

FILED  
Court of Appeals  
Division II  
State of Washington  
2/5/2019 4:26 PM

No. 51098-7-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION TWO

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State of Washington,

Respondent,

v.

Jeremiah Allen Teas,

Appellant.

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

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APPELLANT'S REPLY BRIEF

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## A. ARGUMENT IN REPLY

1. **The prosecutor engaged in misconduct when he: (1) created an inference of guilt based on Mr. Teas' exercise of his right to testify; (2) equated the weapon allegedly used in the offense to the weapon the 9/11 hijackers used to take down the planes during 9/11; and (3) used facts not in evidence to vouch for Mr. Teas' accuser's credibility.**
  - a. The State cannot prove the prosecutor's closing argument, which (1) created an inference that Mr. Teas was guilty because he chose to exercise his right to testify; and (2) asserted Mr. Teas tailored his testimony, was harmless beyond a reasonable doubt.

Jeremiah Allen Teas exercised his constitutional right to testify during his trial. U.S. Const. amends. V, VI, XIV; Const. art. I, § 22; *Rock v. Arkansas*, 483 U.S. 44, 51-52, 107 S. Ct. 2704, 97 L. Ed. 2d 37 (1987); *State v. Martin*, 171 Wn.2d 521, 533, 537-38, 252 P.3d 872 (2011). In turn, during closing arguments, the prosecutor (1) created an inference that Mr. Teas was guilty due to his exercise of this right, claiming Mr. Teas only exercised this fundamental constitutional right to “try and explain away what happened,” and only because he “saw the overwhelming evidence against him;” and (2) suggested Mr. Teas tailored his testimony based on the testimony of others. RP 747-48. The prosecutor weaponized Mr. Teas' exercise of his constitutional right to convey to the jury that Mr.

Teas was guilty, and the prosecutor improperly argued that Mr. Teas tailored his testimony to conform to the testimony of other witness. Because the jury's belief in Mr. Teas' credibility (or lack thereof) was critical to this case, the prosecutor's comments undoubtedly prejudiced him. Op. Br. at 21-23. The State cannot prove that the prosecutor's improper comments were harmless beyond a reasonable doubt, and so this Court should reverse.

Nevertheless, the State maintains the prosecutor's comments do not warrant reversal, arguing that because (1) the prosecutor never explicitly argued Mr. Teas was guilty because he testified; and (2) the prosecutor merely argued the defendant was not credible, no misconduct occurred. Resp. Br. at 17-25. The State also claims it is congruent with article I, section 22 for a prosecutor to argue during closing argument that the defendant tailored his testimony. Resp. Br. at 25-28. Additionally, the State argues this Court should only reverse based on this misconduct if the remarks are "so flagrant and ill-intentioned" that no jury instruction could cure the error. Resp. Br. at 17-19. All of these arguments are untenable, and this Court should reject them.

- i. *It is misconduct for a prosecutor to merely insinuate that a defendant's decision to exercise his constitutional rights is evidence of guilt.*

Contrary to the State's suggestions, it is unnecessary for a prosecutor to explicitly assert that someone is guilty because they exercised their right to testify for the prosecutor to nevertheless create an impermissible inference that a defendant's exercise of his constitutional right to testify is actually evidence of guilt. Resp. Br. at 19; *See State v. Espey*, 184 Wn. App. 360, 336 P.3d 1178 (2014) (reversing conviction due to prosecutorial misconduct because although the prosecutor did not explicitly argue during his closing that the defendant was guilty because he sought counsel before his arrest, the prosecutor improperly *insinuated* the defendant's decision to confer with counsel was evidence of his guilt); *accord State v. Easter*, 130 Wn.2d 228, 922 P.2d 1285 (1996). Therefore, the State's argument that only explicit prosecutorial assertions of guilt based on a defendant's exercise of his constitutional rules warrant reversal is unpersuasive.

