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No. _____
Court of Appeals No. 61127-5-I

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STATE OF WASHINGTON

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

TIMOTHY MARTIN,

Petitioner.

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER

Petitioner Timothy Martin, Petitioner below, respectfully requests this Court accept review of the Court of Appeals' decision affirming his convictions for three counts of kidnapping in the first degree and two counts of robbery in the second degree.

B. COURT OF APPEALS DECISION

Pursuant to RAP 13.4, Martin seeks review of the Court of Appeal's published decision in State v. Martin, 151 Wn. App. 98, 210 P.3d 345 (2009). The opinion was filed on July 6, 2009. The Motion to Reconsider was filed on July 24, 2009 and denied on August 12, 2009.

C. ISSUES PRESENTED FOR REVIEW

1. During Martin's trial the prosecutor implied he tailored his testimony to the State's evidence simply because he exercised his rights to view the discovery and be present at trial. Art. 1, § 22 of the Washington State Constitution guarantees a criminal defendant "the right to appear and defend in person, or by counsel...to testify in his own behalf, [and] to meet the witnesses against him face to face." When a prosecutor elicits testimony that the defendant has had the opportunity to read all discovery and to hear all the State's witnesses and evidence before he testified,

implying that the defendant tailored his testimony, does such questioning violate his rights under Art. 1, § 22?

2. The Court of Appeals may exercise inherent supervisory powers to maintain sound judicial practice. Where a prosecutor uses the fact of the defendant's presence at trial to accuse or imply that the defendant has tailored his testimony to fit the State's evidence, does that practice undermine the administration of fair trials, requiring the court to fashion court rules that would ban such questioning?

D. STATEMENT OF THE CASE

The facts are stated in the Opening Brief at 2-17 and are incorporated by reference.

1. Argument on Appeal. On appeal, Martin argued that the State's cross-examination, implying he tailored his testimony to fit the State's evidence, violated his rights under Art. 1, § 22 of the Washington State Constitution. Martin argued in the alternative that the Court should exercise its inherent supervisory power to bar prosecutors from accusing a defendant of tailoring his testimony based solely on his presence at trial.

2. Decision By The Court Of Appeals. The Court of Appeals, Division One, relied on Portuondo v. Agard, 529 U.S. 61, 120 S.Ct. 1119, 146 L.Ed.2d 47 (2000) (holding accusations of testimony-tailoring based on a defendant's presence at trial do not violate the Sixth Amendment).

The Court found that because the prosecutor's questions in this case were similar to those in Portuondo, "the prosecutor herein did not violate Martin's Sixth Amendment rights to attend trial, to confront witnesses, or to testify in his own defense." Martin, 151 Wn. App. at, 107.

The Court ruled that Art. 1, § 22 of the Washington State Constitution does not warrant a Gunwall analysis independent from the Sixth Amendment and dismissed Martin's claim of broader protection under Art. 1, § 22 as a mere attempt to "escape the effect of Portuondo." Martin, 151 Wn. App. at 107. Although the Portuondo Court specifically invited the state courts to review the issue of whether a prosecutor may argue or imply that a defendant has tailored testimony and to fashion court rules barring such questioning, the Court declined to consider Martin's argument that the Court should use its supervisory powers for that purpose.

E. ARGUMENT WHY REVIEW SHOULD BE GRANTED

Martin requests this Court grant review of his case pursuant to RAP 13.4(b) because it presents two questions of first impression: whether the Washington State Constitution protects a criminal defendant from prosecutorial accusations that a defendant tailored his testimony based solely on his right to presence at trial, and whether such practice should be barred by the courts' supervisory powers in the interest of fair trials.

As to the constitutional issue, the Court of Appeals' ruling involves a significant question of law under Art. 1, § 22 and is in conflict with State v. Gunwall, 106 Wn.2d 54, 720 P.2d 808 (1986), finding broader protection under the Washington State Constitution than under the Sixth Amendment.

As to the second issue, the Court of Appeals' refusal to exercise its inherent supervisory power conflicts with multiple decisions of this Court (State v. Fitzsimmons ("Fitzsimmons II"), 94 Wn.2d 858, 859, 620 P.2d 999 (1980); State v. Bennett, 161 Wn.2d 303, 306, 165 P.3d 1241 (2007); State v. Fields, 85 Wn.2d 126, 130, 530 P.2d 284 (1975)), exercising its inherent supervisory powers to condemn and bar practices which result in unfair trials, despite the lack of constitutional violations in those cases. This Court's clarification of this issue will be critical to furthering the public's interest in fair and impartial trials and necessary for the guidance of prosecutors, defense attorneys, and trial courts, and therefore involves an issue of substantial public interest that should be determined by the Supreme Court.

1. THIS COURT SHOULD REVIEW WHETHER THE STATE CONSTITUTION IS VIOLATED BY A PROSECUTOR'S ACCUSATION THAT A DEFENDANT HAS TAILORED HIS TESTIMONY BASED ONLY ON HIS PRESENCE AT TRIAL.

Whether prosecutorial accusations of testimony-tailoring infringe upon a defendant's rights under Art. 1, § 22 is a question of first impression before this Court. Like the Sixth Amendment to the United States Constitution, Art. 1, § 22 provides 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 that the State violated the Sixth Amendment by implying that a testifying defendant tailored his testimony to the State's evidence. See State v. Johnson, 80 Wn. App. 337, 340, 908 P.2d 900 (1996), rev. denied, 129 Wn.2d 1016, 917 P.2d 575 (1996). Cf. State v. Smith, 82 Wn. App. 327, 334-35, 917 P.2d 1108 (1996). These cases were overruled by Portuondo, holding such comments are permissible under the Sixth Amendment. 529 U.S. at 64; State v. Miller, 110 Wn. App. 283, 285, 40 P.3d 692, 693 (2002). However, no case addresses whether this practice violates the defendant's rights under Art. 1, § 22 of the Washington State Constitution.

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.¹ 106 Wn.2d 54, 720 P.2d 808 (1986). An analysis of these factors – in particular, the first four – reveals that Art. 1, § 22 provides greater protection for the rights to be present, mount a defense, testify, and confront witnesses than does the Sixth Amendment.

a. Factors One and Two – Textual Language of the Washington Constitution and Significant Differences in the Texts of Parallel Provisions of the Federal and State Constitutions. Art. 1, § 22 expressly provides for a defendant’s right “to appear and defend in person” and “to testify in his own behalf.” This contrasts with the U.S. Constitution as the federal rights to appear in person and to present a defense are not explicit but merely derived from the defendant’s right to confront witnesses and due process. United States v. Gagnon, 470 U.S. 522, 526, 105 S.Ct. 1482, 84 L.Ed.2d 486 (1985); Faretta v. California, 422 U.S. 806 819, n. 15, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975); Davis v. Alaska, 415 U.S. 308, 320, 94 S.Ct. 1105, 39 L.Ed.2d 347 (1974).

