

62408-3

62408-3

NO. 62408-3-I

IN THE COURT OF APPEALS OF STATE OF WASHINGTON  
DIVISION I

---

---

STATE OF WASHINGTON

Respondent,

v.

SAMET BIDERATAN,

Appellant.

---

---

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

The Honorable Susan Craighead, Judge

---

---

BRIEF OF APPELLANT

---

---

FILED  
COURT OF APPEALS DIVISION I  
STATE OF WASHINGTON  
~~2009~~ JUL - 1 AM 10:36

SUZANNE LEE ELLIOTT  
Attorney for Appellant

1300 Hoge Building  
705 Second Ave.  
Seattle, WA 98104  
(206) 623-0291

TABLE OF CONTENTS

A. ASSIGNMENTS OF ERROR..... 1

B. STATEMENT OF THE CASE..... 2

    1. JURY SELECTION..... 4

    2. RESTRICTION ON CROSS-EXAMINATION ..... 9

    3. IMPROPER CLOSING ARGUMENT..... 11

C. ARGUMENT..... 15

    1. BIDERATAN WAS DEPRIVED OF HIS RIGHT TO A FAIR TRIAL WHEN THE PROSECUTOR TRIED TO INDOCTRINATE THE JURY TO HER THEORY OF THE CASE IN VOIR DIRE..... 15

    2. BIDERATAN WAS DENIED HIS CONSTITUTIONAL RIGHT TO CROSS EXAMINE WASMER ON HER STATEMENTS TO THE INVESTIGATING OFFICER ..... 16

    3. BIDERATAN WAS DENIED HIS RIGHT TO A FAIR TRIAL WHEN THE PROSECUTOR ENGAGED IN MISCONDUCT DURING CLOSING ARGUMENT..... 18

    4. BIDERATAN WAS DEPRIVED OF HIS RIGHT TO A FAIR TRIAL AND HIS RIGHT TO PRESENT A DEFENSE BY THE CUMULATIVE TRIAL ERRORS INCLUDING THE STATE’S IMPROPER JURY VOIR DIRE QUESTIONS THAT IMPROPERLY INDOCTRINATED WITH THE STATE’S VIEW OF THE FACTS,

THE IMPROPER EXCLUSION OF EVIDENCE RELEVANT TO  
BIDERATAN’S CLAIM THAT THE VICTIM CONSENTED TO  
SEXUAL INTERCOURSE AND BY THE STATE’S HIGHLY  
IMPROPER CLOSING ARGUMENTS. .... 22

