagrant and ill intentioned that it causes an enduring and resulting prejudice that could not have been neutralized by an admonition to the jury. In other

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<sup>4</sup> The defendant does not articulate the standard of review on appeal. This is not a "trial error" case. There was no improperly admitted or excluded evidence. Rather, the defendant alleges a "trial irregularity." See State v. Evans, 96 Wn.2d 1, 633 P.2d 83 (1981) for an explanation of the difference between a "trial irregularity" (e.g., improper argument or questioning) and a "trial error" (e.g., improperly admitted evidence).

In Evans, evidence was improperly admitted regarding Evans' post-arrest silence—a trial error with the error reviewed under a constitutional error standard. Evans, 96 Wn.2d at 3. However, the prosecutor's argument concerning Evans' post-arrest silence was reviewed under the regular misconduct standard because the issue is one of due process—the right to a fair trial and the propriety of the State's argument, not whether the defendant's constitutional rights were violated. Evans, at 5. Like here, the defendant's right to be present at trial was not violated; rather, the issue is the propriety of the question and argument made by the prosecutor.

words, a conviction must be reversed only if there is a substantial likelihood that the alleged prosecutorial misconduct affected the verdict.

Russell, 125 Wn.2d at 85-87, see also State v. Davenport, 100 Wn.2d 757, 675 P.2d 1213 (1984); State v. Weber, 99 Wn.2d 158, 659 P.2d 1102 (1983).

Ten years ago, the United States Supreme Court ruled in Portuondo v. Agard,<sup>5</sup> that defendants who testify at trial can be treated just like any other witness who testifies; their credibility can be called into question for all the same reasons as any other witness. In other words, argument that a defendant's testimony is less credible because he had the opportunity to hear the other witnesses and tailor his testimony accordingly "does not infringe upon any rights guaranteed by the United States Constitution." State v. Miller, 110 Wn. App. 283, 40 P.3d 692 (citing Portuondo, supra), rev denied, 147 Wn.2d 1011 (2002).

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<sup>5</sup> 529 U.S. 61, 120 S. Ct. 1119, 146 L. Ed. 2d 47 (2000).

Recently, the defense bar has attempted to circumvent the decision in Portuondo by claiming that the same closing arguments held valid under the United States Constitution would not be valid under the Washington State Constitution. However, this Court has specifically rejected this argument. See Martin, supra.

Rather than discussing the propriety of being able to raise this issue for the first time on appeal, the defendant instead launches straight into a Gunwall<sup>6</sup> analysis comparing article I, section 22 of the Washington Constitution and the Sixth Amendment. Yet, the defendant must overcome the fact that under the current state of the law, the argument made here is perfectly appropriate under both the United States Constitution and the Washington State Constitution and that he never objected below.

Failure to object to improper argument constitutes waiver unless the improper argument was flagrant and ill-intentioned. Russell, at 85-87. Even if the Supreme Court were ultimately to reverse the Martin case, the prosecutor's argument here cannot be

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<sup>6</sup> Referring to State v. Gunwall, 106 Wn.2d 54, 720 P.2d 808 (1986).

said to have been flagrant and ill-intentioned when the argument comports with existing law. In short, this issue has been waived.<sup>7</sup>

In any event, the defendant's claim that the type of argument made here violates the state constitution fails.

a. **A Gunwall Analysis.**

Whether the state constitution provides broader protection than its federal counterpart is dependent on the context to which it is applied. Both the United States Constitution and the Washington State Constitution guarantee criminal defendants the right to be present at trial and to confront and cross-examine adverse witnesses. U.S. CONST. amend. VI; Wash. Const. art. I, § 22; State v. Smith, 148 Wn.2d 122, 131, 59 P.3d 74 (2002).