¹ The six factors are: (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. Gunwall, 106 Wn.2d at 61-62.

Similarly, the federal right to testify is not spelled out in any amendment but is 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), citing Faretta, 422 U.S. t 819, n. 15; Ferguson v. Georgia, 365 U.S. 570, 602, 81 S.Ct. 756, 5 L.Ed. 783 (1961).

Here, the Court of Appeals dismissed the difference between the express guarantee of the right to testify in Art. 1, § 22 and the lack of a corresponding explicit guarantee in the Sixth Amendment as a "distinction of no moment." Martin, 151 Wn. App. at 111. However, this Court has made clear that distinctions of this sort are precisely the kind that 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). Although the Sixth Amendment impliedly protects the right to testify, the inclusion of express language in Art. 1, § 22 demonstrates that the framers intended a broader set of protections.

This Court employed the same analysis in Gunwall itself. There, this Court found the express protection of "private affairs" in Art. 1, § 7 was greater than the Fourth Amendment's privacy protections. Id. at 65.

The Court of Appeals attempted to distinguish Gunwall from the instant case by stating that unlike Art. 1, § 7, “there is nothing in the language of article I, section 22 to suggest that the defendant's rights, as set forth therein, are any different from those protected by the Sixth Amendment.” Martin, 158 Wn. App. at 111. However, the court did not explain how a broad reference to “private affairs” can support such a specific holding while the explicit guarantee of the right to testify in person in Art. 1, § 22 fails to suggest the possibility of broader protection. In fact, this case involving a right expressly protected by the text of the state constitution but not found in the language of the federal constitution, requires an analysis very similar to that used in Gunwall.

At the very least, Art. 1, § 22’s express provision demonstrates the framers’ intent to provide broader and stronger protection to defendants than the Sixth Amendment. And while the Sixth Amendment does not describe how confrontation is to be achieved, Art. 1, § 22 specifies the method of confrontation as “face to face.” It is when a defendant appears in person, confronts the witnesses against him face to face (and necessarily hears the witnesses’ testimony), and testifies – when he exercises the bundle of rights explicitly named and protected by Art. 1, § 22 but not the Sixth Amendment – that he is vulnerable to prosecutorial accusations of tailoring his testimony.

The framers of the Washington Constitution were aware of the federal constitution when they drafted and adopted more specific language. Foster, 135 Wn.2d. at 485 (internal citations omitted). In addition to the rights named above, Art. 1, § 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. The state constitution is thus more detailed, again meriting a different interpretation than that given to the Sixth Amendment. Id.²

b. Factor Three – State Constitutional and Common Law History.

Little is known about the drafting of Art. 1, § 22. Foster, 135 Wn.2d at 722, 734-35; State v. Silva, 107 Wn.App. 605, 619, 27 P.3d 663 (2001). Logically, the framers of the Washington Constitution did not intend Art. 1, § 22 to be interpreted identically to the federal Bill of Rights, since they copied it from a state constitution and the federal Bill of Rights did not then apply to the states. Id. at 672-73, citing Robert F. Utter, Freedom and

² Here, the Court of Appeals pointed out that Foster does not stand “for the proposition that article I, section 22, in its entirety, must always be interpreted independently of the Sixth Amendment.” This is a red herring, since Martin never made such a claim. Martin, 151 Wn. App. 98, 112. Martin simply pointed to Foster as an example of when and how Art. 1, § 22 could be interpreted independently from the Sixth Amendment. The Court’s reliance on dicta from State v. Mason is misplaced: “Foster did not establish a firmly-rooted principle of state constitutional jurisprudence, as it discussed only the constitutional provisions in a context entirely distinct from the one presented here” Martin, 151 Wn. App. 98, at 112, quoting State v. Mason, 127 Wn. App. 554, 569, 126 P.3d 34 (2005). At issue in Mason, however, was whether a Gunwall analysis was necessary at all, as the defendant believed the issue had been settled by the State Supreme Court in a previous case - obviously not the question here.

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).

As early as 1902, this Court explained that Art. 1, § 22 provided a criminal defendant due process, including the right to meet the witnesses against him face to face and cross-examine those witnesses in open court. State v. Stentz, 30 Wash. 135, 142, 70 P.241 (1902). Therefore, as in Foster, state constitutional and common law history require an independent interpretation of Art. 1, § 22. 135 Wn.2d at 486-93.

c. Factor Four – Preexisting Washington Law. Art. 1, § 22 was revised by amendment 10, but the relevant portion of the original 1889 text was unchanged, still explicitly providing the accused with “the right to appear and defend in person.” Historical Notes to Const. art. 1, § 22. In contrast, 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.

Thus, preexisting Washington law demonstrates that the framers intended to protect the rights of a criminal defendant to appear, to present a defense, to testify, and to confront witnesses face-to-face, and were not willing to sacrifice these rights to the spectre of tailored testimony simply because the defendant's testimony follows that of the State's witnesses. Allowing the State to burden these rights offends the framers' purpose.

2. THIS COURT SHOULD EXERCISE ITS INHERENT SUPERVISORY POWER TO FASHION COURT RULES THAT WOULD BAR A PROSECUTOR FROM INVITING A JURY TO INFER A DEFENDANT TAILORED HIS TESTIMONY FROM THE MERE FACT OF HIS PRESENCE AT TRIAL

a. This Court has the power to supervise the lower courts and bar prosecutors from inviting a jury to infer a defendant tailored his testimony from the mere fact of his presence at trial. In Portuondo, the U.S.

Supreme Court invited the state courts to continue to review the issue of whether a prosecutor may argue or imply that a defendant has tailored testimony.” 529 U.S at 73. Although the Portuondo Court held that the kind of prosecutorial comments at issue in this case do not violate the Sixth Amendment, it explicitly stated that its holding did 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.

Id. at 76. Despite the concerns expressed by the concurring and dissenting Justices, the 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. This Court has recognized its “inherent rulemaking powers as ‘an integral part of the judicial process.’” “Fitzsimmons II”, 94 Wn.2d at 859 (quoting State v. Smith, 84 Wn.2d 498, 502, 527 P.2d 674 (1974)). In Fitzsimmons, this 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 from the U.S. Supreme Court, the Washington Supreme 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 Court was not troubled by the limitations of the federal constitution in this context, explaining that “[r]eliance on federal precedent and federal constitutional provisions

would not preclude us from taking a more expansive view of the right to counsel under state provisions should the United States Supreme Court limit federal guaranties.” Id.