5. THE LENGTH OF THE COMMUNITY CUSTODY TERM IS  
ILLEGAL BECAUSE IT EXCEEDS THE STATUTORY  
MAXIMUM..... 22

6. THE SEXUAL ASSAULT PROTECTION ORDER IS ILLEGAL  
BECAUSE IT EXCEEDS THE STATUTORY MAXIMUM TERM. 24

D. CONCLUSION..... 25

## TABLE OF AUTHORITIES

### **Cases**

<i>Bruno v. Rushen</i> , 721 F.2d 1193, 1194 (9th Cir.1983).....	20
<i>California v. Trombetta</i> , 467 U.S. 479, 104 S.Ct. 2528, 81 L.Ed.2d 413 (1984).....	22
<i>Crane v. Kentucky</i> , 476 U.S. 683, 106 S.Ct. 2142, 90 L.Ed.2d 636 (1986) .....	22
<i>Crawford v. Washington</i> , 541 U.S. 36, 61, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004).....	17
<i>Davis v. Alaska</i> , 415 U.S. 308, 315-16, 94 S.Ct. 1105, 39 L.Ed.2d 347 (1974).....	17
<i>Holley v. Yarborough</i> , - F.3rd – (9 <sup>th</sup> Cir. 2009), 2009 WL 1667867.....	18
<i>In re Sentences of Jones</i> , 129 Wn. App. 626, 630, 120 P.3d 84 (2005) ...	24
<i>Olden v. Kentucky</i> , 488 U.S. 227, 232-33, 109 S.Ct. 480, 102 L.Ed.2d 513 (1988).....	17
<i>People v. Boston</i> , 383 Ill App. 3 <sup>rd</sup> 352, 893 N.E. 2 <sup>nd</sup> 677 (2008) .....	15
<i>Pointer v. Texas</i> , 380 U.S. 400, 403, 85 S.Ct. 1065, 13 L.Ed.2d 923 (1965) .....	17
<i>State v. Bahl</i> , 164 Wn.2d 739, 744, 193 P.3d 678 (2008).....	25
<i>State v. Davis</i> , 146 Wn. App. 714, 726, 192 P.3d 29 (2008).....	23
<i>State v. Easter</i> , 130 Wash.2d 228, 236, 922 P.2d 1285 (1996) .....	16

<i>State v. Echevarria</i> .....	19
<i>State v. Lewis</i> , 130 Wash.2d 700, 707, 927 P.2d 235 (1996) .....	16
<i>State v. Negete</i> .....	19
<i>State v. Neslund</i> .....	19
<i>State v. Reed</i> .....	19
<i>State v. Warren</i> , 165 Wash.2d 17, 29-30, 195 P.3d 940 (2008) .....	19
<i>Viereck v. United States</i> , 318 U.S. 236, 247-48, 63 S.Ct. 561, 87 L.Ed. 734 (1943).....	19

**Statutes**

RCW 7.90.150(6)(a) .....	24
RCW 7.90.150(6)(c) .....	24
RCW 9.94A.545(1).....	23
RCW 9.94A.850 .....	23
RCW 9.94A.850(5).....	23

**Other Authorities**

Wash. Sentencing Guidelines Comm'n, Adult Sentencing Manual I-43 (2008).....	23
---	----

**Rules**

CrR 6.4(b) .....	15
------------------	----

**Regulations**

WAC 437-20-010..... 23

**Constitutional Provisions**

U.S. Const. amend. V..... 16

U.S. Const. amend. VI (Compulsory Process)..... 22

U.S. Const. amend. VI (Confrontation)..... 22

Wash. Const. art. I, § 9..... 16

A. ASSIGNMENTS OF ERROR

1. Bideratan was deprived of his right to a fair trial when the prosecutor tried to indoctrinate the jury to her theory of the case in voir dire.
2. Bideratan was denied his constitutional right to cross-examine Wasmer on her statements to the investigating officer.
3. Bideratan was denied his right to a fair trial when the prosecutor engaged in misconduct during closing argument.
4. Bideratan was deprived of his right to a fair trial and his right to present a defense by the cumulative trial errors including the state's improper jury voir dire questions that improperly indoctrinated with the state's view of the facts, the improper exclusion of evidence relevant to Bideratan's claim that the victim consented to sexual intercourse and by the state's highly improper closing arguments.
5. The length of the community custody term is illegal because it exceeds the statutory maximum.
6. The sexual assault protection order is illegal because it exceeds the statutory maximum term.

Issues Pertaining to the Assignments of Error

1. Did the trial judge err when she failed to grant a mistrial after the prosecutor committed misconduct in voir dire?

2. Did the trial judge deprive Bideratan of his right to confrontation when she refused to permit the defense to impeach the victim on an issue that related to the victim's credibility?
3. Was Bideratan deprived of his right to a fair trial when the prosecutor committed misconduct in closing argument by disparaging defense counsel?
4. Did the cumulative errors discussed above deprive Bideratan of his right to a fair trial?
5. Was the proper term of community custody only 12 months?
6. Does the sexual assault protection order exceed the statutory maximum term?

