

NO. 62316-8-1

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

EMIR BESKURT,

Appellant.

2009 JUN 30 PM 4:55

COURT OF APPEALS
STATE OF WASHINGTON



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

The Honorable Susan J. Craighead

*

BRIEF OF APPELLANT

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A. SUMMARY OF ARGUMENT

After spending an evening drinking and socializing with her neighbor, appellant Emir Beskurt, and three of his friends, Heather Wasmer accused the young men of raping her. The men did not deny a group sexual encounter had occurred, but asserted the sex was consensual.

At trial, the State repeatedly urged the jurors to draw a negative inference from the young men's exercise of their constitutional rights to silence, to confront their accuser, to the assistance of counsel, and to have a trial. The State capped its multiple inappropriate comments with an emotional appeal to the jurors to convict based on sympathy for Wasmer, not the evidence. The grave misconduct prevented fair consideration of Beskurt's defense, thereby denying him a fair trial.

B. ASSIGNMENTS OF ERROR

1. The prosecutor improperly commented on and urged the jury to draw a negative inference from Beskurt's exercise of his Fifth Amendment privilege against self-incrimination.

2. The prosecutor improperly commented on and urged the jury to draw a negative inference from Beskurt's exercise of his

Sixth Amendment rights to confrontation, to the assistance of counsel, and to have a trial.

3. Prosecutorial misconduct in closing argument denied Beskurt his due process right to a fair trial.

4. Cumulative error denied Beskurt his due process right to a fair trial.

5. The court erred in excluding defense evidence probative of the complainant's credibility, thereby violating Beskurt's right to present a complete defense and confront the witnesses against him.

6. The court erred in imposing an illegal term of community custody.

7. The court erred in entering a sexual assault protection order issued in conjunction with Beskurt's sentence that exceeds the statutory maximum term.

C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. The Fifth Amendment and article I, section 9 of the Washington Constitution prohibit the State from burdening the accused's exercise of his right to silence by directly or indirectly urging the jury to consider silence as evidence of guilt. Did the prosecutor improperly comment on Beskurt's Fifth Amendment right

to silence when, during voir dire, she extensively discussed the Fifth Amendment privilege against self-incrimination and told the jurors that she did not have an opportunity to speak with the defendants or know what evidence they planned to present?

2. A prosecutor commits misconduct when, during trial or in closing argument, he or she comments on the exercise of a specific constitutional right of the accused. In trial and closing argument here, the prosecutor commented on appellant's constitutional rights to confrontation, to be present in court, to have a trial, to remain silent, and to the assistance of counsel. Was the prosecutor's misconduct a manifest constitutional error that prejudiced Beskurt's right to a fair trial, requiring reversal of his conviction and remand for a new trial?

3. The court barred Beskurt from eliciting evidence that the complaining witness told a police officer shortly after the alleged rape that she did not want her assailants to go to jail. This evidence was probative of the credibility of the allegation and the State presented no compelling interest for its exclusion. Is reversal required because the court's violation of Beskurt's constitutional rights to present a complete defense and confront the witnesses against him was not harmless beyond a reasonable doubt?

4. Did cumulative error deny Beskurt his Fourteenth Amendment right to a fundamentally fair trial?

5. Must the community custody portion of the sentence be vacated because the term of community custody was imposed without statutory authority?

6. The term of a sexual assault protection order issued in conjunction with a criminal prosecution may not exceed two years beyond the expiration of the associated sentence. Is the protection order illegal because it exceeds the term allowed by statute?

D. STATEMENT OF THE CASE

1. Allegation and criminal charges. On a hot July day in Seattle, 20-year-old Heather Wasmer was feeling celebratory because she had a day off from both school and work. 10RP 45-46.¹ She spent the afternoon by the pool in her apartment complex

¹ 24 volumes of transcripts are referenced herein as follows:

June 23, 2008	-	1RP
June 24, 2008	-	2RP
June 25, 2008	-	3RP
June 26, 2008	-	4RP
June 30, 2008	-	5RP
July 1, 2008	-	6RP
July 2, 2008	-	7RP
July 8, 2008 (Kennedy)	-	8RP
July 8, 2008 (Bonicelli)	-	9RP
July 9, 2008	-	10RP
July 10, 2008	-	11RP
July 14, 2008	-	12RP
July 15, 2008	-	13RP

with her friends Caroline Concepcion and Spencer Crilly drinking cheap beer, then the three went up to the apartment Wasmer shared with Concepcion to cook dinner. 10RP 46.

From the window Concepcion and Wasmer could see appellant Beskurt and his friend "Tony," Turgut Tarhan, in Beskurt's 13th-floor apartment. 18RP 13, 21. Concepcion had met the two men approximately two months earlier at the pool and found Beskurt attractive. 18RP 138. Concepcion and Wasmer beckoned to Beskurt and Tarhan to come upstairs. 18RP 24. Beskurt and Tarhan hesitated, but after Wasmer and Concepcion gestured to them again from the window, they decided to accept the invitation. 10RP 60; 11RP 105.

Over the course of the evening, Beskurt and Tarhan were joined by Tarhan's twin brother, Taner, and another friend, Samet Bideratan. 19RP 42-44. The party became boisterous; everyone was drinking, Wasmer and Concepcion were dancing, and Wasmer

July 16, 2008	-	14RP
July 17, 2008	-	15RP
July 21, 2008	-	16RP
July 22, 2008	-	17RP
July 23, 2008	-	18RP
July 24, 2008 (Moll)	-	19RP
July 24, 2008 (McGrath)-	-	20RP
July 28, 2008	-	21RP
July 29, 2008	-	22RP
July 30, 2008	-	23RP
August 1, 2008	-	24RP

showed the young men tattoos on her lower back, chest, and leg. 12RP 13; 21RP 42. Wasmer removed her tank top and was wearing only a bikini top and shorts. 14RP 115.

At some point, Wasmer and Concepcion asked if they could see Beskurt's apartment. 18RP 27. They invited Crilly, but Crilly, who had been intimate with Wasmer the night before, was jealous and did not want to come. 10RP 82; 11RP 110, 113; 14RP 68-70; 19RP 56.