This Court has similarly used its supervisory powers to condemn other procedures or practices which result in unfair trials. See e.g. Bennett, 161 Wn.2d at 306; Fields, 85 Wn.2d at 130; State v. Bonds, 98 Wn.2d 1, 13, 653 P.2d 1024 (1983).

Here, the Court of Appeals stated in a footnote that because it found no “constitutional infirmity in the prosecutor’s questions, there is no principled basis on which to fashion the rule that Martin seeks.” Martin, 151 Wn. App. at 117. In fact, this is precisely the reason the Court of Appeals should have considered exercising its supervisory power to prescribe rules of practice in this context. In fact, 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, as here, the Court finds no constitutional violation, it must turn to the alternative argument that the fundamental unfairness of the practice calls for the exercise of the courts’ supervisory powers. Constitutional infirmity or no, courts have a principled basis for adopting rules that would bar prosecutorial practices which undermine the goal of a fair trial.

b. To ensure sound practice and fair trials, this Court should prohibit prosecutors from implying tailoring of testimony based only on a defendant's exercise of his rights. Prior to Portuondo, this Court held that a “prosecutor's comments about the defendant's unique opportunity to be present at trial and hear all the testimony against him impermissibly infringed his exercise of his Sixth Amendment rights to be present at trial and confront witnesses.” Johnson, 80 Wn. App. at 341,. This Court clarified its holding 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 unique ability to hear all the witnesses' testimony, but only asked the defendant only about his review of the discovery, and accused him of tailoring his testimony to that evidence. Id. at 334. The Court found no misconduct, explaining:

Under Johnson, 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 holding in Johnson does not prevent the State from arguing that a defendant has tailored his testimony to the State's proof. The constitutional right is to be present at trial and confront witnesses. It is not a right to be insulated from suspicion of manufacturing an exculpatory story consistent with the available facts.

The State's questions in this case raised an inference from Smith's testimony; they were not "focused on the exercise of the constitutional right itself."

Id. at 335 (emphasis in the original), quoting Johnson, 80 Wn. App. at 341.

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 do not burden the defendant’s fundamental right to be present for his entire trial. Id., at 339; Smith, 82 Wn. App. at 335. Portuondo overruled both holdings with regard to the Sixth Amendment, and neither addressed the Washington State Constitution. However, the reasoning in both evince a concern for preventing prosecutorial misconduct from denying defendants a fair trial and a condemnation of unfounded prosecutorial accusations of tailoring based on the defendant’s exercise of his rights. This reasoning is equally applicable even outside of the Constitutional context. 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, as discussed above. Fitzsimmons II, 94 Wn.2d at 859 (citing Minnesota v. National Tea Co., 309 U.S. 551, 556, 84 L.Ed. 920, 60 S.Ct. 676 (1940); Fox Film Corp. v. Muller, 296 U.S. 207, 210, 80 L.Ed.158, 56 S.Ct. 183 (1935)).

On similar principles, other state courts have taken up the Portuondo Court’s invitation to decide whether prosecutorial accusations

of tailoring are sound trial practice. Most recently, 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 Supreme Court noted that under Portuondo, the prosecutor's remarks were permissible under the federal constitution and declined to address the issue under the state constitution. Daniels, 182 N.J. at 88. However, the Court discussed approvingly the Portuondo dissent and concurrence:

Justice Ginsburg condemned the majority for "transform[ing] a defendant's presence at trial from a Sixth Amendment right into an automatic burden on his credibility." The dissent advocated a "carefully restrained and moderate" approach and would have permitted the prosecutor to argue, during summation, that the defendant tailored his testimony only if there was evidence that supported that contention.

Daniels, 182 N.J. at 91, quoting Portuondo, 529 U.S. at 76, 79 (Ginsberg, J., dissenting).

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.

Daniels, 182 N.J. at 91-92, quoting Portuondo, 529 U.S. at 76 (Stevens, J., concurring).

The Daniels Court noted that it had a 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. Daniels, 182 N.J. 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 right to be present at trial, to hear the evidence and confront the witnesses against him, to present evidence and witnesses in his defense, and to testify on his own behalf. Id. at 97-98 (emphasis added; internal citations omitted). Therefore, the Court found,

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 98 (emphasis added).

The Court distinguished between “generic accusations...when the prosecutor, despite no specific evidentiary basis that the defendant has tailored his testimony, nonetheless attacks the defendant’s credibility by drawing the jury’s attention to the defendant’s presence during trial and his concomitant opportunity to tailor his testimony” and specific accusations, based on evidence in the record. Id. Even with evidence of tailoring, the Court held, the prosecutor may not “refer explicitly” to the defendant’s exercise of his right to be present at trial and hear the evidence against him. Id. at 99. Thus, although there was evidence in the record to support an inference of tailoring, the prosecutor’s explicit remarks highlighting the defendant’s presence and opportunity to “craft his version to accommodate” the State’s evidence were unfairly prejudicial to the defendant, requiring reversal. Id. at 101-02.

The Massachusetts Supreme Court has taken a different approach. In Commonwealth v. Gaudette, the Court reaffirmed its pre-Portuondo holding that “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.” 441 Mass. 762, 767, 808 N.E.2d 798 (2004) (citing Commonwealth v. Person, 400 Mass. 136, 140, 508 N.E.2d 88 (1987) and Commonwealth v. Beauchamp, 424 Mass. 682, 690-91, 677 N.E.2d 1135 (1997)). The Court did not consider the state constitution but instead apparently exercised its supervisory authority. Gaudette, 441 Mass. at 767. The Massachusetts Court emphasized the prosecutor’s responsibility to argue “within the bounds of evidence,” making clear it would not tolerate what the New Jersey Court termed “generic accusations.” Id. at 803 (internal citations omitted). The Court affirmed the conviction because the accusation was not generic; the evidence supported the prosecutor’s accusations of tailoring.). Id.

As the New Jersey and Massachusetts Courts recognized, the prosecutorial practice at issue here burdens not just the defendant but the very process of the trial. The defendant has an absolute right to be present at his entire trial; in fact, it cannot begin without him. Wash. CrR 3.4. Moreover, the State presents its case first because it carries the burden of proof, thus enabling the defendant to hear the witnesses against him. While a defendant could theoretically attempt to waive these rights – declining to be present at 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

himpotentially forcing a defendant to waive fundamental rights in order to insulate himself against the prosecutor's unfettered accusations of tailoring. Thus, when the prosecutor is permitted to accuse a defendant of tailoring his testimony merely because the trial has been conducted correctly, this places a burden on every defendant who chooses to testify. Such a burden is completely at odds with the principle of a fair trial.