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<sup>7</sup> A month after he was convicted, at a pre-sentencing hearing, defense counsel told the court: "I didn't brief this part of it but I wanted to -- the record to reflect in case this does go up on appeal, one, that other issue that I think was -- was a misconduct, is that in -- counsel basically called Mr. Yohannes a complete liar in her closing argument by saying he had the opportunity to sit here, listen to everyone's testimony, and fashion his testimony accordingly. And I'll end it there." 8RP 13. Counsel did not ask for a ruling from the trial court and none was forthcoming. This is insufficient to preserve the issue for appeal--there was never a court ruling or timely objection allowing the trial court to correct the alleged error. See State v. Avendano-Lopez, 79 Wn. App. 706, 710, 904 P.2d 324 (1995) (a party must make a timely objection), rev. denied, 129 Wn.2d 1007 (1996); State v. Guloy, 104 Wn.2d 412, 421, 705 P.2d 1182 (1985) ("a litigant cannot remain silent as to claimed error during trial and later, for the first time, urge objections thereto").

In determining whether the Washington State Constitution should be considered as extending broader rights to its citizens than does the United States Constitution, the court will consider the following nonexclusive criteria: (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) whether the matter is of particular state interest. State v. Gunwall, 106 Wn.2d 54, 61-62, 720 P.2d 808 (1986). This Court rejected a similar Gunwall claim in Martin. See Martin, 151 Wn. App. at 107-17.

**i. The textual language of the two provisions.**

The first and second Gunwall factors involve the textual language of the two provisions. Article I, section 22 guarantees a defendant the right "to meet the witnesses against him face to face." The Sixth Amendment guarantees the right "to be confronted by the witnesses against him." Recently, the Supreme Court held that while the text of the provisions differ, for purposes of

confronting a witness, the rights under both provisions are identical. State v. Foster, 135 Wn.2d 441, 957 P.2d 712 (1998).

Foster involved the constitutionality of allowing a child victim to testify via one-way closed circuit television under certain circumstances. The Court looked at the two provisions and found the scope to be identical in terms of the right of a defendant to meet the witness face to face or confront the witness against him. Here, the different textual language suggests no differing rights. Both provisions mean the same thing, to "meet" or "confront" the witness, the defendant must be present. Because the meaning in this context is identical, the textual differences do not justify independent review.

**ii. The constitutional and common law history.**

The third fact, the constitutional and common law history, does not support the notion that article I, section 22 of the state constitution is any broader than its federal counterpart. In Foster, the majority, concurrence/dissent and dissent all agreed that the history of the state confrontation provision yields no information at all other than that it was lifted from the Oregon and Indiana

constitutions. See Foster, 135 Wn.2d at 460, 477, 487-88. This is consistent with the United States Supreme Court's finding that there is no evidence any state attempted to affirmatively forbade comments on a defendant's opportunity to tailor his testimony to the testimony provided by other witnesses. See Portuondo, 529 U.S. at 65-67.

**iii. Pre-existing state law.**

Pre-existing Washington law supports a finding that article I, section 22 provides identical rights as the Sixth Amendment regarding the permissible scope of cross examining a testifying defendant--and thus any resulting argument to be made therefrom.

Washington code of 1881, § 1067 (currently enacted at RCW 10.52.040) is the statute that permitted a defendant to testify on his own behalf. It states in part:

and any person accused of any crime in this territory by indictment or otherwise, may in the examination or trial of the cause, offer himself or herself as a witness in his or her own behalf, and shall be allowed to testify as other witnesses in such case, and when such accused shall so testify he or she shall be subject to all the rules of law relating to cross examination of other witnesses...

Washington code of 1881, § 1067.

During cross examination a party is permitted to inquire into facts that diminish the personal trustworthiness of the witness.

State v. Robideau, 70 Wn.2d 994, 997, 425 P.2d 880 (1967).

Washington has a long history of permitting cross examination into matters that bear on a defendant's credibility. See State v.

Peeples, 71 Wash. 451, 458, 129 P. 108 (1912) (the Court found

no constitutional error when the prosecutor cross examined the defendant charged with forgery regarding his passing of forged

papers on other occasions); Robideau, 70 Wn. App at 998 (no

violation when prosecutor asked the defendant whether he told the police about his alibi witness he just testified about).