B. STATEMENT OF THE CASE

The State charged Samet Bideratan with second degree rape of Heather Wasmer by forcible compulsion. CP 1. His co-defendants were Turgut and Taner Tarhan (twin brothers) and Emir Beskurt. The jury convicted all four of the lesser included offense of third degree rape. CP 11-12. The court sentenced Bidertan to 10 months in jail and 36 to 48 months of community custody. CP 13-24. This timely appeal followed. CP 23-24.

Bideratan testified that he had consensual sexual intercourse with Wasmer. 7/24/08 RP 34 to 7/28/08 RP 17. But the State's efforts to

unconstitutionally and unfairly deprive Bidertan of his right to present this defense requires reversal of his conviction.

It was undisputed that Wasmer and her friend, Caroline Concepcion, met the four men in Wasmer's apartment complex. Wasmer and Concepcion first invited the men to Wasmer's apartment to socialize and drink beer. 7/9/08 RP 38-58. To the defendants, there appeared to be friendly physical contact and flirting. 7/21/08 RP 192-95, 7/24/08 RP 58-60, 7/28/08 RP 47. The group eventually went to Berkurt's apartment.

At some point, Concepcion left to buy cigarettes. According to Wasmer, that at point all four men participated in raping her. There were inconsistencies in her story, however. After the incident, the two women went back to Wasmer's apartment. Concepcion said "So they raped you?" and Wasmer nodded her head and Concepcion told Wasmer she wanted to call the police. 7/23/08 RP 48, 150-51. Wasmer did not respond when Concepcion told her this. 7/14/08 RP 47-48.

Wasmer was taken to the hospital, where she was interviewed and examined for evidence of sexual assault. The sexual assault nurse who examined Wasmer at the hospital testified Wasmer had no bruises. 7/17/08 RP 20, 54. Tiny, superficial lacerations were consistent with both consensual and forced sex. 7/17/08 RP 62-66, 89, 119-21, 148.

And Wasmer maintained she had only two or three beers. 7/9/08 RP 140. She admitted to having a little "buzz" but denied being drunk. *Id.* However, the hospital tested her urine and it had a .16 alcohol concentration. 7/21/08 RP 147.

1. *JURY SELECTION*

The State began the individual questioning of jurors. 6/24/08 RP 132. With the entire panel in the courtroom, the prosecutor drew the first objection when she asked the panel:

“What does the presumption of innocence mean to you? Do you think it’s a good thing or a bad thing?”

Mr. Savage: Your Honor, I respectfully object. The court is going to give the legal definition, and I think that the jurors have to be bound by Your Honor’s definition, rather than individual opinions.

The Court: Of course the jury will be bound by my legal definition of it, but I think it’s all right to discuss some of these concepts in the context stated, so your objection is overruled.”

6/24/08 RP 141-142.

The following exchanged then took place:

Does everyone – well, let me ask this: 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 or 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? No?

Juror No. 33: Do you know what they had?

Ms. Keating: No. Do you think that seems unfair?

Juror No. 33: Yeah.

Ms. Keating: And why does that seem unfair?

Mr. Savage: Objection, Your Honor.

The Court: It's sustained. It's more complicated than that.

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 somebody is arrested with a crime, 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 these 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?

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

6/24/08 RP 150-51.

The trial judge and the parties had a side bar discussion. Bideratan's attorney clarified his objection. He said:

Mr. Savage: Your Honor, I would like the record to show that after asking the court for permission to address the legal matter, we gathered in chambers and I made a motion for a mistrial based on what I felt were inappropriate comments on the defendant's Fifth Amendment rights and Miranda rights.

Just to go back over what I just heard from the court reporter, the – it started off, the prosecutor's question, about giving all of the evidence to the defense.

First of all, that's not true. She doesn't have to give all the evidence to the defense, the rules say what she has to give. The rules also speak to what she can hold back.

A lot of times we go before criminal motions judges because we're not getting what we think we ought to. So the idea that she's got to give up everything and we don't have to give up anything is totally misleading. There are plenty of obligations on the defense to surrender materials to the prosecutor, and those are covered in the criminal rules.