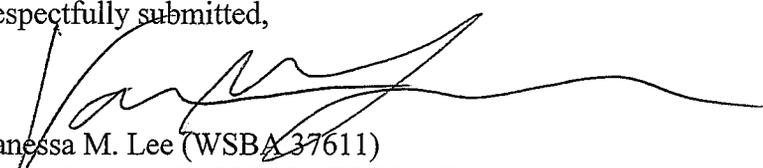
This Court should use its inherent supervisory powers to protect the goal and principle of the fair trial by prohibiting prosecutorial accusations of tailoring based on the defendant's exercise of his rights.

F. CONCLUSION

Division One erred in holding that Art. 1, § 22 does not provide criminal defendants broader protections from accusations of testimony-tailoring than the Sixth Amendment, and in refusing to consider exercising its supervisory power to ensure fair trials, despite a principled basis to do so. Martin therefore respectfully requests this Court grant review.

DATED this 11th day of September, 2009.

Respectfully submitted,



Vanessa M. Lee (WSBA 37611)
WASHINGTON APPELLATE PROJECT-91052
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DECLARATION OF MAILING OR DELIVERY

The undersigned certifies under penalty of perjury under the laws of the State of Washington that on the below date, a true copy of the **Petition for Review to the Supreme Court of the State of Washington** filed under **Court of Appeals No. 61127-5-I** to which this declaration is affixed/attached, was mailed or caused to be delivered to each attorney or party or record for respondent **Mary Kathleen Webber - Snohomish County Prosecuting Attorney**, **appellant** and/or other party, at the regular office or residence or drop-off box at the prosecutor's office.



MARIA ARRANZA RILEY, Legal Assistant
Washington Appellate Project

Date: September 11, 2009

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,)	
)	DIVISION ONE
Respondent,)	
)	No. 61127-5-1
v.)	
)	
TIMOTHY SEAN MARTIN,)	PUBLISHED OPINION
)	
Appellant.)	FILED: July 6, 2009
_____)	

DWYER, A.C.J. — Today we decide whether, in the context of a prosecutor’s cross-examination of a defendant concerning the defendant’s opportunity to tailor his testimony to evidence previously introduced at trial, a defendant’s rights to be present at trial, to testify, and to confront witnesses pursuant to article I, section 22 of the Washington Constitution should be interpreted differently from parallel rights protected under the Sixth Amendment to the United States Constitution. We hold that, in this context, no differing interpretation is compelled. Thus, because the federal constitution permits a jury to consider a defendant’s opportunity to tailor testimony, the questions posed herein were allowable. Accordingly, we affirm.

I

Timothy Martin was charged with three counts of kidnapping in the first degree and one count of robbery in the second degree. At trial, Jessica Sobania identified Martin as the individual who forced his way into her minivan in a Marysville drugstore parking lot one night as she was seating her two young

children in the backseat and who, after Sobania later escaped from the vehicle to seek help, drove off with Sobania's children still in the van. Other witnesses testified that, the following morning, police officers found Sobania's van parked at an industrial complex a few miles from where Sobania had escaped and recovered her children physically unharmed. A police detective testified that he found Sobania's purse next to Martin's photo identification and clothing in the vicinity of the industrial complex. The State's forensic DNA expert testified that DNA samples collected from the van's steering wheel and keys found in the van matched Martin's DNA profile. He further testified that an individual must handle an item for a prolonged period of time in order to deposit a sufficient amount of DNA to allow for DNA testing, thus supporting Sobania's testimony that Martin had driven away in her van. In addition, a friend of Martin's, Gerrie Summers, testified that Martin had essentially confessed to her that he had kidnapped Sobania and her children.

After the State presented its case in chief, Martin testified in his defense. He admitted that he had entered Sobania's van near the industrial complex. He further admitted that he had touched the steering wheel when attempting to start the vehicle and that he took Sobania's purse from the van but later discarded it along with his photo identification and clothing. However, he denied kidnapping Sobania or her children. Instead, Martin testified, he entered Sobania's van as part of an elaborate, drug-induced vehicle-prowling scheme that took him on foot throughout Marysville as he attempted to scrounge money following his release from prison a few days earlier. Martin testified that he was nowhere near the

drugstore parking lot when Sobania was abducted. To support this testimony, Martin pointed to a library time log showing that, roughly an hour before Sobania was kidnapped, he was at a library approximately eight miles from the drugstore, thus inviting the jury to infer that he could not have traveled from the library to the drugstore on foot in the space of an hour. Martin also attempted to explain away Summers' damaging testimony.

Whether Martin tailored his testimony to fit the evidence introduced at trial became an issue during his testimony. On direct examination, Martin explicitly testified that he had relied on other witnesses' prior testimony to pinpoint the time when he entered Sobania's van.¹ He also confirmed on direct examination that he had been "present and heard" Summers' testimony. On cross-examination, Martin again explicitly testified that he was relying on other witnesses' testimony as to when he had entered Sobania's van.² The prosecutor then asked more

¹ The following exchange took place between Martin and his lawyer:

- Q. All right. Before I go any further, do you have any idea what time it was when you were at that location [i.e., the industrial complex where the van was found]?
- A. I would guess 11:30, 12:00, 12:30 at night. From prior testimony, I know it had to be before one, because I heard people working in there, I heard lots of, you know, loud working.

VII Report of Proceedings (RP) (Dec. 11, 2007) at 28.

² The prosecutor and Martin engaged in the following exchange:

- Q. Now, can you tell me again about what time it is you think this happened, about what time do you think you got into the van?
- A. I would say my estimate, 11:30, 12:00, 12:30. Like I said, I didn't have a watch. I don't know for sure. I heard plenty of people working. I'm saying this time, because of prior testimony, that I heard, said that the shop was closed at 1:00 a.m., so it was before 1:00 a.m.

VII RP (Dec. 11, 2007) at 74.

questions drawing attention to Martin's opportunity to tailor his testimony to the evidence introduced at trial.³ The jury subsequently convicted Martin on all counts.