At Beskurt's apartment, Wasmer was enjoying herself but Concepcion was growing frustrated because the men were showing Wasmer more attention than her. 10RP 101; 19RP 50-51. Concepcion saw Beskurt sitting close to Wasmer, brushing her leg with his hand, and Taner Tarhan, seated on Wasmer's other side, also starting to touch her. 18RP 35, 83-84. At this point, Concepcion decided to leave to "get cigarettes" (although Beskurt smoked and had cigarettes in the apartment). 18RP 38. Concepcion chatted with friends at the store and then, rather than return to Beskurt's apartment, she went back to Wasmer's apartment. 18RP 38.

When Concepcion got upstairs, she found Crilly still in Wasmer's apartment, "freaking out," according to Concepcion,

because he had knocked on Beskurt's door and no one had answered. 18RP 39. Concepcion went downstairs and knocked on Beskurt's door, and eventually Wasmer answered. Id. Wasmer was naked except for her bikini top, which had been untied, and was crying. 18RP 40-41. She told Concepcion that the men all started having sex with her, and asked her to get her clothes. 10RP 130; 18RP 48. Concepcion called the police, and the four men were arrested.

The King County Prosecuting Attorney charged all four men with rape in the second degree. CP 1. At a jury trial, Wasmer testified that she was sitting on the futon in Beskurt's apartment, with Beskurt and Taner Tarhan sitting on either side of her. 10RP 102, 105. The two men started touching her, grazingly at first, but the situation quickly progressed and soon Wasmer found herself lying on her back on the futon. 10RP 107. They undressed her and started touching her intimately. 10RP 109-11. She realized that Concepcion was gone, but had not noticed her leaving. 10RP 102. She asked the men to "knock it off," and repeatedly asked for Caroline. 10RP 107, 111; 11RP 1226. The men disrobed rapidly and soon she found herself having oral and vaginal sex with all four men. 10RP 116-17. She tried to get up but the men held her

down. She found it “awkward” to resist them and said the “whole thing” was “embarrassing.” 11RP 129. She described their behavior as “horny,” not “angry” or “scary.” 10RP 122; 13RP 13.

According to Bideratan and Turgut Tarhan, Wasmer was a willing and active participant in a group sexual encounter. 19RP 62-66, 21RP 57-78. When Concepcion knocked, Turgut was having vaginal intercourse with Wasmer. 21RP 69-70. Wasmer brushed Turgut’s hands away from her hips and said, “stop, stop,” and he immediately complied. 19RP 69; 21RP 80.

2. Prosecutor’s misconduct during voir dire. During jury voir dire, the prosecutor, Christine Keating, asked,

Is there anyone who thinks it’s a bad thing that in a criminal case I have to give all of the evidence that I have and intend to present in court to the defense attorneys and their clients before trial, does anyone think that seems fair, unfair, that they get to know exactly what I’ve got?

2RP 150.

Juror No. 33 asked, “Do you know what they had?” Ms. Keating replied, “No. Do you think that seems unfair?” Juror No. 33 said, “Yeah.” Id. Ms. Keating asked, “And why does that seem unfair?” Id. At this point, Bideratan’s counsel, Tony Savage

objected, and the court sustained his objection, commenting, "It's more complicated than that."² Id.

Ms. Keating nonetheless persisted with this improper line of inquiry:

Ms. Keating: Well, sir, let me ask you this. If you were to learn during the course of the trial that I had never – that the State doesn't have an opportunity to speak with defendants, do you think that is unfair?

Juror No. 33: Speak with them?

Ms. Keating: To speak with them, talk to them, prior to a case.

Mr. Savage: Your honor, I object to the question. The Fifth Amendment says that she can't.

Ms. Keating: That doesn't mean a juror thinks the Fifth Amendment's a good thing.

The Court: Perhaps you could rephrase the question.

Ms. Keating: Sir, let me ask you this: Obviously, if someone is arrested with a crime [sic], charged with a crime, they have the right to remain silent, they don't have to talk, and we come in here for this trial, not any one of those four defendants has to get up and testify, they don't have to put on a shred of evidence, the burden is on me to prove the case. If they don't want to tell me before the case what they might testify to, they don't have to, because that's their right.

Does that seem like a good thing, a bad thing, unfair to the State?

² At the start of the trial, the court agreed the objection of one defense attorney could speak for all four attorneys, that if an attorney would be presumed to join in an objection if he remained silent, and that he would only need to speak affirmatively if he wished to expressly withdraw from an objection. 1RP 20-21.

Mr. Savage: Your Honor, I have a legal matter to take up before the Court.

2RP 150-51.

Mr. Savage moved for a mistrial, and the other attorneys joined in the motion. 2RP 152-60. Mr. Savage argued that Ms. Keating had commented on their clients' Fifth Amendment rights, and that she inappropriately had told the jurors that she did not know what evidence the defendants might present. 2RP 152-53.

The court found that Ms. Keating's comments, while improper, did not rise to the level of a mistrial, and drafted a curative instruction to read the jury. 2RP 164. Beskurt's counsel, Mr. Meryhew, maintained his request for a mistrial and objected to the instruction as a "gong, not a bell." 2RP 165-66.

3. Prosecutor's misconduct during trial. During the trial, after presenting Wasmer's testimony, Ms. Keating asked her to describe the experience of having to talk to police officers, medical staff, family members, prosecutors, and defense attorneys about the allegations. 11RP 27-28. Wasmer responded the experience was "embarrassing," and, after the court overruled an objection to the relevance of the inquiry, Wasmer stated, "I shouldn't have to tell

them something like this. It's not something I wanted." 11RP 28-29.

Ms. Keating pursued this inquiry, asking Wasmer how much she had slept before testifying. 11RP 29. The court again overruled a defense objection, and, emboldened, Ms. Keating asked, "Heather, is this the first time since the incident that you've had to be in a room, staring at the defendants?" *Id.* Wasmer responded, "Yes." Ms. Keating asked, "And how has that been for you?" 11RP 29-30. Wasmer replied, "It's awkward, uncomfortable, really, really, uncomfortable." 11RP 30.

In her redirect examination of Wasmer, the prosecutor again harped upon this theme. She asked Wasmer to describe the experience of testifying and being cross-examined, and Wasmer stated it was "horrendous." 13RP 15. An objection to this question was sustained. Objections to subsequent questions were overruled, however, and the prosecutor was permitted to elicit testimony that the experience of being a witness had caused Wasmer to have nightmares. 13RP 16.