Mr. Teas agrees with the State that it is proper for a prosecutor to point out inconsistencies in the defendant's testimony and therefore challenge the defendant's credibility in this respect during closing argument; however, a prosecutor *cannot* assail a defendant's credibility

based on his exercise of his constitutional rights. Resp. Br. at 22; *see* Op. Br. at 11-12 (citing cases). While the State devotes much of its argument to arguing the prosecutor was free to challenge Mr. Teas' credibility, it appears the State has constructed a straw man instead of addressing Mr. Teas' true argument. Resp. Br. at 19-25. The State does not attempt to address why it was acceptable for the prosecutor to claim Mr. Teas only exercised his right to testify to lie to the jury. RP 747-48. Thus, the State's counterpoints to Mr. Teas' argument in this respect are irrelevant and unavailing.

- ii. *It is incongruent with article I, section 22 of our constitution for a prosecutor to suggest during closing argument that the defendant tailored his testimony.*

As our Supreme Court explained in *Martin*, it is incongruent with article I, section 22 of our state constitution for a prosecutor to suggest during closing argument that the defendant tailored his testimony. *Martin*, 171 Wn.2d at 535-36; *see* Op. Br. at 14-16. However, relying on *State v. Berube*, 171 Wn. App. 103, 286 P.3d 402 (2012), the State claims it is actually permissible for a prosecutor to suggest during his closing argument that the defendant tailored his testimony. Resp. Br. at 25-27.

Because *Berube* is inconsistent with our Supreme Court's holding in *Martin*, the State's reliance on this case is misplaced. In *Berube*, the

defendant argued his conviction should be reversed because the prosecutor claimed during closing argument that the defendant tailored his testimony based on the testimony of others. 171 Wn. App. at 114-17. *Id.* at 114-17. He argued the prosecutor’s arguments were inconsistent with our Supreme Court’s ruling in *Martin. Id.*

However, Division One affirmed based on a misapprehension of our Supreme Court’s reasoning and ruling in *Martin*. In *Martin*, our Supreme Court assessed whether prosecutorial suggestions of tailoring during cross-examination were permissible under article I, section 22 of our constitution. 171 Wn.2d at 528. While the court held it was proper for a prosecutor to point out during *cross-examination* that the defendant had the opportunity to listen to the testimony of others, the court examined the entire opinion in *Portuondo v. Agard*,<sup>1</sup> including the dissent, to determine *when* prosecutorial accusations of tailoring crossed article I, section 22’s boundaries. *Id.* at 534. The court turned to some of the *reasoning* in Justice Ginsburg’s dissent, not Justice Ginsburg’s ideal *holding*, to hold “suggestions of tailoring are appropriate during cross-examination,” because “it is during cross-examination, *not closing argument*, when the

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<sup>1</sup> 529 U.S. 61, 120 S. Ct. 1119, 146 L. Ed. 2d 47 (2000) (holding it was proper under the Fifth, Sixth, and Fourteenth Amendments of the United States constitution for a prosecutor to suggest during closing argument that the defendant tailored his testimony based on the testimony of others).

jury has the opportunity to determine whether the defendant is exhibiting untrustworthiness.” *Id.* at 535-36. Indeed, the court stated, “we believe it is appropriate to examine the entire opinion [in *Portuondo*] in order to determine if the *reasoning* of any of the justices can *assist us* in interpreting article I, section 22 of our state constitution.” *Id.* at 534 (emphases added).

However, *Berube* misinterpreted our Supreme Court’s reliance on some of the *reasoning* in Justice Ginsburg’s dissent to mean that in *Martin*, our Supreme Court adopted Justice Ginsburg’s *entire* opinion. *Berube*, 171 Wn. App. at 115-16. Justice Ginsburg’s dissent expressly approved the Second Circuit’s position that would allow a prosecutor “at any stage of a trial to accuse a defendant of tailoring specific elements of his testimony to fit with particular testimony given by other witnesses,” but would disallow tailoring arguments if no particular reason existed to believe tailoring occurred and the defendant had no opportunity to respond to the accusation. *Id.* at 115-16 (referencing *Portuondo*, 592 U.S. at 78 (Ginsburg, J., dissenting)). Because the prosecutor’s closing argument in *Berube* consisted of specific accusations that the defendant tailored his testimony, the court affirmed the conviction, believing this was consistent with our Supreme Court’s holding in *Portuondo*. *Berube*, 171 Wn. App. at 116-17.