As the Supreme Court stated in 1930:

A defendant in a cause has no special privileges when he offers himself as a witness on his own behalf. His credit as a witness may be tested and his testimony impeached in the same manner and to the same extent as that of any other witness. While under the Constitution he cannot be compelled to give evidence against himself, it is not to violate the rule to ask him concerning his connection with other offenses similar to that for which he is on trial.

State v. Hollister, 157 Wash. 4, 7, 288 P. 249 (1930).

The territorial law as it existed before statehood shows that Washington provides no greater protection to testifying defendants.

**iv. The structural differences and whether matters of particular local concern are at issue.**

The fifth Gunwall factor is of no moment here. As the Supreme Court has noted, the structural differences support an independent analysis but that it is the same in every case. Martin, at 115 (citing Foster, at 458). In short, the United States Constitution is a grant of limited power to the federal government while the state constitution imposes limitations on the plenary power of the state. Id. However, there is no indication that this difference is a difference with meaning in this situation. Martin at 115.

The sixth factor likewise is a non-factor here. There is no evidence that ensuring that criminal defendants be permitted to testify without full cross examination or argument concerning their testimony is a matter of any particular local concern.

Taken to total, there does not appear to be any reason under the Gunwall factors to support an independent analysis of article I, section 22. This is the same result reached in Martin, supra. As such, the decision in Portuondo is controlling.

However, even were article I, section 22 considered to be broader than the protections of the Sixth Amendment, there is

nothing in article I, section 22, or its history that suggests an application different than the Sixth Amendment in the situation herein. While one may argue, as did the dissent in Foster, that "face to face" means literally what it says--a witness must be in the courtroom face to face with the defendant--this greater protection has nothing to do with a defendant testifying and being treated just like any other witness.

With there being no prohibition on cross examining a testifying defendant, there can be no misconduct for arguing to a jury concerning the credibility of a defendant's testimony just as either party can argue concerning the testimony of any other witness. The defendant's argument fails and his attempt to preserve the issue is without merit.

**3. THE DEFENDANT'S REQUEST THAT THIS COURT ENACT A NEW RULE OF LAW IS WAIVED AND MISGUIDED.**

In the event this Court affirms that a defendant who elects to testify can be treated like any other witness, the defendant asks this Court to enact a rule of law that would bar the State from arguing that the credibility of a defendant's testimony may be based on the defendant's ability to observe other witnesses prior to taking the

stand. This argument is misguided. The defendant never raised this issue below. This Court has no such rulemaking authority. And this Court should be loathe to substitute its judgment for the drafters of the Constitution who made permissible the very type of argument the defendant seeks to prohibit.

While a defendant may raise a claimed error for the first time on appeal if it is a "manifest error affecting a constitutional right," RAP 2.5(a)(3), here, the defendant's claim concerns his request that this Court create a new non-constitutional, court-created rule. By not raising this issue below, the defendant's request is waived. See State v. Sengxay, 80 Wn. App. 11, 15, 906 P.2d 368 (1995) (holding that claim on appeal that police videotaped defendant without his consent was waived because prohibition is statutory); State v. C.D.W., 76 Wn. App. 761, 764, 887 P.2d 911 (1995) (alleged violation of court-created corpus delicti rule failed when no objection made below).

Along with the issue being waived, this Court does not possess the power the defendant espouses to enact new rules like the rule the defendant seeks. The *Supreme Court* does possess

certain limited rule making powers. See e.g., RCW 2.04.190;<sup>8</sup> and State v. Templeton, 148 Wn.2d 193, 217, 59 P.3d 632 (2002) (holding the right to counsel under CrRLJ 3.1 comes within the ambit of RCW 2.04.190 and the court's inherent power to prescribe procedural court rules); City of Seattle v. Hesler, 98 Wn.2d 73, 80, 653 P.2d 631 (1982) (holding the court had the authority to promulgate the RALJ under RCW 2.04.190). While the Supreme Court does possess certain limited rulemaking authority, none of the cases cited by the defendant stand for the proposition that the Court of Appeals possesses the power to enact new rules of law as the defendant envisions. Further, it would be inappropriate to enact a new rule of law governing trial practice throughout this State with

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<sup>8</sup> RCW 2.04.190 provides that:

The supreme court shall have the power to prescribe, from time to time, the forms or writs and all other process, the mode and manner of framing and filing proceedings and pleadings; of giving notice and serving writs and process of all kinds; of taking and obtaining evidence; of drawing up, entering and enrolling orders and judgments; and generally to regulate and prescribe by rule the forms for and the kind and character of the entire pleading, practice and procedure to be used in all suits, actions, appeals and proceedings of whatever nature by the supreme court, superior courts, and district courts of the state. In prescribing such rules the supreme court shall have regard to the simplification of the system of pleading, practice and procedure in said courts to promote the speedy determination of litigation on the merits.

no opportunity for public debate and comment--the usual procedures followed in enacting new rules of law.

In addition, policy considerations do not support the enactment of the defendant's proposed new rule. This Court, or any court, should be loathe to substitute its judgment for the drafters of the Constitution.

Both the United States Constitution and Washington State Constitution allow a jury to gauge the credibility of the testimony of any witness, including the defendant, by the circumstances wherein the testimony is given--the purpose of trial being the seeking of the truth. See Portuondo, 529 U.S. at 69 (when a defendant takes the stand "his credibility may be impeached and his testimony assailed like that of any other witness"). As the Supreme Court noted, a defendant has a unique opportunity to observe the evidence and testimony presented at trial before testifying. Portuondo, at 73.

It would be totally contrary to the purposes of trial to allow a defendant to fabricate his or her testimony based on his observations made at trial and to do so with impunity, the opposing party not being able to point this out to the jury (and presumably the jury not even being allowed to consider the fact that a defendant was able to view others' testimony prior to taking the stand). Rules

governing the dealing of witnesses testifying should "serve the truth-seeking function" of trial. Portuondo, at 69. Allowing comment upon a defendant's presence in the courtroom and his unique opportunity to tailor his testimony "is appropriate and indeed...sometimes essential-to the central function of the trial, which is to discover the truth." Id. at 73. Where there is no constitutional violation or constitutional issue, there can be no overriding policy grounds for creating a rule that limits the truth-seeking function of trial and the fact-finder's ability to determine credibility of any witness, including a testifying defendant.

Finally, even were this Court to adopt a new rule of law, the defendant's conviction would be unaffected. While the Supreme Court has some limited rule making authority, no case supports the proposition that a new rule of law such as proposed here may be enacted to apply retroactively to reverse the defendant's conviction. For example, in State v. Bennett, 161 Wn.2d 303, 165 P.3d 1241 (2007), the Court exercised its supervisory power to instruct lower courts to refrain from using a particular reasonable doubt instruction in future cases. This is not a situation wherein a law is being interpreted in a particular manner with retroactivity being an open question. This is a situation wherein the defendant is requesting

the enactment of a completely new rule, a rule that if enacted, would not apply to the defendant's case tried under then existing laws and rules.

**4. THE DEFENDANT'S CLAIM THAT THE PROSECUTOR SOUGHT A CONVICTION BASED ON CULTURAL AND RACIAL BIAS IS NOT SUPPORTED BY THE RECORD.**

The defendant contends that the prosecutor committed misconduct by deliberately arguing and eliciting testimony that Lia was from Eritrea, that Eritrea has a patriarchal society, and that the jury should convict the defendant on this basis. Essentially, the defendant claims the prosecutor sought a conviction based on racial and cultural biases. This claim should be rejected. It was a month after his conviction that the defendant first raised this serious allegation, with the trial judge finding the defendant's allegation baseless. The trial court did not abuse its discretion, the prosecutor did not commit misconduct, and in any event, the issue is waived.

A defendant alleging prosecutorial misconduct must show (1) that the prosecuting attorney's conduct was improper and (2) that he was prejudiced thereby. State v. Fisher, 165 Wn.2d 727, 747, 202 P.3d 937 (2009).

In regards to the first requirement, it must be "clear and unmistakable" that counsel has committed misconduct. State v. Sargent, 40 Wn. App. 340, 344, 698 P.2d 598, reversed on other grounds, 111 Wn.2d 641 (1985). And it is the defendant who bears the heavy burden of establishing the impropriety of the prosecutor's conduct. State v. Reed, 102 Wn.2d 140, 145, 685 P.2d 699 (1984).

