

62268-4

62268-4

COA NO. 62268-4-I

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

STATE OF WASHINGTON,

Respondent,

v.

TURGUT TARHAN,

Appellant.

REC'D

OCT 08 2009

King County Prosecutor
Appellate Unit

FILED
COURT OF APPEALS DIV. #1
STATE OF WASHINGTON
2009 OCT -8 PM 4:38

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

The Honorable Susan Craighead, Judge

REPLY BRIEF OF APPELLANT

CASEY GRANNIS
Attorney for Appellant

NIELSEN, BROMAN & KOCH, PLLC
1908 East Madison
Seattle, WA 98122
(206) 623-2373

TABLE OF CONTENTS

	Page
A. <u>ARGUMENT IN REPLY</u>	1
1. PROSECUTORIAL COMMENT ON TARHAN'S CONSTITUTIONAL RIGHT TO CONFRONT HIS ACCUSER REQUIRES REVERSAL.....	1
B. <u>CONCLUSION</u>	4

TABLE OF AUTHORITIES

Page

WASHINGTON CASES

State v. Dykstra,
127 Wn. App. 1, 110 P.3d 756 (2005)..... 1, 2

State v. Davenport,
100 Wn.2d 757, 675 P.2d 1213 (1984)..... 1

State v. Jones,
144 Wn. App. 284, 183 P.3d 307 (2008)..... 1

State v. York,
28 Wn. App. 33, 621 P.2d 784 (1980)..... 3

STATE CASES

Walker v. State,
790 A.2d 1214 (Del. 2002)..... 2, 3

A. ARGUMENT IN REPLY

1. PROSECUTORIAL COMMENT ON TARHAN'S
CONSTITUTIONAL RIGHT TO CONFRONT HIS
ACCUSER REQUIRES REVERSAL.

The State claims the prosecutor's disparagement of defense counsel was proper because it was provoked by defense counsels' closing arguments. Brief of Respondent (BOR) at 49, 61, 78. This claim fails.

First, the State made improper remarks during its initial closing argument before the defense even presented argument. At that point, there was no defense argument to be provoked by because the defense had not yet presented any.

Second, while a prosecutor's remarks made in *direct* response to defense argument are not necessarily grounds for reversal, such remarks may not go beyond what is *necessary* to respond to the defense. State v. Dykstra, 127 Wn. App. 1, 8, 110 P.3d 756 (2005). Moreover, improper remarks provoked by defense counsel are still grounds for reversal if the remarks are not a pertinent reply. State v. Jones, 144 Wn. App. 284, 299, 183 P.3d 307 (2008); State v. Davenport, 100 Wn.2d 757, 760, 675 P.2d 1213 (1984) (response was improper despite being invited by adversary in closing argument because it exceeded scope of provocation).

Criticism of the prosecutor's argument invited criticism of the defense argument in rebuttal. But it did not invite criticism of the manner

in which defense counsel examined Wasmer. That is where the prosecutor went too far. It was not *necessary* for the prosecutor to disparage the manner in which Wasmer was examined in order to respond to defense counsels' supposed attacks on the prosecutor. Dykstra, 127 Wn. App. at 8. Criticism of the manner in which Wasmer was examined was not a *direct* response to those arguments. Id.

The same holds true for the State's assertion that the defense attacked Wasmer in closing. BOR at 65. It was unnecessary to criticize the manner in which defense counsel examined Wasmer in order to make the point that Wasmer was a credible witness. Such criticism is gratuitous. The prosecutor is entitled to argue a witness is credible based on the evidence, not her personal opinion of the manner in which defense counsel cross examined that witness. Walker v. State, 790 A.2d 1214, 1219 (Del. 2002).

Defense counsel argued Wasmer was not credible. Stripped to its core, the State's argument is that defense counsel invites disparagement any time he or she vigorously cross examines a State's witness and subsequently argues the witness is not credible. If that were the rule, then prosecutors could routinely denigrate defense counsel while bolstering the credibility of key prosecution witnesses by means of that denigration.

The State describes cross examination of Wasmer as "vigorous." BOR at 62. Defense counsel's job is to present a vigorous defense. Walker, 790 A.2d at 1218. Counsel accordingly examined Wasmer in a rugged manner and the trial court appropriately permitted it. Criminal defendants are given extra latitude in cross-examination to show credibility, especially when the particular prosecution witness is essential to the State's case. State v. York, 28 Wn. App. 33, 36, 621 P.2d 784 (1980).

The State agrees misconduct occurred in Walker, where the prosecutor criticized the method, manner and tone of defense counsel's cross-examination. BOR at 78; Walker, 790 A.2d at 1218. That is what happened in Tarhan's case.

The State nevertheless asserts there was no misconduct here because the prosecutor's remarks accurately described the manner in which the defense examined Wasmer. BOR at 73-74. Under the State's logic, any time a State's witness is subject to vigorous cross examination, then it is fair game for the prosecutor to invite the jury to hold that examination against defense counsel and, by extension, the defendant. That is not the law nor should it be. If the State's argument were accepted, then prosecutors would be given free reign to attack the integrity of defense counsel in countless criminal cases on the basis that they acted as

zealous advocates for their clients. Tarhan's constitutional right to confront the witness against him through cross examination did not give the prosecutor license to denigrate defense counsel.

B. CONCLUSION

For the reasons stated above and in the opening brief, this Court should reverse conviction and remand for a new trial.

DATED this 8th day of October 2009.

Respectfully submitted

NIELSEN, BROMAN & KOCH, PLLC



CASEY GRANNIS
WSBA No. 37301
Office ID No. 91051
Attorney for Appellant

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION I**

STATE OF WASHINGTON,)	
)	
Respondent,)	
)	
v.)	COA NO. 62268-4-I
)	
TURGUT TARHAN,)	
)	
Appellant.)	

DECLARATION OF SERVICE

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 8TH DAY OF OCTOBER, 2009, I CAUSED A TRUE AND CORRECT COPY OF THE **REPLY BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

- [X] SUSAN WILK
WASHINGTON APPELLATE PROJECT
1511 3RD AVENUE
SUITE 701
SEATTLE, WA 98101

- [X] SUZANNE ELLIOTT
ATTORNEY AT LAW
705 2ND AVENUE
SUITE 1300
SEATTLE, WA 98104

- [X] TURGUT TARHAN
2308 188TH PLACE SW
LYNNWOOD, WA 98036

SIGNED IN SEATTLE WASHINGTON, THIS 8TH DAY OF OCTOBER, 2009.

x *Patrick Mayovsky*

FILED
COURT OF APPEALS
STATE OF WASHINGTON
2009 OCT 8 PM 4:38