4. Prosecutor's misconduct during closing argument. Ms. Keating reserved her most egregious comments for closing argument. Ms. Keating commenced her argument by improperly

commenting on the defendants' right to have a trial and to confrontation, stating,

[Wasmer] had no idea that she would be questioned about that evening as if she were the one on trial, no idea that a decision about what happened to her, about what these four men did to her, would fall into the hands of each of you, 13 people, 12 people, who Heather has never met and never seen until she walked into this courtroom, but that is, in fact, where we are today.

22RP 24.

Ms. Keating continued to comment on the defendants' right to confront their accuser and to the assistance of counsel, arguing,

Heather sat in that chair and she answered questions that I'm sure for her felt like they would never end, questions by me that led her down paths or made her think about things maybe she hadn't thought about in a while, and then she had to relive it again and again and again, as she answered, patiently and respectfully, the questions of the four defense attorneys. She was always polite, she was always trying very hard to answer the questions the best that she could, and she was clearly overwhelmed, but she tried.

22RP 30-31.

Ms. Keating built upon this theme:

[Wasmer] could have said, "The heck with all of you, I am not going through this, I am not going to sit there and be humiliated and answer these questions. I am not going to have my life put on display. I am not going to talk about what was done to me in front of a room full of strangers." ...

She bravely came back, day after day, to answer the questions, she told you she was running on empty, she had no sleep, she was having nightmares when she did sleep, she was losing pay every day that she missed work, and yet, without fail, she came back and told you what happened to her.

22RP 31-32.

Ms. Keating then argued that because Bideratan's DNA was detected on Wasmer's body,

[T]he fact that that DNA was there prevented Mr. Bideratan or any of the other defendants from getting up here and saying, "Never happened, don't know what she's talking about, we never had sex."

22RP 38.

Mr. Savage immediately objected, and the court instructed Ms. Keating to "move on." 22RP 38-39. Undeterred, Ms. Keating argued, "What that DNA forced Mr. Bideratan to do--" 22RP 39.

Mr. Savage again objected, and the court sustained the objection. Id. Ms. Keating nonetheless continued to make this argument:

Ladies and gentlemen, if that DNA had not been there, I would suggest to you that it would have been a lot easier to say no sex had happened, but there was DNA in her mouth, there was DNA in her vagina, and so the only way out of this--"

Id. Mr. Savage objected a third time, and requested a sidebar. Id.

Following the sidebar, Ms. Keating listed “all the different reasons you had to believe Heather Wasmer” and said “one of those reasons is that Mr. Bideratan’s DNA was found in Heather’s mouth and in her vagina, and with that, the only available defense is that this was consensual.” 22RP 40. The court overruled defense objections to this argument. Id.

Ms. Keating then returned to her earlier theme of commenting on the rights to trial and to confrontation:

You heard how Heather, after this happened, went through a joint interview in the prosecutor’s office, where she sat down, yet again, with a prosecutor and with a detective, and told them what happened. You heard how Heather sat down another time with a different prosecutor and told him what happened. You heard how Heather sat down with me and told me what happened, and you heard how Heather met with each of the four defense attorneys and again patiently and respectfully answered their questions.

And then you saw how Heather came back to court, as we’ve discussed, not just one day, not even just two days, Heather came back four days. She sat on the witness stand for four days and answered questions, and she told you, with these four men staring at her, with their families staring at her, she told you what they did, she told you how she got through it.

22RP 41-42.

Following this argument, despite vigorously contesting the admission of any evidence of Wasmer's sexual history under the rape shield statute,³ the prosecutor argued,

Now, I'm sure that somewhere out there you all could find a woman who after only two hours of knowing four men would agree to have sex with them, but the real question, the real question for this trial is is Heather one of those women? Is she the kind of girl that says come hither, and then says come hither, come hither, and come hither again? Is she the kind of girl that has sex with four men that she's known for less than two hours while her friend goes to get cigarettes?

22RP 46.

At the break, all of the defense attorneys moved for a mistrial based on Ms. Keating's comments that the DNA evidence had "forced" the defendants to argue the intercourse was consensual. 22RP 52-54. In response, Ms. Keating falsely claimed that she was "confining [her] remarks [about the DNA] to Mr. Bideratan"⁴ and contended that because he "chose to" testify, Bideratan had opened the door to the improper argument. 22RP 55-56. The

³ 1RP 77-85; 2RP 12-15, 17; 4RP 24-27, 36-37, 71-73, 83-84.

⁴ In fact, Ms. Keating stated,

[T]he fact that that DNA was there prevented Mr. Bideratan or **any of the other defendants** from getting up here and saying, "Never happened, don't know what she's talking about, we never had sex."

22RP 38 (emphasis added).

court ruled that the misconduct was not so improper as to warrant either a mistrial or a curative instruction. 22 RP 56-57.

Ms. Keating's rebuttal argument was, if possible, even more egregious than her initial presentation. She commenced,

There's a saying in the courthouse, when you have the facts on your side, pound the facts, when you have the law on your side, pound the law, and when you don't have either one, pound the victim, and ladies and gentlemen, yesterday afternoon and this morning, that is exactly what you have seen happen.

23RP 12-13.

She alleged that some of the questions posed by defense counsel "bordered on the offensive." 23RP 13. She argued,

[A] number of the defense attorneys have tried to gain great mileage, not only by casting aspersions on Heather yesterday, but by casting aspersions on me, by suggesting that my speech, as Mr. Meryhew and Mr. Savage call it, was based on hyperbole and emotion, and failed to address any of the evidence in this case. Well, that's an interesting summary of my remarks yesterday, an inaccurate one, but he's right [sic], there was emotion in my remarks to you. Why? Because this case screams with emotion, and, in fact, emotion is part of the evidence, and rape is emotional, it's emotional, regardless of what unsophisticated words you use to describe it.

23RP 14-15.

Ms. Keating snidely suggested that Mr. Meryhew had "missed a very significant portion of Ms. Wasmer's testimony . . .

where she sat there in tears, bullied by Mr. Savage's questions[.]”