³ Over the objections of Martin's counsel, the prosecutor asked Martin the following:

- Q. And you've had the advantage of hearing all the testimony before you testified today, correct?
- A. Obviously I have been sitting in that seat the whole time, yes.
- Q. And you've also had the advantage of knowing what people were going to say ahead of time, wouldn't you agree with me?
- A. No, I didn't know what anybody was going to say ahead of time.
- Q. You didn't get to read the police reports?
- A. I got to read the police reports.
- Q. And you didn't get to read witness statements?
- A. I read witness statements, yes.
- Q. And you weren't allowed to bring those reports and statements with you to court?
- A. I read everything involved, yes.
- Q. And you've had what, a little over a year to concentrate on what people were going to say, didn't you?
-
- A. I have been in custody for 13 months.
- Q. That wasn't my question. My question is, you've known this was coming up for a year, correct?
- A. I thought of nothing about this, yes, I was ready to go to trial a year ago. I am not the one who made it last this long.
-
- Q. So in the pendency of this trial, you've had access of [sic] what the evidence was?
- A. I've read the police reports, I've read your discovery, yes.
- Q. And you've heard all the testimony so far?
- A. So far, yes.
- Q. And so you knew all that before you testified?
- A. Yes.
- Q. And so you knew exactly where your DNA had been found in the car?
-
- Q. Mr. Martin, you've known since April that your DNA was on the keys?
- A. Yes.
- Q. And you've known since August that your DNA was on the steering wheel, isn't that true?
- A. Yes.

II

Martin contends that the prosecutor's questions concerning his opportunity to tailor his testimony to the evidence introduced at trial constituted prosecutorial misconduct. Specifically, Martin asserts that the prosecutor's questions infringed his rights under article I, section 22 of the Washington Constitution to be present at trial, to meet witnesses face to face, and to testify in his behalf.⁴ We disagree.

To prevail on a claim of prosecutorial misconduct, the defendant must show both improper conduct and prejudicial effect. State v. Roberts, 142 Wn.2d 471, 533, 14 P.3d 717 (2000). "The State can take no action which will unnecessarily chill or penalize the assertion of a constitutional right and the State may not draw adverse inferences from the exercise of a constitutional right." State v. Gregory, 158 Wn.2d 759, 806, 147 P.3d 1201 (2006) (internal quotation marks omitted) (quoting State v. Rupe, 101 Wn.2d 664, 705, 683 P.2d 571 (1984)). A prosecutor may, however, touch upon a defendant's exercise of a constitutional right, provided the prosecutor does not "manifestly intend[] the remarks to be a comment on that right." Gregory, 158 Wn.2d at 806-07 (quoting State v. Crane, 116 Wn.2d 315, 331, 804 P.2d 10 (1991)).

Martin recognizes that the United States Supreme Court's decision in Portuondo v. Agard, 529 U.S. 61, 120 S. Ct. 1119, 146 L. Ed. 2d 47 (2000), precludes him from arguing that the prosecutor's questions violated his rights

⁴ Article I, section 22 of the Washington Constitution provides, in pertinent part:

In criminal prosecutions the accused shall have the right to appear and defend in person, . . . to testify in his own behalf, [and] to meet the witnesses against him face to face.

under the Sixth Amendment to the United States Constitution to be present at trial, to confront witnesses, and to testify in his own defense. Instead, he offers a Gunwall⁵ analysis in support of his claim that article I, section 22 should be independently interpreted more favorably to him than is the Sixth Amendment. Before we consider Martin's argument, however, we must analyze the Portuondo decision to discern the nature of a defendant's Sixth Amendment rights in this context, thus illuminating the issues arising in a Gunwall analysis of article I, section 22. See State v. Foster, 135 Wn. 2d 441, 456, 957 P.2d 712 (1998) (plurality opinion) (discussing scope of federal right of confrontation before embarking on Gunwall analysis).

In Portuondo, the Court held that a prosecutor does not violate a defendant's Sixth Amendment rights to be present at trial, to confront adverse witnesses, and to testify by commenting on the defendant's opportunity to tailor his or her testimony to the evidence previously introduced at trial. The prosecutor in Portuondo remarked during closing argument that the defendant, Agard, had an advantage over other witnesses because he had the opportunity to observe the other witnesses' testimony before he testified and, thus, could tailor his testimony to the evidence previously introduced. 529 U.S. at 64. The Court explained that "[t]he prosecutor's comments . . . concerned [Agard's] *credibility as a witness*, and were therefore in accord with our longstanding rule that when a defendant takes the stand, 'his credibility may be impeached and his testimony assailed like that of any other witness.'" Portuondo, 529 U.S. at 69

⁵ State v. Gunwall, 106 Wn.2d 54, 720 P.2d 808 (1986).

(quoting Brown v. United States, 356 U.S. 148, 154, 78 S. Ct. 622, 2 L. Ed. 2d 589 (1958)). The Court further observed that “the rules that generally apply to other witnesses—rules that serve the truth-seeking function of the trial—are generally applicable to [a testifying defendant] as well.” Portuondo, 529 U.S. at 69 (quoting Perry v. Leeke, 488 U.S. 272, 282, 109 S. Ct. 594, 102 L. Ed. 2d 624 (1989), and citing Reagan v. United States, 157 U.S. 301, 305, 15 S. Ct. 610, 39 L. Ed. 709 (1895)).

In holding that the prosecutor’s comments did not violate Agard’s Sixth Amendment rights, the Court in Portuondo contrasted a prosecutor’s comment on a defendant’s credibility, based on the opportunity to tailor testimony, with a prosecutor’s comment urging the jury to draw a negative inference of guilt from the defendant’s refusal to testify. The latter type of comment, “by ‘solemniz[ing] the silence of the accused into evidence against him,’ unconstitutionally ‘cuts down on the privilege [against self-incrimination] by making its assertion costly.’” Portuondo, 529 U.S. at 65 (first alteration in original) (quoting Griffin v. California, 380 U.S. 609, 614, 85 S. Ct. 1229, 14 L. Ed. 2d 106 (1965)). In essence, a comment that the jury should find a defendant guilty because he remained silent amounts to “urging the jury to do . . . something *the jury is not permitted to do.*” Portuondo, 529 U.S. at 67. Thus, a prosecutor is “prohibited [from making] comments that suggest a defendant’s silence is ‘evidence of *guilt*.’” Portuondo, 529 U.S. at 69 (quoting Griffin, 380 U.S. at 615). In addition, “the inference of guilt from silence is not always ‘natural or irresistible,’” thus making effective a jury instruction that a defendant’s guilt may not be inferred from his silence.