In regards to the second requirement, in order to sustain a claim of prosecutorial misconduct, a defendant must show that the misconduct had a prejudicial effect. State v. Roberts, 142 Wn.2d 471, 533, 14 P.3d 713 (2000). Prejudice exists only where the defendant can prove that there is a substantial likelihood that the misconduct affected the verdict. State v. McKenzie, 157 Wn.2d 44, 52, 134 P.3d 221 (2006).

Defense counsel's failure to object to misconduct at trial constitutes waiver on appeal unless the misconduct is so flagrant and ill-intentioned that it evinces an enduring and resulting prejudice incurable by a jury instruction. Fisher, 165 Wn.2d at 747.

The defendant claims misconduct in this case occurred during two separate phases of the trial--examination of the witnesses and closing argument. The analysis involving each claim is distinct and must be examined separately. State v. Wright, 76

Wn. App. 811, 820, 888 P.2d 1214, rev. denied, 127 Wn.2d 1010 (1995).

**a. Examination Of The Witnesses.**

The defendant cites to two portions of the examination of witnesses that he claims constitute misconduct. See Def. br. at 9. The first alleged misconduct involves the introductory background questions asked of Lia Araya. After Lia stated her name, age, and place of birth--Eritrea, she testified that she came to the United States in 2006. 4RP 99-100. This was followed by additional questioning--none of which was objected to by the defendant.

Q: Is there a lot of differences between living here and in 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.

Q: Did you go to school?

A: Yes. In Africa.

Q: How many years of school?

A: I went to high school. I finished to 11<sup>th</sup> grade. We don't have a 12<sup>th</sup> grade, only to 11<sup>th</sup> grade. After finishing high school I worked for the American Embassy. Before that I was working as an assistant teacher in an international school.

4RP 100-01.<sup>9</sup>

The defendant also claims the following questions of him during cross examination constitute misconduct.

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?

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<sup>9</sup> While the State believes no misconduct occurred, it is also apparent from the colloquy that some of Lia's answers were not exactly responsive to the questions asked.

A: Yes they are.

Q: They are not allowed to smoke in public are they?

A: Yes.

Defense counsel: Objection.

Q: Women aren't allowed to smoke cigarettes in Eritrea are they?

A: Yes they are.

Q: Women who do are not thought of very much 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.

6RP 120-21.

Although defense counsel objected once when the prosecutor asked about women smoking in public, counsel did not state the basis of the objection, obtain a ruling from the trial court or request a curative instruction. Counsel made no objection to the earlier related questions on cross and counsel made no objection to any of the related later questions asked on cross. Counsel also did not ask that any of the testimony be struck.

When a claim of misconduct involves the asking of questions on cross examination, the issue is one of the propriety of the questions. Wright, 76 Wn. App. at 821-22. In other words, a

question is "merely objectionable" to the extent that the answer to the question may constitute inadmissible evidence. Id. If a question is asked that appears likely to elicit inadmissible evidence, an objection should be raised and the court should sustain the objection. Id. The absence of an objection precludes a party from raising the issue for the first time on appeal. Wright, at 823 (citing State v. Thetford, 109 Wn.2d 392, 745 P.2d 496 (1987)).

Here, except to a single question wherein defense counsel objected but did not provide a basis for the objection or obtain a ruling,<sup>10</sup> the defendant never raised an objection to any of the questions asked by the prosecutor to which he now complains.<sup>11</sup> This failure to object bars review.

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<sup>10</sup> "An objection which does not specify the particular ground upon which it is based is insufficient to preserve the question for appellate review." Guloy, 104 Wn.2d at 422.