23RP 15. She discussed each of the attorneys' closing arguments in turn, and then said,

Now, regardless of which one of these explanations that has been offered, the bottom line that defense counsel would have you believe is that Heather has perpetrated a lie on all of you and on this court, that because she regrets a decision or wishes she had been raped, or is loyal to a friend, that she is willing to come in here and testify against these four men, about these very serious allegations.

23RP 24.

She alleged that defense counsel's

questions themselves and the bullying manner in which they were asked were designed to elicit just those types of responses from Heather, designed to confuse her, designed to make her think she'd given a different answer before, designed to get her to say, either, yes – anything is possible, or to dig in her heels. To be frank, I'm not even sure I could have withstood some of the questioning that was posed by defense, and why was that? Why were those questions asked of Heather in that way? Perhaps so that defense counsel could get right in here in closing argument and tell you Heather is not to be believed.

23RP 26-27.

Ms. Keating concluded by stating, “Mr. McFarland asked you if your sons were on trial, what evidence would be enough. Well, ladies and gentlemen, if your daughter had been the victim, what kind of evidence would be enough?” 23RP 29.

The jury convicted all four men of rape in the third degree. CP 11. The court imposed a ten-month sentence and imposed community custody of 36-48 months. CP 46-48. Beskurt appeals. CP 53-54.

E. ARGUMENT

1. THE PROSECUTOR'S COMMENTS DURING VOIR DIRE ON THE DEFENDANTS' FIFTH AMENDMENT RIGHTS WERE MISCONDUCT.

a. Comments on a defendant's exercise of his constitutional right to silence violate the Fifth Amendment privilege against self-incrimination and the Fourteenth Amendment due process right to a fair trial. Both the federal constitution and the Washington Constitution explicitly safeguard an accused person's right to silence and privilege against incrimination. U.S. Const. amend. 5;⁵ Const. art. I, § 9.⁶ The Fifth Amendment applies to states through the Fourteenth Amendment. Malloy v. Hogan, 378 U.S. 1, 3-4, 84 S.Ct. 1489, 12 L.Ed.2d 653 (1964). The right to silence enshrined in the Fifth Amendment prohibits the government from either commenting on the exercise of the right, or from urging

⁵ In pertinent part, the Fifth Amendment states, no person "shall ... be compelled in any criminal case to be a witness against himself." U.S. Const. amend. 5.

⁶ Article I, section 9 states in relevant part: "No person shall be compelled in any criminal case to give evidence against himself."

the jury to draw a negative inference therefrom. Doyle v. Ohio, 426 U.S. 610, 618, 96 S.Ct. 2240, 49 L.Ed.2d 91 (1976); State v. Burke, 163 Wn.2d 204, 217, 181 P.3d 1 (2008). The United States Supreme Court and the Washington Supreme Court have repeatedly reversed convictions where the State has improperly commented on or urged the jury to draw a negative inference from the exercise of the right to silence. Doyle, supra, Griffin v. California, 380 U.S. 609, 614-15, 85 S.Ct. 1229, 14 L.Ed.2d 106 (1965); Burke, supra; State v. Easter, 130 Wn.2d 228, 235, 922 P.2d 1285 (1996).

b. The prosecutor's comments during jury voir dire on Beskurt's right to remain silent, and urging the potential jurors to draw a negative inference from the exercise of this right by telling them the defendants did not give the State all of their evidence, were reversible misconduct. Washington categorically follows Doyle in holding that improper comments on the right to silence are reversible error. Easter, 130 Wn.2d at 237; State v. Fricks, 91 Wn.2d 391, 396, 588 P.2d 1328 (1979).

While Washington appellate courts have not been confronted with the circumstance of a prosecutor commenting on the right to silence in jury voir dire, the decisions of other state

courts are instructive. For example, the Florida courts hold it is reversible error for a prosecutor to comment on the defendant's right to remain silent during jury voir dire. Varona v. State, 674 So.2d 823 (Fla. 1996) ("even cursory references to the right to remain silent are impermissible"); Lawrence v. State, 829 So.2d 955, 958 (Fla. App. 2002); (finding comments on right to silence in voir dire reversible error); accord Wilson v. State, 988 So.2d 43 (Fla. App. 2008). Likewise, the Virginia Court of Appeals found a prosecutor's statement that the defendant "has a fundamental and Constitutional Right not to testify if he chooses not to and that is not to be held against him nor are you to draw an adverse inference from his choosing not to testify" was an impermissible comment on the defendant's right not to testify, and was improper and prejudicial. Hazel v. Commonwealth, 524 S.E.2d. 134, 139 (Va. App. 2000). And the Oklahoma Court of Appeals found a comment that simply explained the Fifth Amendment right, without urging the jury to draw a negative inference as the prosecutor did here, came "dangerously close to causing a reversal of these convictions," but concluded the error was harmless because of the "exceptional amount of evidence" against the accused. Pickens v. State, 850 P.2d 328, 341-42 (Ok. App. 1993); accord People v. Emery, 159

A.D.2d 992, 992 (N.Y. App. 1990) (finding trial court's comments on right to silence during voir dire improper, but harmless given wealth of evidence against defendant).

These cases establish that an accurate explanation of the right to remain silent by a prosecutor, or even a prosecutor's mere reference to the right, violate the rule stated in Doyle and Griffin. Here, however, the prosecutor coupled her "explanation" of the Fifth Amendment right with the assertion that she did not know what evidence the defendants planned to present. 2RP 150-51. She repeatedly asked the jurors whether this was "unfair." Id. The court found that her explanation misstated the law. Id. The prosecutor's comments plainly violated Beskurt's Fifth Amendment right.

c. The constitutional error was prejudicial. Where the State has burdened the exercise of an accused person's constitutional right to silence, the State must prove the error was harmless beyond a reasonable doubt. Chapman v. California, 386 U.S. 18, 24, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967); Easter, 130 Wn.2d at 242.

A constitutional error is harmless only if the reviewing court is convinced beyond a reasonable doubt that any reasonable jury would reach the same result

absent the error and where the untainted evidence is so overwhelming it necessarily leads to a finding of guilt.

Burke, 163 Wn.2d at 222 (citing Easter, 130 Wn.2d at 242).