But nowhere in *Martin* does our Supreme Court expressly adopt Justice Ginsburg's ideal holding or the Second Circuit's position in *Portuondo*. Instead, the opinion focuses on Justice Ginsburg's *reasoning*, focusing on portions of her dissent that highlight that accusations of tailoring should not be made during closing because, at that point, the jury is unable to "measure a defendant's credibility by evaluating the defendant's response to the accusation, for the broadside is fired after the defense has submitted its case." *Martin*, 171 Wn.2d at 534-35 (quoting *Portuondo*, 529 U.S. at 78 (Ginsburg, J., dissenting)). Based on this reasoning, the court concluded accusations of tailoring may only be made during cross-examination, not during closing argument, because this is "when the jury has the opportunity to determine whether the defendant is exhibiting untrustworthiness." *Id.* at 535-36.

In other words, based on select portions of her dissent, Justice Ginsburg persuaded our Supreme Court into allowing suggestions of tailoring during cross-examination because during cross-examination, the jury can observe the defendant's reaction to the prosecutor's accusation of tailoring. Based on other portions of Justice Ginsburg's dissent, she also persuaded our Supreme Court into disallowing accusations of tailoring during summation because during summation, the jury cannot observe the defendant's reaction to the accusation.

Because the Washington Supreme Court is the final arbiter of state law, our Supreme Court's decision in *Martin* binds this Court, not *Berube*. *In re Petersen*, 138 Wn.2d 70, 80, 980 P.2d 1204 (1999). And even if this Court believes *Berube* did not stray from the ruling in *Martin*, the Court of Appeals' decision in *Berube* is from a different division of this Court and therefore only serves as persuasive authority; it is not binding on this Court. *See Matter of Arnold*, 109 Wn.2d 136, 410 P.3d 1133 (2018) ("the divisions of the Court of Appeals have traditionally treated decisions from other divisions as persuasive rather than binding because it allows for rigorous debate and improves the quality of appellate advocacy and the quality of judicial decision making") (internal citations and quotations omitted).

iii. *Because the prosecutor's misconduct directly violated Mr. Teas' constitutional rights, this Court applies the constitutional harmless error standard.*

When a prosecutor commits misconduct that directly violates a constitutional right, this Court applies the constitutional harmless error standard to determine if the misconduct warrants reversal. *Easter*, 130 Wn.2d at 242. A constitutional error is harmless only if this Court is convinced beyond a reasonable doubt the jury would have reached the same result absent the misconduct and "where the untainted evidence is so

overwhelming it necessarily leads to a finding of guilt.” *Espey*, 184 Wn. App. at 370. The State bears the burden of demonstrating that any error was harmless. *Id.* As the State cannot meet this heavy burden, this Court should reverse. Op. Br. at 21-23.

However, the State repeatedly asks this Court to employ the wrong standard to determine whether this misconduct warrants reversal—whether the misconduct was so flagrant and ill-intentioned that no instruction could have cured it. Resp. Br. at 17-19. This Court should disregard the State’s request for this Court to employ the wrong standard.

b. The prosecutor further compounded the prejudice Mr. Teas experienced with other flagrant misconduct.

The prosecutor further compounded the prejudice Mr. Teas experienced when he engaged in other flagrant misconduct. First, the prosecutor equated the pocketknife recovered from the incident to the weapon the 9/11 hijackers used to take down the planes during 9/11, the deadliest foreign attack on American soil. RP 735-36. Second, the prosecutor argued facts never admitted into evidence. RP 196, RP 724. And third, the prosecutor inappropriately bolstered the complainant’s credibility. RP 725. *See* Op. Br. at 24-30.

In response, the State claims (1) the comment about 9/11, “while potentially ill-advised,” did not constitute misconduct because the

prosecutor qualified his statement by claiming that Mr. Teas' charged crime was "not even close to 9/11" and because the prosecutor never expressly compared Mr. Teas to the 9/11 terrorists; and (2) the prosecutor did not improperly bolster R.C.'s credibility because her stories were "consistent." Resp. Br. at 32-33. These arguments are untenable, and this Court should reject them.

It was unnecessary for the prosecutor to explicitly call Mr. Teas a terrorist for the jury to improperly associate him with the 9/11 terrorists when the prosecutor argued the weapon Mr. Teas purportedly used was similar to the weapons used to take down the planes on 9/11. The prosecutor's attempt to qualify his inflammatory statement could not inoculate the inflammatory effect of his remarks.