The juror says, "Do you know what they have?" And her answer is, "No." I think that that is inaccurate. She does not know per the Fifth Amendment what the defendants, if they testify, are going to say, but there has been a witness list provided, and things of that nature.

Now we get to the fact that is it unfair or inappropriate that she be allowed to speak with the defendants? The Fifth Amendment says in effect that she can't, and to ask the juror to comment on that, when the Constitution forbids it, I think is inappropriate.

Then of all things, we get in the area of does somebody think the Fifth Amendment is a good thing. Well, I guess there are a number of us in the courtroom that think it's a great

thing, and I think that the question or the suggestion or the idea that it may not be a good thing is totally inappropriate.

And then we get into the question of the exercise by the defendants of their rights at the time of arrest. Whether or not they give a statement or don't give a statement, they don't have to, and there are cases, a legion of cases which say that commenting in front of the jury – and we've just had the entire pool exposed to it – about the defendants' exercise of Miranda rights, is totally inappropriate. Mistrials have been granted on this because a petit jury was advised by law enforcement in the course of the trial the defendant refused to testify, refused to give a statement, and asked for his lawyer. That's inadmissible. Here we have it in front of the entire jury now. I would renew my motion for mistrial.

6/24/08 RP 152-54

The prosecutor argued that her questioning had not been inappropriate. She said, in part:

There are a lot of rights that defendants have, including getting discovery from the State that are different from what the State gets. I think it is all relevant subject for voir dire, contrary to what Mr. Savage has said, because yes, the constitution gives defendants the presumption of innocence and, yes, the Fifth Amendment gives defendants the right to remain silent and the right to not testify at trial, but there are lots of people who disagree with that or think that's not a good idea, and those are not people that we want on this jury. I wouldn't think that the defendants would want them on the jury.

6/24/08 RP 157.

Mr. Bideratan's attorney then argued:

What she's saying to the court is I'm here to uncover the jurors that don't like the fifth amendment, which would follow naturally that she is going to exercise a peremptory or challenge them for cause. Well, we all know that that is

hardly likely to happen, or that she's uncovering jurors for us that we somehow or other are going to miss by ourselves.

The idea is to get before the jury, with all due respect to the prosecutor, who's doing her usual wonderful job on behalf of the State, is to get a dialogue going about whether these people like the constitution of the United States. Well, that's not at issue, we all have to obey it, and to get an argument started or a discussion started about is it good or is it bad, I submit it's totally inappropriate."

6/24/08 RP 159.

The trial judge ruled that the "remarks" of the prosecutor did not necessitate a mistrial. 6/24/08 RP 164. She said:

What I propose to instruct the jury is as follows: the court needs to clarify a few points regarding the preparation of a criminal case. Both, the State and the defendants, are required to comply with court rules that govern the sharing of information with one another. The Constitution requires the State to provide all of the evidence it intends to use against a defendant to that defendant prior to trial.

Under the Fifth Amendment, a defendant is never required to speak to the State or to testify at trial, and the fact that a defendant has not done so cannot be used to infer guilt or prejudice him in any way.

6/24/08 RP 165. Defense counsel stated that the only proper solution was to grant a mistrial. 6/24/08 RP 166.

After further objections by the co-defendants the Court edited the instruction. The final instruction read to the jury stated:

The court needs to clarify a few points regarding the preparation of a criminal case.

Both, the State and the defendants, are required to comply with court rules that govern the sharing of information with one another. Under the Fifth Amendment to the United States Constitution, a defendant is never required to speak to the State or the police at any point, or to testify at trial, and the fact that a defendant has not done so cannot be used to infer guilt or prejudice him in any way.

6/24/08 RP 172.