Here, the State cannot meet this heavy burden. Unlike Pickens and Emery, the State did not have overwhelming evidence of guilt; rather, the circumstances strongly indicated that the sexual contact between Wasmer and the young men was consensual. Uncontroverted evidence established Wasmer raised her hips when the young men undressed her, and both Bideratan and Turgut Tarhan testified that Wasmer appeared to be enjoying herself. 19RP 129; 21RP 62, 70, 89, 106.

There was a substantial basis for the jury to conclude that Wasmer had willingly engaged in sexual intercourse with Beskurt and his companions. And there was no way to cure the impropriety from the prosecutor's comments; both Beskurt and Taner Tarhan, who did not testify, and Bideratan and Turgut Tarhan, who did, were prejudiced equally by the prosecutor's insinuation that the rights they enjoyed were "unfair." The constitutional error requires reversal of the conviction.

2. THE PROSECUTOR'S MULTIPLE COMMENTS ON THE RIGHTS TO CONFRONTATION, TO THE ASSISTANCE OF COUNSEL AND TO HAVE A TRIAL, COUPLED WITH THE PROSECUTOR'S ARGUMENTS VOUCHING FOR THE COMPLAINING WITNESS, UNDERMINING THE PRESUMPTION OF INNOCENCE, AND APPEALING TO JURY SYMPATHY DENIED BESKURT THE FAIR TRIAL HE IS GUARANTEED BY THE FOURTEENTH AMENDMENT.

a. Principles of due process forbid prosecutors from engaging in misconduct to obtain convictions. Prosecutors, as quasi-judicial officers, have the duty to seek verdicts free from prejudice and based on reason. State v. Echevarria, 71 Wn. App. 595, 598, 860 P.2d 420 (1993). This is consistent with the prosecutor's obligation to ensure an accused person receives a fair and impartial trial. Berger v. United States, 295 U.S. 78, 88, 55 S. Ct. 629, 79 L.Ed. 1314 (1935); State v. Charlton, 90 Wn.2d 657, 665, 585 P.2d 142 (1978); U.S. Const. amends. 5; 14; Const. art. I, § 3.

The [prosecutor] is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer. He

may prosecute with earnestness and vigor – indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.

Berger, 295 U.S. at 88.

i. Standard of review. The defense bears the burden of proving a “substantial likelihood” that prosecutorial misconduct affected the jury. State v. Reed, 102 Wn.2d 140, 145, 684 P.2d 699 (1984). A claim of prosecutorial misconduct in closing argument is waived if defense counsel did not object and curative instructions would have obviated the prejudice from the remarks. State v. Belgarde, 110 Wn.2d 504, 507, 755 P.2d 154 (1988). However, “[a]ppellate review is not precluded if the prosecutorial misconduct is so flagrant and ill intentioned that no curative instructions could have obviated the prejudice engendered by the misconduct.” Id. (emphasis in original). This Court has also found prosecutorial misconduct to be flagrant and ill-intentioned where prior decisional law has made the impropriety of the remarks clear. State v. Fleming, 83 Wn. App. 209, 214, 921 P.2d 1076 (1996), rev. denied, 131 Wn.2d 1018 (1997). Finally, where misconduct invades a fundamental constitutional right, it may be

manifest constitutional error that is properly before the Court on review notwithstanding the absence of an objection. Id. at 216; State v. Warren, 165 Wn.2d 17, 27 n. 3, 195 P.3d 940 (2008).

ii. The prosecutor's comments on Beskurt's constitutional right to be present to a trial, and to confrontation were flagrant misconduct. Both the federal and state constitutions safeguard an accused person's right to confront the witnesses against him. U.S. Const. amend. 6;⁷ Const. art I, § 22.⁸ The Sixth Amendment right to confront witnesses is a fundamental right made obligatory on the states by the Fourteenth Amendment. Pointer v. Texas, 380 U.S. 400, 403, 85 S.Ct. 1065, 13 L.Ed.2d 923 (1965). Face to face confrontation is "essential to fairness." State v. Jones, 71 Wn. App. 798, 810, 863 P.2d 85 (1993) (citing Coy v. Iowa, 487 U.S. 1012, 1019, 108 S.Ct. 2798, 101 L.Ed.2d 857 (1988), rev. denied, 124 Wn.2d 1018 (1994)).

As essential to the dignity of a trial and the presumption of innocence, an accused person also has the fundamental right to be present at his trial. An accused person's right to be present at trial

⁷ The Sixth Amendment secures the right of an accused person "to be confronted with the witnesses against him." U.S. Const. amend. 6.

⁸ The Washington state constitution expressly protects the right of an accused person to "appear and defend in person" and to "meet the witnesses against him face to face." Const. art. I, § 22.

is “one of the most basic rights guaranteed by the Confrontation Clause,” Illinois v. Allen, 397 U.S. 337, 338, 90 S.Ct. 1057, 25 L.Ed.2d 353 (1970), and is “scarcely less important to the accused than the right of trial itself.” Diaz v. United States, 223 U.S. 442, 455, 32 S.Ct. 250, 56 L.Ed. 500 (1912); see also, Duncan v. Louisiana, 391 U.S. 145, 155-56, 88 S.Ct. 1444, 20 L.Ed.2d 491 (1968) (an accused person has the fundamental right to a jury trial).

A prosecutor commits reversible constitutional error when he or she comments on a specific constitutional right of the accused. “The State may not act in a manner that would unnecessarily chill the exercise of a constitutional right, nor may the State draw unfavorable inferences from the exercise of a constitutional right.” Jones, 71 Wn. App. at 810; cf., also, Darden v. Wainwright, 477 U.S. 168, 182, 106 S.Ct. 2464, 91 L.Ed.2d 144 (1986) (prosecutorial misconduct during closing argument may infect trial with constitutional error when it “implicate[s] ... specific rights of the accused”); Griffin, 380 U.S. at 615 (prosecution prohibited from using defendant’s exercise of right to remain silent against him in case-in-chief).

In State v. Gregory, 158 Wn.2d 759, 147 P.3d 1201 (2006), the prosecutor in closing argument contended that a witness would

not have subjected herself to the trial process just to avenge a broken condom. 158 Wn.2d at 806. The Court found the comments were not improper because “[t]he State did not specifically criticize the defense’s cross-examination of R.S. or imply that Gregory should have spared her the unpleasantness of going through trial.” Id. at 807. The Court distinguished Jones because in that case, the prosecutor directly implicated Jones’ constitutional right to confrontation. Id. at 807-08.