Contrary to the State's claims, R.C.'s retelling of the alleged events was not "consistent." The word "consistent" means "marked by harmony, regularity, or steady continuity: free from variation or contradiction." *Consistent*, Merriam Webster.<sup>2</sup> The fact that deviations exist in R.C.'s stories, as the State acknowledges, proves her stories were actually inconsistent. Resp. Br. at 32. As detailed in the opening brief,

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<sup>2</sup> <https://www.merriam-webster.com/dictionary/consistent> (last visited Feb. 3, 2019).

R.C.'s statements changed with each retelling. Op. Br. at 29-30. But the prosecutor falsely claimed R.C. "has not changed her story." RP 725.

Moreover, the State ignores that the prosecutor used facts never admitted into evidence to boost R.C.'s credibility to the jury, which also constitutes misconduct. RP 196; Op. Br. at 28-30; *State v. Ish*, 170 Wn.2d 189, 196, 241 P.3d 389 (2010). The prosecutor plainly engaged in misconduct, and the State's arguments to the contrary are unpersuasive.

The prosecutor's misconduct substantially prejudiced Mr. Teas because it resolved the centrally disputed issue in this case—credibility—in the State's favor. Op. Br. at 31-32. Accordingly, this Court should reverse.

**2. The trial court erred when it denied Mr. Teas' request for a consent instruction.**

Additionally, the trial court erred when it denied Mr. Teas' request for a consent instruction because both Mr. Teas and the State produced more than enough evidence to require the court to instruct the jury on consent. Op. Br. at 32-37. In response, the State argues (1) the evidence was insufficient to warrant the instruction; and (2) the instruction was unnecessary. Resp. Br. at 33-39. Alternatively, the State argues any error in the court not granting the instruction was harmless beyond a reasonable

doubt. Resp. Br. at 40-42. These arguments are unconvincing, and this Court should reject them.

To merit a consent instruction, the evidence presented at trial need only create a reasonable doubt as to the victim's consent. *See State v. W.R.*, 181 Wn.2d 757, 768, 336 P.3d 1134 (2014); *see also State v. Riker*, 123 Wn.2d 351, 367, 869 P.2d 43 (1994). This is because consent negates the element of "forcible compulsion," and so the State must disprove consent beyond a reasonable doubt. *W.R.*, 181 Wn.2d at 766. Creating a "reasonable doubt" in the minds of jurors is far easier than proving a defense by a preponderance of the evidence, so it follows that the quantum of evidence that must be produced at trial is even lower than the quantum of evidence that must be produced with affirmative defenses. *See id.* at 770; *see also State v. Fisher*, 185 Wn.2d 836, 850-51, 374 P.3d 1185 (2016) (describing the deferential standard our court applies to determine whether a defendant is entitled to an affirmative defense instruction). Therefore, this Court should reject the State's argument that a defendant is only entitled to a jury instruction when the instruction is "supported by substantial evidence." Resp. Br. at 34.

For the reasons explained thoroughly in the opening brief, Mr. Teas more than met the necessary threshold to warrant the consent instruction, as his testimony indicated that "at the time of the act of sexual

intercourse or *sexual contact* there [were] actual words or conduct indicating freely given agreement to have sexual intercourse or sexual contact.” RCW 9A.44.010(7); Op. Br. at 34-35; (emphasis added). The State’s argument to the contrary is unpersuasive.

The State points to our Supreme Court’s decision in *W.R.* to argue that even if the evidence supported the instruction, the court did not need to grant it. Resp. Br. at 37. While *W.R.* does suggest that consent instructions are unnecessary, *W.R.* does not hold that courts should never grant consent instructions if the defendant requests it. *W.R.*, 181 Wn.2d 767, n.3.<sup>3</sup>

It is consistent with a defendant’s Sixth Amendment right to present a defense and make fundamental strategic decisions concerning his defense for the court to grant the defendant’s proposed instruction on consent as long as the evidence supports the instruction. *See Coristine*, 177 Wn.2d at 376 (“to further the truth-seeking function of trial and to respect the defendant’s dignity and autonomy, the Sixth Amendment recognizes the defendant’s right to control important strategic