## 2. *RESTRICTION ON CROSS-EXAMINATION*

Detective Kizzier interviewed Wasmer at the hospital. 6/23/08 RP 88-89. The detective asked her what she would like to see happen. 6/23/08 ORP 89. She said something to the effect that she did not want to see the defendants go to jail. *Id.*

The State moved to prohibit the defense from cross-examining Wasmer about this statement. *Id.* The State maintained this evidence was irrelevant because the court, not the victim, determines punishment and the issue of possible punishment should not be presented to the jury. *Id.* The State further suggested the evidence should be excluded because Wasmer was not legally sophisticated and thus did not know the true possibilities for punishment. 6/26/08 RP 89.

The defense opposed the motion to exclude Wasmer's statement. Co-counsel argued Wasmer's remark was highly relevant because it showed the uncertainty in her own mind about what actually happened. 6/26/08 RP 90-

91. He disagreed with the prosecutor's characterization of how the jury would treat this evidence. 6/26/08 RP 94-95. He wanted the jury to consider this evidence in relation to the issue of whether a rape really occurred because "it if did happen, she'd want them in jail for the rest of their lives, but instead that's a very real concern of hers within a couple hours of the incident." *Id.*

The court nevertheless prohibited cross-examination on this issue.

I really have considered that the State has a really good argument that, by itself, the statement that the defense would want to elicit is misleading, and insofar as -- because of the circumstances, but also it would create the impression that the complaining witness doesn't really have a stake or doesn't really care what happens at this point, and that's, obviously, not true.

And when I imagine -- I've tried different scenarios in my mind about how could the State clarify the situation or rehabilitate the complaining witness about this, and every time I come up with a scenario it ends up getting into information about possible punishment or about pretrial negotiations or both, none of which should be considered by the jury.

And so I just do not see how I can allow that statement to come in, given that I would -- in order to be fair, have to allow the State to rehabilitate the witness on this point, and I just can't see how it can be done, so for that reason I'm going to exclude the statement about not being sure if the defendants should go to jail that night.

6/26/08 RP 96-97.

After Wasmer testified at trial but before Detective Kizzier took the stand, Tarhan's counsel asked the court to reconsider its ruling. 7/21/08 RP

30. The defense noted that the State had extensively questioned Wasmer about her emotional state after the incident in order to corroborate the contention that she was raped. 7/21/08 RP 30-31. The defense pointed out that her statement to the detective rebutted that contention. 7/21/08 RP 31. Her ambivalence about wanting to see the defendants punished fit into the defense theory that she did not act like a rape victim. 7/21/08 RP 31.

The State again objected to cross-examination on this issue. But during that objection, the prosecutor said that the detective asked this question of every person claiming to be raped in order to assess their credibility. 7/21/08 RP 32.

The judge said she had been thinking about her ruling throughout the trial as she listened to the testimony and began to better understand why the defense was interested in admitting that statement into evidence. 7/21/08 RP 31-32. The court, however, adhered to its previous reasons for excluding the evidence and identified a third reason: Wasmer would have to be brought back to testify to be rehabilitated or present a more complete picture about her views and "I don't think anybody really wants to put her through coming back again." 7/21/08 RP 32.

### *3. IMPROPER CLOSING ARGUMENT*

In closing the prosecutor wanted to discredit Bideratan's testimony. At trial there was DNA evidence that unquestionably established that Bideratan had sexual intercourse with Wasmer. Thus, she argued:

In addition to that you have DNA. Mr. Bideratan made a big mistake that night, because his DNA was found in Heather's mouth, it was found in her vagina, and it was found where it, apparently, leaked down by her anus, and the fact that that DNA was there prevented Mr. Bideratan or any of the other defendants getting up here and saying, "Never happened, don't know what she's talking about, we never had sex."

7/29/08 RP 38. Bideratan's attorney stated that he objected and argued that "the suggestion that such a thing would have happened is entirely improper."

*Id.* Then the Court said:

Could you move on, Counsel.