In Jones, by contrast, the Court held that despite defense counsel’s failure to object to the prosecutor’s remarks drawing attention to the defendant’s “star[ing] at” the child complainant, the improper comments presented a manifest constitutional error that was properly addressed on appeal. 71 Wn. App. at 810-11. The Eighth Circuit similarly has held that a prosecutor’s argument referencing the right to a jury trial and to confront witnesses was so egregious that a petitioner was entitled to habeas relief, notwithstanding the absence of an adequate objection by the defense and a procedural default below. Burns v. Gammon, 260 F.3d 892, 895-98 (8th Cir. 2001) (“Burns II”).⁹

⁹ The improper argument was:

And indeed, it is well-settled that prosecutorial comments on an accused person's fundamental rights infringe the right to a fair trial. See e.g. Burns II, 260 F.3d at 896-97 (and citations therein); Jones, 71 Wn. App. at 811. 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

MR. BEDNAR: And it's fair that this defendant have a trial, and it's fair that the State has the burden to prove beyond a reasonable doubt that this defendant is guilty of the crimes charged, the highest burden known to our system. And now it's also fair that he has Caroline Arnold come in here and he had the ability to sit there and, face-to-face, confront all of the witnesses against him, to question them through his attorney, to cross-examination, one of the finest machines invented by man to get to the truth. That was fair, and it was fair that Caroline Arnold had to go through those humiliating --

MS. SCHENKENBERG: Your Honor, I object to that. It was the State that called Ms. Arnold.

THE COURT: Objection overruled.

MR. BEDNAR: (Continuing) -- that she had to go through those humiliating sexual assaults and those violent acts perpetrated against her in this trial so that the defendant, through his counsel, could cross-examine her.

Now it's fair that you, the Jury, who we chose on Monday, go back to your jury room and deliberate upon the punishment that this defendant deserves for the violent acts that he committed at the Red Bridge Shopping Center on December 1st.

Burns v. Gammon, 173 F.3d 1089, 1094-95 (8th Cir. 1999) ("Burns I").

returned.” Portuondo v. Agard, 529 U.S. 61, 76, 120 S.Ct. 1119, 146 L.Ed.2d 47 (2000) (Stevens, J., concurring).

Unlike the comments in Gregory, and like the comments in Jones and Burns II, he prosecutor’s argument here asked the jury to draw a negative inference from Beskurt’s attendance at his trial. 8RP 41. The prosecutor then targeted Beskurt’s right to confront his accuser by pointing to the fact that Wasmer had to testify “staring at the defendants,” 11 RP 29, and had to endure “these four men staring at her ... their families staring at her.” 22RP 42. Like the prosecutor in Burns II, the prosecutor here linked this argument to the emotional impact Beskurt’s trial had on Wasmer and, by so doing, invited the jury to penalize him for the exercise of this fundamental constitutional right. 8RP 45.

Not even an inexperienced prosecutor would be unaware that such comments are misconduct.¹⁰ Thus, even in the absence of an objection by defense counsel, this Court should hold the

¹⁰ The prosecutor in this trial was not inexperienced. In fact, this prosecutor was in the King County Prosecuting Attorney’s appellate unit prior to this trial rotation and thus presumably knew her comments were improper. 4RP 137 (prosecutor tells court she spent two years in the appellate unit). See State v. Neidigh, 78 Wn. App. 71, 76, 895 P.2d 423 (1995) (when asked at oral argument why prosecutors continue to engage in clear misconduct, the deputy prosecutor told the appellate court, “because it’s always been found to be harmless error”).

improper remarks were both flagrant and ill-intentioned. Fleming, 83 Wn. App. at 214.

iii. The prosecutor's multiple comments disparaging defense counsel were misconduct. A prosecutor violates the Sixth Amendment right to counsel if she personally attacks defense counsel, impugns defense counsel's integrity or character, or disparages the role of defense attorneys in general. State v. Fisher, 165 Wn.2d 727, 771, 202 P.3d 937 (2009) (Madsen, J., concurring); Warren, 165 Wn.2d at 29-30. Such arguments are improper because they "seek[] to draw the cloak of righteousness around the prosecutor in [her] personal status as government attorney and impugn[] the integrity of defense counsel." State v. Gonzales, 111 Wn. App. 276, 283, 45 P.3d 205 (2002) (quoting United States v. Frascone, 747 F.2d 953, 957 (5th Cir. 1984)).

In Warren, the King County Prosecuting Attorney – the same office that prosecuted Beskurt – conceded allegations that "mischaracterizations" in defense counsel's closing were "an example of what people go through in a justice system when they deal with defense attorneys," and that defense counsel was "taking these facts and completely twisting them to their own benefit, and

hoping that you are not smart enough to figure out what in fact they are doing” were misconduct. 165 Wn.2d at 29. Yet, this former appellate prosecutor chose to accuse defense counsel of “casting aspersions” on her, of “bullying” and “pounding” the complaining witness, and of asking questions that “bordered on the offensive.” 23RP 12-15, 26-27. This prosecutor argued, “[T]he bottom line that defense counsel would have you believe is that Heather has perpetrated a lie on all of you and on this court.” 23RP 24. This prosecutor surely knew her arguments were grossly improper, yet chose to place the integrity of her case on the line by advancing unseemly attacks on defense counsel.

In Warren, the Court declined to reverse the convictions in part because the remarks were not part of a well-developed theme. 165 Wn.2d at 30. Here, however, virtually the entirety of the prosecutor’s closing argument consisted of improprieties. The prosecutor consistently and repeatedly linked direct attacks on the character of defense counsel to the defendants’ exercise of fundamental constitutional rights.