Portuondo, 529 U.S. at 67 (quoting Griffin, 380 U.S. at 615). On the other hand, the Court explained, “it is natural and irresistible for a jury, in evaluating the relative credibility of a defendant who testifies last, to have in mind and weigh in the balance the fact that he heard the testimony of all those who preceded him.”

Portuondo, 529 U.S. at 67–68.

Further, the Court rejected the argument that it is impermissible for a prosecutor to generally comment that a defendant had the opportunity to tailor testimony. Portuondo, 529 U.S. at 70. Such general comments are permissible because, similar to jury instructions on witness bias, they “set forth a consideration the jury was to have in mind when assessing the defendant’s credibility, which, *in turn*, assisted it in determining the guilt of the defendant.”

Portuondo, 529 U.S. at 71. In summarizing its reasoning that the Sixth Amendment does not preclude a prosecutor from drawing attention to a defendant’s opportunity to tailor testimony, the Court explained that there was

no reason to depart from the practice of treating testifying defendants the same as other witnesses. A witness’s ability to hear prior testimony and to tailor his account accordingly, and the threat that ability presents to the integrity of the trial, are no different when it is the defendant doing the listening. Allowing comment upon the fact that a defendant’s presence in the courtroom provides him a unique opportunity to tailor his testimony is appropriate—and indeed, given the inability to sequester the defendant, sometimes essential—to the central function of the trial, which is to discover the truth.

Portuondo, 529 U.S. at 73.

The questions that the prosecutor asked Martin on cross-examination are substantively indistinguishable from the comments at issue in Portuondo.

Therefore, under the holding in Portuondo, the prosecutor herein did not violate Martin's Sixth Amendment rights to attend trial, to confront witnesses, or to testify in his own defense.

Martin attempts to escape the effect of Portuondo by arguing that, in light of the analytical framework established in Gunwall, his trial rights under article I, section 22 of the Washington Constitution should be interpreted independently and more broadly than his parallel rights under the Sixth Amendment. In determining whether the Washington State Constitution "should be considered as extending broader rights to its citizens than does the United States Constitution," we 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. Gunwall, 106 Wn.2d at 61–62.

The court in Gunwall identified these criteria, in part, to ensure that consideration of independent state law grounds "will be made for well founded legal reasons and not by merely substituting our notion of justice for that of duly elected legislative bodies or the United States Supreme Court." 106 Wn.2d at 62–63. The court criticized the practice of state courts "resorting to state constitutions rather than to analogous provisions of the United States Constitution [and] simply announc[ing] that their decision is based on the state constitution but . . . not further explain[ing] it." Gunwall, 106 Wn.2d at 60. In

developing a mode of legal analysis to give distinct vitality to the state constitution, the court chided the practice of relying on state constitutional provisions, without more, to reach results differing from those of cases interpreting parallel federal constitutional provisions. It observed that, “[t]he difficulty with such decisions is that they establish no principled basis for repudiating federal precedent and thus furnish little or no rational basis for counsel to predict the future course of state decisional law.” Gunwall, 106 Wn.2d at 60. Analysis within this neutral framework helps to “achieve a balanced and complete development of the issue and avoid baseless, result-oriented jurisprudence.” State v. Silva, 107 Wn. App. 605, 614, 27 P.3d 663 (2001) (citing Hugh D. Spitzer, Which Constitution? Eleven Years of *Gunwall* in Washington State, 21 SEATTLE U. L. REV. 1187, 1205 (1998)). Stated differently, by consistently considering neutral criteria in determining whether the protective scope of parallel federal and state constitutional provisions differ, courts can avoid unprincipled decisions that suffer from the arbitrary ascription of different meaning to substantially similar language.

Gunwall itself provides guidance about when an independent state constitutional analysis is warranted. At issue in Gunwall was whether article I, section 7 of the Washington Constitution⁶ required the police to first obtain a search warrant before obtaining long distance telephone call records and before

⁶ Article I, section 7 of the Washington Constitution provides:

No person shall be disturbed in his private affairs, or his home invaded, without authority of law.

placing a pen register on the suspect's phone. 106 Wn.2d at 58. The court recognized that the United States Supreme Court, in Smith v. Maryland, 442 U.S. 735, 99 S. Ct. 2577, 61 L. Ed. 2d 220 (1979), had held that the Fourth Amendment did not require police to obtain a warrant to install a pen register and that other courts had held that the Fourth Amendment likewise did not require police to obtain a warrant to obtain long-distance billing records. Gunwall, 106 Wn.2d at 64. The Gunwall court concluded, however, that article I, section 7 protects individual privacy in this context more expansively than does the Fourth Amendment. Of great significance was that article I, section 7, unlike the Fourth Amendment, expressly protects an individual's "private affairs." Gunwall, 106 Wn.2d at 65. The court also found it noteworthy that the State Constitutional Convention of 1889 rejected a "proposal to adopt language identical to that of the Fourth Amendment." Gunwall, 106 Wn.2d at 66. Further, the court noted that Washington's "long history and tradition of strict legislative protection of telephonic and other electronic communications," including statutes criminalizing the wrongful interception of such communications, "len[t] strong support to [its] decision to resort to independent state constitutional grounds in this case." Gunwall, 106 Wn.2d at 66. The court also characterized telephonic communication as a "necessary component of modern life . . . indispensable to one's ability to effectively communicate in today's complex society." Gunwall,

106 Wn.2d at 67 (quoting People v. Sporleder, 666 P.2d 135, 141 (Colo. 1983)).⁷

The provisions of article I, section 22 implicated in this case, however, do not warrant an analysis independent from the Sixth Amendment.

The first two Gunwall factors—the text of the state constitution and significant textual differences between the parallel state and federal constitutional provisions—do not support an independent analysis. Pursuant to article I, section 22, “[i]n criminal prosecutions the accused shall have the right to appear and defend in person, . . . to testify in his own behalf, [and] to meet the witnesses against him face to face.” The Sixth Amendment provides that, “[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, . . . to be confronted with the witnesses against him[,] [and] to have compulsory process for obtaining witnesses in his favor.” The significant textual difference between these provisions is that the Sixth Amendment does not expressly guarantee the defendant the right to attend trial and to testify as does article I, section 22. But the Sixth Amendment has been interpreted as necessarily guaranteeing these rights. See Rock v. Arkansas, 483 U.S. 44, 52, 107 S. Ct. 2704, 97 L. Ed. 2d 37 (1987) (recognizing defendant’s right to testify); Illinois v. Allen, 397 U.S. 337, 338, 90 S. Ct. 1057, 25 L. Ed. 2d 353 (1970) (recognizing defendant’s right to attend trial) (citing Lewis v. United States, 146 U.S. 370, 13 S. Ct. 136, 36 L. Ed.