MS. KEATING (the prosecutor): What that DNA forced Mr. Bideratan to do –

MR. SAVAGE: Objection, Your Honor, didn't force him to do anything.

THE COURT: Sustained.

MS. KEATING: Ladies and gentlemen, if 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 --

MR. SAVAGE: Objection, Your Honor, I'd like to have a sidebar.

7/29/08 RP 39.

The Court sustained this objection at sidebar. *Id.* But the prosecutor continued:

MS. KEATING: Thank you, Your Honor. Ladies and gentlemen, before our break we were talking about all the different reasons you had to believe Heather Wasmer, and 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.

MR. SAVAGE: Objection, Your Honor.

THE COURT: Overruled, based on our earlier discussion.

MR. SAVAGE: Very well, Your Honor.

MS. KEATING: The only available defense was that this was consensual, and Heather told you --

THE COURT: Overruled for the same reasons.

7/29/08 RP 40.

At a later sidebar Mr. Savage explained his objection and moved for a mistrial. He said:

Not only the leading up to the sidebar, but subsequent thereto, I objected to the prosecutor's argument that but for the DNA, Mr. Bideratan would have taken the stand and perjured himself in some other direction, and but for with the DNA, Mr. Bideratan had no other defense except to say it was consensual.

The latter just simply isn't true. Mr. Bideratan always has the defense of just sitting here and doing nothing at all, he doesn't have to testify, so an additional problem with the prosecutor's problem is it's a backhanded way of commenting on the defendant's right not to testify, the emphasis being, well, he was forced to get up here because the DNA, so he had to get up and lie to cover himself.

He didn't have to do that, he didn't have to testify at all, and to suggest that he would have perjured himself in some other direction but for the DNA, is entirely improper, by suggesting that he would have been testifying before you but lying in some other way, and certainly the implication that he would have lied, absent the DNA, can't be said to be acceptable on the theory that he is tailoring his defense to meet the evidence, and I think that a curative instruction would not have solved the problem, and I move for a mistrial, and I so move again.

7/29/08 RP 52-53. The trial court denied the motion for mistrial and the motion for a curative instruction. 7/29/08 RP 57.

During rebuttal, the prosecutor took a different tactic; she blamed defense counsel. She said:

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.

7/30/08 RP 12-13, 19.

The prosecutor said some of defense counsel's questions "bordered on the offensive. 7/30/08 RP 13. She specifically referenced Bideratan's trial attorney when she argued that "she sat there in tears, bullied by Mr. Savage's questions." 7/30/08 RP 15.

In attempting to explain why Wasmer's could remember certain events and to explain why her testimony changed over the course of trial, the prosecutor argued it was defense counsel's trickery. She said:

Perhaps it was because over the weekend she finally got some sleep, or perhaps it was because the questions -- 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 here in closing argument and tell you Heather is not to be believed.

7/30/08 RP 27.

C. ARGUMENT

1. *BIDERATAN WAS DEPRIVED OF HIS RIGHT TO A FAIR TRIAL WHEN THE PROSECUTOR TRIED TO INDOCTRINATE THE JURY TO HER THEORY OF THE CASE IN VOIR DIRE.*

CrR 6.4(b) provides that: “A voir dire examination shall be conducted for the purpose of discovering any basis for challenge for cause and for the purpose of gaining knowledge to enable an intelligent exercise of peremptory challenges.” It is not a vehicle for educating jurors and indoctrinating them into the State’s theory of the case. *People v. Boston*, 383 Ill App. 3<sup>rd</sup> 352, 893 N.E. 2<sup>nd</sup> 677 (2008).

The prosecutor’s questions to the panel concerning the defendant’s right to remain silent were particularly concerning. Both the United States and Washington Constitutions guarantee a criminal defendant the right to be free from self-incrimination, including the right to silence. U.S. Const.

amend. V; Wash. Const. art. I, § 9. The right against self-incrimination prohibits the State from using a defendant's constitutionally protected silence as substantive evidence of guilt. *State v. Easter*, 130 Wash.2d 228, 236, 922 P.2d 1285 (1996). Clearly in closing, the State may not use a defendant's silence to "suggest to the jury that the silence was an admission of guilt." *State v. Lewis*, 130 Wash.2d 700, 707, 927 P.2d 235 (1996).