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<sup>3</sup> To the extent that *W.R.* in any way suggests that courts cannot grant a defendant’s request for a consent instruction, this Court should read this portion of the court’s opinion as dicta, and therefore this Court need not follow it. *State v. Hurtado*, 173 Wn. App. 592, 606, 294 P.3d 838 (2013). This portion of *W.R.* is dicta because it was unnecessary for the court to reach its resolution to the case; *W.R.* was a juvenile case with a bench trial. 181 Wn.2d at 760.

decisions...the primary focus should be whether the defendant had a fair chance to present his case in his own way”) (referencing *McKaskle v. Wiggins*, 465 U.S. 168, 177, 104 S. Ct. 944, 79 L. Ed. 2d 122 (1984)). A court honors and respects this right when it grants the defendant’s request for the instruction.

Contrary to the State’s claims, the State cannot meet its heavy burden in proving the absence of this instruction was harmless beyond a reasonable doubt. Resp. Br. at 40-42. Without the proposed instruction, no assurances exist that the jury knew whether it *could* weigh the evidence of consent. Similarly, the jury had no guidance on *how* to weigh the considerable evidence of consent. Accordingly, this Court should reverse.

**4. The court erred when it imposed a sentence of life without parole because article I, section 14 categorically bars the imposition of life without parole under the POAA when the predicate offense(s) occurred when the offender was a youth.**

Alternatively, Mr. Teas asks this Court to find that his life without parole sentence is cruel under our constitution. Op. Br. at 39-57. The court had no choice but to sentence Mr. Teas to life without parole pursuant to the Persistent Offender Accountability Act (POAA) based in part on a predicate offense that occurred when Mr. Teas was a teenager. Because youthful offenders are less culpable than fully formed adults, this Court should hold that a sentence of life without parole based in part on a

predicate offense that occurred when the defendant was a youth is cruel under our constitution.

However, the State appears to construct another strawman, misinterpreting Mr. Teas' argument to instead be that under the POAA, the court erred in sentencing Mr. Teas as a persistent offender. Resp. Br. at 43-47. But this is not Mr. Teas' argument. Mr. Teas agrees the POAA divested the sentencing court of any discretion and required it to sentence Mr. Teas to life without parole. *See* Op. Br. at 40 (“because Mr. Teas (1) was previously convicted of the crime of child molestation in the first degree; and (2) is currently convicted of rape in the first degree, the POAA compelled the court to sentence Mr. Teas to life in prison without the possibility of parole”)

Mr. Teas is instead arguing that *under article I, section 14* of our constitution, it is cruel to sentence individuals to life without parole if one of the predicate offenses occurred when the defendant was a youth. Op. Br. at 47-52. Mr. Teas argued this sentence was cruel under the categorical approach this Court announced in *State v. Bassett*, 198 Wn. App. 714, 394 P.3d 430 (2017), *affirmed* 192 Wn.2d 67 (2018). However, the State does not even attempt to explain why the *Bassett* framework is

inapplicable in this case; instead, it inexplicably turns to the *Fain*<sup>4</sup> factors to argue the sentence is not cruel under our constitution. Resp. Br. at 47-49. Because the *Fain* factors form an inadequate framework to assess the constitutionality of Mr. Teas' sentence, the State's argument is unavailing. Op. Br. at 48.

## **B. CONCLUSION**

Based on the arguments posed in this brief and in his opening brief, Mr. Teas asks this Court to reverse his conviction and remand for a new trial. Alternatively, Mr. Teas asks this Court to hold that his sentence is cruel under our constitution and remand so that the court can sentence him within his standard range.

DATED this 5th day of February, 2019.

Respectfully submitted,

/s Sara S. Taboada  
\_\_\_\_\_  
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<sup>4</sup> 94 Wn.2d 387, 617 P.2d 720 (1980).

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DIVISION TWO**

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STATE OF WASHINGTON,	)	
	)	
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	)	NO. 51098-7-II
v.	)	
	)	
JEREMIAH TEAS,	)	
	)	
Appellant.	)	

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# WASHINGTON APPELLATE PROJECT

February 05, 2019 - 4:26 PM

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