⁷ Since the court decided Gunwall, it has determined that the Washington Constitution provides greater protection of individual’s privacy rights in other contexts as well. See, e.g., City of Seattle v. Mesiani, 110 Wn.2d 454, 755 P.2d 775 (1988) (sobriety checkpoint); State v. Boland, 115 Wn.2d 571, 800 P.2d 1112 (1990) (garbage searches); State v. Young, 123 Wn.2d 173, 867 P.2d 593 (1994) (infrared thermal searches); State v. Hendrickson, 129 Wn.2d 61, 917 P.2d 563 (1996) (investigative searches).

1011 (1892)).

Martin attempts to make much of the express guarantee of the right to testify in article I, section 22 and the absence of a corresponding express guarantee in the Sixth Amendment. This distinction is of no moment. That the state constitution expressly guarantees that which the Sixth Amendment impliedly protects has no effect on the content of the rights protected under the parallel constitutional provisions. Nothing in the language of article I, section 22 suggests that the right to testify under the state constitution carries with it immunity from questions about the opportunity to tailor one's testimony. Unlike article I, section 7's language expressly protecting one's "private affairs," which was central to the court's decision in Gunwall, there is nothing in the language of article I, section 22 to suggest that the defendant's rights, as set forth therein, are any different from those protected by the Sixth Amendment. Martin has simply identified a distinction without a difference.

Martin principally relies on Foster for the proposition that the textual differences between article I, section 22 and the Sixth Amendment require an independent analysis. In Foster, the court addressed the question of whether a state statute permitting child-abuse victims to testify via one-way, closed-circuit television under certain conditions violated a criminal defendant's right under article I, section 22 "to meet the witnesses against him *face to face*" (emphasis added). Thus, Foster concerned the *manner* in which a criminal defendant has a right to confront witnesses. 135 Wn.2d at 483 (Johnson, J., dissenting). Although the court upheld the statute, five justices (one concurring and four

dissenting) agreed that, in light of the Gunwall factors, the confrontation clause of article I, section 22 should be analyzed independently of the confrontation clause in the Sixth Amendment. Foster, 135 Wn.2d at 473–74 (Alexander, J., concurring in part, dissenting in part); 135 Wn.2d at 481 (Johnson, J., dissenting); see also State v. Shafer, 156 Wn.2d 381, 391, 128 P.3d 87 (2006) (recognizing that a majority of justices in Foster agreed that the state confrontation clause should be interpreted independently from the Sixth Amendment); State v. Smith, 148 Wn.2d 122, 131, 59 P.3d 74 (2002) (same).

Martin misreads Foster as establishing the principle that, whenever there arises an issue concerning one of the many protections that article I, section 22 affords a criminal defendant, we must analyze the particular right or rights in question separately from any parallel federal provision. However, Foster does not stand for the proposition that article I, section 22, in its entirety, must always be interpreted independently of the Sixth Amendment. Rather, as we have previously observed, Foster concerned only one of the rights that an accused enjoys under the bundle of protections afforded by article I, section 22. See State v. Mason, 127 Wn. App. 554, 569, 126 P.3d 34 (2005) (explaining, in the context of a challenge to the admission of hearsay evidence, that “Foster did not establish a firmly-rooted principle of state constitutional jurisprudence, as it discussed only the constitutional provisions in a context entirely distinct from the one presented here”), aff’d on other grounds by 160 Wn.2d 910, 162 P.3d 396 (2007), cert. denied, 128 S. Ct. 2430 (2008); Silva, 107 Wn. App. at 613 (observing that “Washington courts have not yet interpreted article I, section 22

relating to an accused's right of access to the courts").

The recognition of a majority of the justices in Foster that, in the context of the issue therein presented, the confrontation clause in the state constitution warranted an independent analysis is not controlling in this instance. Simply put, the two cases do not involve the same issues. Unlike in Foster, the issue here is not whether the manner in which Martin confronted witnesses at trial satisfied the requirements of the confrontation clause in article I, section 22. Instead, the issue here is whether Martin's right to observe the State's case in its entirety shields him from a prosecutor's questions concerning the opportunity thus presented to tailor his testimony. Whether article I, section 22 requires that a defendant be able to confront a witness in person instead of via closed-circuit television has no bearing on the determination of whether a defendant's state constitutional trial rights provide a larger measure of protection against tailoring inquiries than does the Sixth Amendment. Foster is ultimately of little relevance to this case.

With respect to the third Gunwall factor—state constitutional and common law history—Martin contends that legal history cuts in favor of an independent and more expansive interpretation of his rights under article I, section 22. He emphasizes that the State Constitutional Convention adopted language for article I, section 22 at variance with the Sixth Amendment. In so doing, Martin posits, the Convention intended the rights at issue to guarantee protections that differ from those afforded by the Sixth Amendment. His argument rests largely on the commentary of a former Washington Supreme Court justice, who argued that

“state bills of rights were never intended to be interpreted in light of the United States Bill of Rights” both because many early states adopted individual rights charters before the United States Constitution was ratified and because “Washington, like the vast majority of relatively newer states, copied much of its Declaration of Rights from the constitutions of older states, rather than from the federal charter.” 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).

Legal history, however, contributes little to resolving the issue before us. As courts have noted and Martin himself recognizes, little historical evidence exists concerning the intentions of the individuals who drafted and adopted the Washington Constitution. See, e.g., Foster, 135 Wn.2d at 460 (plurality opinion); Silva, 107 Wn. App. at 619. The Journal of the 1889 Washington State Constitutional Convention provides no clue as to whether the drafters of article I, section 22, by explicitly recognizing the rights here at issue, sought to shield a testifying defendant from questions about the opportunity to tailor testimony and thereby treat the testifying defendant differently from other witnesses. The Journal contains only the text of the adopted provision and notes the date on which the Convention reviewed the language: July 30, 1889. The minutes from that day of debate likewise provide no insight. See THE JOURNAL OF THE WASHINGTON STATE CONSTITUTIONAL CONVENTION 510-12, note 38, at 511, 191–96 (Beverly Paulik Rosenow ed., William S. Hein & Co. 1999) (1962) [hereinafter JOURNAL]. The Journal simply notes that article I, section 22, as originally

adopted, was “identical” to parallel provisions in the Indiana and Oregon constitutions and that it was “similar” to the Sixth Amendment. JOURNAL, *SUPRA* note 37, at 511. Nor does the leading treatise on state constitutional law shed light on this question. See ROBERT F. UTTER AND HUGH D. SPITZER, THE WASHINGTON STATE CONSTITUTION: A REFERENCE GUIDE 22-24, 35-37 (2002) (discussing rights of accused persons).