<sup>11</sup> The State admits that the questioning about Lia smoking, smoking in general or in public in Eritrea seems to bear little relevance to the case. In fact, it is unclear why both defense counsel and the State discussed the issue. Indeed, defense counsel was the first to ask questions regarding smoking. For an unknown reason, defense counsel asked Harborview's nurse practitioner if Lia was a smoker. 4RP 52-53. Defense counsel then asked Lia's neighbor if Lia had been smoking. 4RP 96. Then during cross examination of Lia, defense counsel asked her if she had smoked a cigarette at some point during the night in question. 4RP 77. And finally, during direct examination of his client, defense counsel elicited testimony from the defendant about Lia smoking. 6RP 81-83. All of this preceded the prosecutor's questions of the defendant detailed above.

**b. Closing Argument.**

The Court must next address the defendant's claim that the prosecutor sought to rely on racial and cultural biases to obtain a conviction. This claim, as the trial court found, is not supported by the facts. The issue also has been waived.

The defendant cites to portions of the State's closing and surmises the State's theory of the case is one of racial and cultural bias.<sup>12</sup> He recites that the prosecutor stated that he "put her in her place" after Lia confronted him about having an affair, and that when Lia stood up for herself, the defendant had to knock her down. Def. br. at 15; 7RP 23. The prosecutor discussed that raping Lia after rendering her unconscious was a way to "demean her and disrespect her" with the ultimate act being ejaculating "all over her face." 7RP 25-26.

Defense counsel never raised an objection to any of the argument he now claims constitutes misconduct. This failure to

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<sup>12</sup> What is also of note is that while there was direct testimony about Lia being born and raised in Eritrea, as stated in the Statement of Facts, there was no direct testimony about the defendant's ancestry. All that is known is that he was born in Saudi Arabia, came to the United States prior to turning two years of age, and apparently spent some time in Eritrea while in high school.

object bars review. See State v. Gregory, 158 Wn.2d 759, 840-41, 147 P.3d 1201 (2006).

This is even more evident when considering what happened post-trial. A month after the jury returned a guilty verdict against the defendant, defense counsel raised a motion for a new trial based on the same claim he now raises on appeal. See 8RP at 2.<sup>13</sup> The trial court told counsel that he was raising a very serious allegation against the prosecutor. 8RP 3. However, the court noted that it was defense counsel who introduced some of the complained of evidence, and that even in voir dire, defense counsel asked questions about the defendant's race and culture. 8RP 3-4. In denying the defendant's motion, the court stated that it did not see "anything remotely" supporting the defendant's allegation the prosecutor sought a conviction base on racial and cultural prejudices. 8RP 5, also 8RP 6-9.

Misconduct cannot be the basis for reversal if it could have been "obviated by an objection and curative instruction that the defense did not request." Russell, 125 Wn.2d at 85. Even further, the Supreme Court has stated, "[c]ounsel may not remain silent,

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<sup>13</sup> According to the record, defense counsel provided briefing to the trial judge outlining his allegations of racism. Defense counsel, however, never made his briefing part of the record.

speculating upon a favorable verdict, and then, when it is adverse, use the claimed misconduct as a life preserver on a motion for a new trial or on appeal." Russell, at 93. Two things are evident from the defense motion here--the issue is waived and the issue is not supported by the facts.

This 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. Dhaliwal, 150 Wn.2d 559, 578, 79 P.3d 432 (2003). Greater latitude is given in closing argument than elsewhere during trial. State v. Stover, 67 Wn. App. 228, 232, 834 P.2d 671 (1992), rev. denied, 120 Wn.2d 1025 (1993). When a prosecutor does no more than argue facts in evidence and makes argument from the evidence, no misconduct occurs. State v. Clapp, 67 Wn. App. 263, 274, 834 P.2d 1101 (1992), rev. denied, 121 Wn.2d 1020 (1993). During closing argument, counsel may draw and express reasonable inferences from the evidence. State v. Harvey, 34 Wn. App. 737, 739, 664 P.2d 1281, rev. denied, 100 Wn.2d 1008 (1983).

Although the defendant does not discuss the fact that he raised a motion for a new trial, he did raise the motion and fail.

When a defendant raises the issue of misconduct below, a reviewing court will evaluate the trial court's ruling for abuse of discretion. Gregory, at 809. After all, the trial judge is in the best position to evaluate a claim of misconduct and whether there was any resulting prejudice. State v. Luvene, 127 Wn.2d 690, 701, 903 P.2d 690 (1995).