In Fleming, also a rape prosecution with a defense of consent, this Court observed, “trained and experienced prosecutors presumably do not risk appellate reversal of a hard-fought

conviction by engaging in improper trial tactics unless the prosecutor feels that those tactics are necessary to sway the jury in a close case.” 83 Wn. App. at 215. This Court held that the many errors in the prosecutor’s closing argument were not cured by the lengthy, legitimate arguments in favor of finding the complaining witness credible. Id. at 216. Here, this Court should likewise hold that the prosecutor’s manifestly improper arguments denied Beskurt a fair trial, and require reversal of the conviction.

iv. The prosecutor’s argument alleging the defendants were “forced” to advance a consent defense was misconduct. Defense counsel repeatedly objected to the prosecutor’s argument that the defendants were “forced” to advance a defense of consent as a consequence of Bideratan’s DNA being found on Wasmer’s body. 22RP 39-40. The court overruled the objections to the argument, ruling,

I sustained [Mr. Savage’s objection] . . . because it seemed to me that although the State is completely allowed to argue that the defendants are tailoring their testimony, that the argument went a little further than that, and it seemed to me that it was proper to not go in that direction any longer.

. . . .
[W]hile it is true that simply holding the State to its burden is construed as a defense by lawyers, I think to lay people a defense is usually more of an affirmative kind of position, which certainly consent is

in this context. So I did not think that the argument justified a curative instruction, and certainly I could not come up with one that I thought would work, and I do not think a mistrial is appropriate here, so I will deny the motion for a mistrial.

22RP 57.

In so ruling, the court misunderstood the import of the prosecutor's argument and so failed to recognize its prejudicial effect. The prosecutor's argument was not an embellishment on the oft-used allegation of tailoring, but rather a blatant accusation that the defendants who testified were perjuring themselves. This accusation was fortified by the allegation that had there not been biological evidence linking Bideratan to the crime, the defendants would have denied intercourse occurred. The prosecutor thereby urged the jury to decide the case based on matters outside the record, violated Beskurt's right to present a defense, and undermined the presumption of innocence.

Whether rooted directly in the Due Process Clause of the Fourteenth Amendment or in the Compulsory Process and Confrontation Clauses of the Sixth Amendment, the Constitution guarantees criminal defendants 'a meaningful opportunity to present a complete defense.'"

Crane v. Kentucky, 476 U.S. 683, 690, 106 S.Ct. 2142, 90 L.Ed.2d 636 (1986) (quoting California v. Trombetta, 467 U.S. 479, 485, 104

S.Ct. 2528, 81 L.Ed.2d 413 (1984)).

The right to offer the testimony of witnesses . . . is in plain terms the right to present a defense, the right to present the defendant's version of the facts as well as the prosecution's to the jury so it may decide where the truth lies.

State v. Maupin, 128 Wn.2d 918, 924, 913 P.2d 808 (1996)

(quoting Washington v. Texas, 388 U.S. 14, 19, 87 S.Ct. 1920, 18 L.Ed.2d 1019 (1967)).

The presumption of innocence is likewise fundamental to a fair trial, Coffin v. United States, 156 U.S. 432, 15 S.Ct. 394, 39 L.Ed. 481 (1895), and has repeatedly been stated to be essential by both the Legislature and the courts. RCW 10.58.020; In re Lile, 100 Wn.2d 224, 227, 668 P.2d 581 (1983). This prosecutor's argument that the State's evidence "forced" the defendants to take a particular position undermined the presumption of innocence by inviting the jury to conclude the defendants were guilty by virtue of presenting a defense.

The likely effect of the prosecutor's improper argument on the jury was amplified by the trial court's refusal to sustain defense counsel's objections. This implied the court gave its imprimatur to the prosecutor's highly inappropriate comments. State v. Davenport, 100 Wn.2d 757, 764, 675 P.2d 1213 (1984) (court's

ruling lent “aura of legitimacy” to prosecutor’s misconduct); accord Mahorney v. Wallman, 917 F.2d 469, 473 (10th Cir. 1990) (finding that where defense counsel’s “vigorous[] object[ion]” to the prosecutor’s misconduct was “immediately and categorically overruled in the presence of the jury... [t]he official imprimatur. . . placed upon the prosecution’s misstatements of law obviously amplified their potential prejudicial effect on the jury.”). This Court should conclude that the trial court erred in refusing to sustain the defense objections, issue a curative instruction, or grant a mistrial. Beskurt’s conviction must be reversed.

v. The prosecutor’s appeal to jury passions was flagrant misconduct. The State must obtain convictions based on the strength of the evidence adduced at trial. Arguments which appeal to the jury’s passions and prejudices invite the jury to determine guilt based on improper grounds and are misconduct. Belgarde, 110 Wn.2d at 507; State v. Boehning, 127 Wn. App. 511, 522, 111 P.3d 899 (2005).

The prosecutor sought to beatify Wasmer by melodramatically alluding to the “nightmarish,” “horrendous” experiences she had put herself through in order to come and testify. The prosecutor conceded that her appeal to the jury was

based on emotion, not reason. 23RP 14-15. But, again disparaging counsel, the prosecutor in effect told the jury to disregard the evidence, stating, the case “screamed with emotion” because “rape is emotional, it’s emotional[.]” Id. Responding to defense counsel’s entirely appropriate comment reminding the jury of the importance of holding the State to its burden of proof, the prosecutor told the jury to think of what proof they would need to convict if their daughters were the victim. 23RP 29.

In State v. Clafin, 38 Wn. App. 847, 690 P.2d 1186 (1984), also a rape case, the prosecutor read a poem to bring home to the jurors the emotional impact of rape on its victims. 38 Wn. App. at 850 n. 3. The poem touched on women’s shared fear of rape and iterated many of the themes highlighted by the prosecutor here. Id.; 8RP 40-41. The court found the reading of the poem was “so prejudicial that no curative instruction would have sufficed to erase the prejudice it was bound to engender in the minds of the jurors.” Clafin, 38 Wn. App. at 850. This Court should similarly find the prosecutor’s dramatic argument inevitably inflamed the prejudices of the jury and improperly urged convictions based on sympathy and prejudice, not reason and evidence.

vi. The prosecutor's misuse of the rape shield statute was misconduct. In addition to urging a conviction based on emotion, not reason, and improperly vouching for the complaining witness, the prosecutor took advantage of the protections offered by the rape shield statute by explicitly urging the jury to find Wasmer credible because she was chaste. Ms. Keating argued that Wasmer was not the "kind of girl" who would consent to sexual intercourse after knowing the defendants for only two hours. She argued Wasmer was not "the kind of girl that says come hither, and then says come hither, come hither, and come hither again." 22RP 41-42.