In addition, Martin points to nothing in the common law supporting an independent state constitutional analysis. Although Martin cites cases decided by courts in Indiana and Oregon, whose constitutions served as a model for article I, section 22, none of these cases deals with the issue at hand. Instead, like Foster, they concern the manner of confrontation. Martin is correct that a criminal defendant’s right to testify was unknown to the common law and did not emerge until the mid-19th Century, first through state constitutions and statutory enactments and then by federal statute in 1878. See Ferguson v. Georgia, 365 U.S. 570, 573-83, 81 S. Ct. 756, 5 L. Ed. 2d 783 (1961). It is also true that when article I, section 22 was adopted, the Sixth Amendment had yet to be interpreted as implicitly guaranteeing the right to testify. See Rock, 483 U.S. at 51-53. However, that recognition of a federal constitutional right to testify developed slowly does not weigh in favor of an independent analysis of article I, section 22 in this context. Nothing suggests that the stuttering evolution of a defendant’s right to testify makes the content of the pertinent rights under article I, section 22 any different from those parallel rights protected under the Sixth Amendment. Without a more detailed historical record indicating a substantive difference

between the parallel state and federal provisions, Martin's argument about original intent gains little purchase. The dearth of legal history relevant to the issue before us neutralizes the third Gunwall factor.

The fourth Gunwall factor—preexisting state law—likewise does not support an independent analysis. There is no law that restricts a prosecutor from asking a defendant about the opportunity to tailor testimony.⁸ On the contrary, under our precedent, a testifying defendant is to be treated the same as any other witness for purposes of cross-examination and credibility challenges. See, e.g., State v. Etheridge, 74 Wn.2d 102, 113, 443 P.2d 536 (1968); cf. Geders v. United States, 425 U.S. 80, 87, 96 S. Ct. 1330, 47 L. Ed. 2d 592 (1976) (explaining the sequestration rule, which does not apply to a defendant, “exercises a restraint on witnesses ‘tailoring’ their testimony to that of earlier witnesses”). In short, there is no preexisting state law that suggests we should interpret article I, section 22 independently in the context presented.

Courts have acknowledged that the fifth Gunwall factor—structural differences—supports an independent analysis of the state constitution and that consideration of this factor is the same in every case. Foster, 135 Wn.2d at 458 (plurality opinion). That is, “the United States Constitution is a *grant* of limited

⁸ We note that this court, in State v. Johnson, 80 Wn. App. 337, 341, 908 P.2d 900 (1996), held that “[t]he prosecutor’s comments [made during closing argument] about the defendant’s unique opportunity to be present at trial and hear all the testimony against him impermissibly infringed his exercise of his *Sixth Amendment* rights to be present at trial and confront witnesses” (emphasis added). In State v. Smith, 82 Wn. App. 327, 334–35, 917 P.2d 1108 (1996), we embraced the reasoning in Johnson but held that tailoring queries on cross-examination were not violative of a defendant’s Sixth Amendment rights *per se*. We subsequently recognized that “Portuondo effectively overrules Johnson and Smith insofar as they state a different rule.” State v. Miller, 110 Wn. App. 283, 285, 40 P.3d 692 (2002). Johnson, Smith, and Miller did not, however, address tailoring queries in the context of Article I, Section 22.

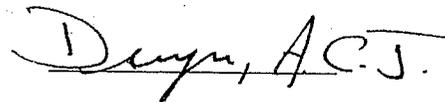
power to the federal government, while the state constitution imposes *limitations* on the otherwise plenary power of the state.” Foster, 135 Wn.2d at 458–59. But this difference is a nonfactor here. How differences in the sources of government power and limitations on that power affect the content of the rights at issue here is not readily apparent. Martin makes no effort to explain the significance of this factor other than to parrot the observation that it always cuts in favor of an independent analysis.

Nor does the sixth Gunwall factor weigh in favor of an independent analysis. Nothing suggests that Washington has a particular concern in limiting the kinds of questions asked by the prosecutor herein. No preexisting state laws reflect a tradition of restricting prosecutorial queries of this type. Of course, it might be argued that every provision of the state constitution is a matter of particular state concern. But if that were, by itself, reason to embark on an independent analysis, the entire Gunwall framework would be rendered superfluous.

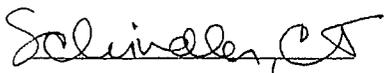
Without any reason under Gunwall to analyze article I, section 22 independently from the Sixth Amendment, Portuondo is controlling. As the Court in Portuondo explained, it is both permissible and irresistible for the jury, in assessing a testifying defendant’s credibility, to consider the defendant’s opportunity to observe the evidence introduced at trial. Were we to hold, as Martin urges, that a prosecutor’s questions about a defendant’s opportunity to tailor testimony constitute a per se violation of a defendant’s rights under article I, section 22, the logical next step would be to require trial courts to instruct

members of the jury that they are not permitted to consider the defendant's access to the evidence introduced at trial. But such a rule would be at odds with the principle that a defendant, by testifying, exposes himself to credibility challenges as does any other witness.⁹ Because it is permissible for the jury to evaluate a defendant's credibility by considering his opportunity to tailor his testimony, a prosecutor may draw attention to the defendant's opportunity to do so on cross-examination in order to impeach the defendant's credibility. Such questions do not constitute an improper comment on a defendant's exercise of his constitutional rights because they do not point to the exercise of his rights as evidence of guilt. Therefore, the prosecutor in this case did not engage in any misconduct by asking Martin about his opportunity to tailor his testimony to the evidence previously introduced at trial.¹⁰

Affirmed.



We concur:





⁹ Martin's counsel conceded at oral argument that nothing requires the issuance of such an instruction to the jury.

¹⁰ Martin also asks us to exercise our inherent authority to prescribe rules of procedure and practice to fashion a rule barring prosecutors from posing the kinds of questions that the prosecutor asked Martin at trial. He points to courts in other jurisdictions that have done so. See, e.g., Commonwealth v. Gaudette, 441 Mass. 762, 808 N.E.2d 798 (2004); State v. Daniels, 182 N.J. 80, 861 A.2d 808 (2004); State v. Mayhorn, 720 N.W.2d 776 (Minn. 2006). Because we find no constitutional infirmity in the prosecutor's questions, there is no principled basis on which to fashion the rule that Martin seeks. Accordingly, we decline the invitation.