The theory of the State's case as articulated in closing and supported by the evidence was that the defendant was having an affair on his wife (admitted by the defendant), that Lia discovered that he was cheating on her when she discovered condoms in his pocket (admitted by the defendant), that Lia became angry and confronted him (admitted by the defendant), that a physical struggle ensued (admitted by the defendant), and that during the course of the struggle, the defendant rendered Lia unconscious, that he engaged in intercourse with her presumably limp body and then ejaculated on her face. Based on the evidence, it is certainly a reasonable inference that the defendant knocking Lia out and then ejaculating on her face while she was still unconscious was a means of putting her in her place as is commonly understood in domestic violence situations. There was nothing about the State's

closing argument that asserted or suggested this theory was based on race or culture.

In point of fact the only person who ever mentioned Eritrean society and culture in closing argument was defense counsel:

I did tell you hell hath no wrath like a woman scorned...This is what this case is all about. It is not about abuse, degradation, humiliation, okay? The State wants you to believe because this man is Eritrean and that Eritrea is a country that is patriarchal, treats women like crap, that is some reason why you should convict him of rape. That has no relevance in this case. First of all, this man has been in the U.S. since he was one years old. That is tantamount to saying all African-Americans or all Asian-Americans or all white Americans believe the same thing or act the same way. That is ridiculous."

7RP 49.<sup>14</sup> With the facts before the court, the defendant has failed to show the trial court abused its discretion in finding the prosecutor did not commit misconduct.

Finally, even had the defendant preserved the right to appeal this issue, he can show no prejudice. A prosecutor's improper comments are prejudicial only where there is a *substantial*

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<sup>14</sup> If defense counsel truly believed the prosecutor was making an argument based on cultural bias, he clearly decided that the best tactical approach was to address it himself rather than raise an objection. This further supports the State's waiver argument. However, with the State's closing woefully bare of the argument defense counsel was alleging, it is also distinctly possible that defense counsel made his argument in an attempt to garner sympathy for the defendant and create adverse feeling towards the prosecutor's case.

*likelihood* the misconduct affected the jury's verdict. State v. Yates, 161 Wn.2d 714, 774, 168 P.3d 359 (2007). A reviewing court does not assess “[t]he prejudicial effect of a prosecutor's improper comments ... by looking at the comments in isolation but by placing the remarks in the context of the total argument, the issues in the case, the evidence addressed in the argument, and the instructions given to the jury.” Yates, 161 Wn.2d at 774 (internal quotations and citations omitted).

Here, if there was any misconduct at all, it was so veiled, so minimal, that the trial court found absolutely no basis to support the claim that any misconduct even occurred. It would be a giant leap to find that where the alleged misconduct was so minimal that defense counsel clearly decided to address the issue in closing rather than object, and where the trial judge found no misconduct, that but for the misconduct, there was a substantial likelihood the verdict would have been different. The defendant cannot meet this burden. This case was indeed partially a credibility call. The defendant's claim that Lia discovered he was having an affair, that they had consensual sex, that he ejaculated on her face as he has many times before, and that he never noticed any of Lia's blood spread throughout the bedroom, is simply not credible.

D. **CONCLUSION**

For the reasons cited above, this Court should affirm the defendant's conviction.

DATED this 20 day of July, 2010.

Respectfully submitted,

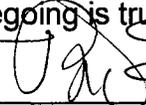
DANIEL T. SATTERBERG  
King County Prosecuting Attorney

By:   
DENNIS J. McCURDY, WSBA #21975  
Senior Deputy Prosecuting Attorney  
Attorneys for Respondent  
Office WSBA #91002

Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to Maureen Cyr, the attorney for the appellant, at Washington Appellate Project, 701 Melbourne Tower, 1511 Third Avenue, Seattle, WA 98101, containing a copy of the Brief of Respondent, in STATE V. YOHANNES, Cause No. 63444-5-1, in the Court of Appeals, Division I, for the State of Washington.

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

  
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Name  
Done in Seattle, Washington

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