The rape shield statute prevents a defendant from using past sexual history to attack a rape victim's credibility. RCW 9A.44.020; State v. Posey, 161 Wn.2d 638, 650, 167 P.3d 560 (2007) (Chambers, J., concurring). Here, the State fought tooth and nail to keep out evidence of Wasmer's sexual history. 1RP 77-85; 2RP 12-15, 17; 4RP 24-27, 36-37, 71-73, 83-84. Yet, having prevailed in this battle, Ms. Keating then used rape shield as both a shield and a sword by asking the jury to draw conclusions about the "kind of girl" Wasmer was – precisely because the defense was

prevented from fully exploring her sexual history. This argument, too, was reversible misconduct.

b. The prosecutor's misconduct in closing argument prejudiced Beskurt's due process right to a fair trial, requiring reversal and remand. There were substantial problems with the State's case. Wasmer was impeached regarding the amount of alcohol she claimed she drank on the night in question. 10RP 140; 16RP 177. Wasmer was impeached regarding the nature of her relationship with Spencer Crilly. 14RP 103. The physical evidence obtained during Wasmer's sexual assault exam showed only that sexual intercourse had occurred, and did not demonstrate the intercourse was not consensual. 15RP 62-66, 89. The prosecutor's improper arguments attempted to make up for the deficiencies in the State's case by (a) urging a conviction based on emotion, rather than reason; and (b) targeting Beskurt's exercise of specific constitutional rights including his rights to confrontation, to silence, to have a trial on the allegations against him, and to the assistance of counsel.

These improprieties were entirely unprovoked by defense counsel. In closing argument, defense counsel did not deny Beskurt and Wasmer had intercourse, but gently suggested that

Wasmer, regretting her behavior, had an “aspirational memory” of what had occurred. The prosecutor twisted this argument and the arguments of the other attorneys into a claim that the defendants wanted the jury to conclude Wasmer had lied. Coupled with the multiple egregious personal attacks on counsel’s integrity and the repeated insistence that by subjecting Wasmer to a trial, the defendants had done something wrong, the prosecutor prevented any possibility of a fair verdict.

An error of constitutional magnitude is harmless only if the appellate court is convinced beyond a reasonable doubt that the jury would not have convicted absent the error. Chapman, 386 U.S. at 24; Easter, 130 Wn.2d at 242. The State cannot meet this heavy burden here.

Again, the question for the jury was not whether sexual intercourse occurred, but whether the intercourse was consensual. In light of the controverted facts, there was significant room for doubt regarding whether the State met its burden of proof. With respect to the arguments infringing on Beskurt’s Fifth, Sixth, and Fourteenth Amendment rights, this Court should find the State cannot prove the error harmless beyond a reasonable doubt. This Court should also find the prosecutor’s appeals to the jury’s

passions and prejudices had a substantial likelihood of affecting the verdict, and remand for a new trial.

3. THE ERRONEOUS EXCLUSION OF WASMER'S STATEMENT TO THE POLICE DEPRIVED BESKURT OF HIS CONSTITUTIONAL RIGHT TO PRESENT A DEFENSE AND CONFRONT HIS ACCUSER.

Pursuant to RAP 10.1(g), Beskurt adopts by reference and incorporates argument 1 in Turgut Tarhan's opening brief, Court of Appeals Cause Number 62268-4-I.

4. CUMULATIVE ERROR DENIED BESKURT HIS DUE PROCESS RIGHT TO A FAIR TRIAL.

Under the cumulative error doctrine, even where no single error standing alone merits reversal, an appellate court may nonetheless find the errors combined together denied the defendant a fair trial. U.S. Const. amend. 14; Const. art. I, § 3; Williams v. Taylor, 529 U.S. 362, 396-98, 120 S. Ct 1479, 146 L. Ed. 2d 435 (2000) (considering the accumulation of trial counsel's errors in determining that defendant was denied a fundamentally fair proceeding); Taylor v. Kentucky, 436 U.S. 478, 488, 98 S.Ct. 1930, 56 L.Ed.2d 468 (1978) (concluding that "the cumulative effect of the potentially damaging circumstances of this case violated the due process guarantee of fundamental fairness"); State v. Coe, 101

Wn.2d 772, 789, 684 P.2d 668 (1984). The cumulative error doctrine mandates reversal where the cumulative effect of nonreversible errors materially affected the outcome of the trial. State v. Alexander, 64 Wn. App. 147, 150-51, 822 P.2d 1250 (1992).

Here, each of the errors set forth above standing alone merits reversal. Viewed together, the errors created a cumulative and enduring prejudice that was likely to have materially affected the jury's verdict. Ms. Keating waged a campaign of misconduct designed to undermine Beskurt's defense. Ms. Keating sought to penalize Beskurt for exercising each of the fundamental rights accorded to persons accused of crimes. Thus, even if, for example, this Court were to find certain errors waived, or determine that certain errors, standing alone, do not merit reversal, this Court should conclude the cumulative effect of the pervasive misconduct, coupled with the limitations on Beskurt's ability to present a defense, denied Beskurt a fair trial.

5. THE LENGTH OF THE COMMUNITY CUSTODY TERM IS ILLEGAL BECAUSE IT EXCEEDS THE STATUTORY MAXIMUM.

Pursuant to RAP 10.1(g), Beskurt adopts by reference and incorporates argument 4 in Turgut Tarhan's opening brief, Court of Appeals Cause Number 62268-4-I.

6. THE SEXUAL ASSAULT PROTECTION ORDER ISSUED IN CONJUNCTION WITH BESKURT'S SENTENCE IS ILLEGAL BECAUSE IT EXCEEDS THE STATUTORY MAXIMUM TERM.

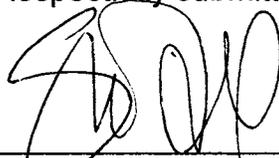
Pursuant to RAP 10.1(g), Beskurt adopts by reference and incorporates argument 5 in Turgut Tarhan's opening brief, Court of Appeals Cause Number 62268-4-I.

F. CONCLUSION

For the foregoing reasons, this Court should conclude that Emir Beskurt was denied his right to a fundamentally fair trial, as guaranteed by the Fourteenth Amendment, and reverse his conviction.

DATED this 30th day of June, 2009.

Respectfully submitted:



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