Here the prosecutor began the trial by essentially telling the jury that the defendant's had some unfair advantage over the state because they did not have to provide discovery or speak to the investigating officers or even testify at trial. In addition, her questions seemed designed to get the jurors to speculate on whether this was "fair." The prosecutor's questions during vior dire were just as improper as commenting on the defendant's exercise of their constitutional rights in closing.

Although the trial court gave a limiting instruction, the suggestion had already been made. Given the other errors at trial, discussed below, it was insufficient to assure the jurors were untainted by the prosecutor's statements.

**2. *BIDERATAN WAS DENIED HIS CONSTITUTIONAL RIGHT TO CROSS EXAMINE WASMER ON HER STATEMENTS TO THE INVESTIGATING OFFICER***

The Confrontation Clause of the Sixth Amendment provides that in criminal cases the accused has the right to "be confronted with witnesses

against him.” U.S. Const. amend. VI. The federal confrontation right applies to the states through the Fourteenth Amendment. See *Pointer v. Texas*, 380 U.S. 400, 403, 85 S.Ct. 1065, 13 L.Ed.2d 923 (1965). The ultimate goal of the Confrontation Clause is to ensure reliability of evidence, but it is a procedural rather than a substantive guarantee. *Crawford v. Washington*, 541 U.S. 36, 61, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004). It commands, not that evidence be reliable, but that reliability be assessed in a particular manner: by testing in the crucible of cross-examination. *Id.*; see *Davis v. Alaska*, 415 U.S. 308, 315-16, 94 S.Ct. 1105, 39 L.Ed.2d 347 (1974) (a primary interest secured by the Confrontation Clause is the right of cross-examination). The Clause thus reflects a judgment, not only about the desirability of reliable evidence, but about how reliability can best be determined. *Crawford*, 541 U.S. at 61.

A defendant meets his burden of showing a Confrontation Clause violation by showing that a reasonable jury might have received a significantly different impression of a witness' credibility had counsel been permitted to pursue his proposed line of cross-examination. Precluding cross-examination of a “central, indeed crucial” witness to the prosecution's case is not harmless error. *Olden v. Kentucky*, 488 U.S. 227, 232-33, 109 S.Ct. 480, 102 L.Ed.2d 513 (1988) (per curiam); see also *Davis*, 415 U.S. at 317-18.

The Ninth Circuit recently reversed a conviction in a similar situation. *Holley v. Yarborough*, - F.3rd – (9<sup>th</sup> Cir. 2009), 2009 WL 1667867. Holley was accused of sexual offenses against two children, one a girl age 11. In closing the state had argued that a young girl would not fabricate a claim of sexual abuse. But the trial court had prevented Holley from cross-examining that girl about her prior claims of sexual activity with a boyfriend and her sexual appeal to others. The Ninth Circuit held that such evidence was admissible to impeach the girl’s trial testimony and “could have shown a tendency to exaggerate or overstate, if not outright fabricate.” 2009 WL 1667867 at \*5.

The same is true here. Wasmer was the critical state witness. The only issue at trial was whether her claim of rape was more credible than the defendants’ claim that she had consented to sexual activity with them. Thus, it was error for the trial court to limit the defendants’ right to confront and cross-examine her on this issue.

***3. BIDERATAN WAS DENIED HIS RIGHT TO A FAIR TRIAL WHEN THE PROSECUTOR ENGAGED IN MISCONDUCT DURING CLOSING ARGUMENT.***

State argued that that Bideratan exercised his right to testify only because he was “forced” to do so by the DNA evidence. She also speculated that, had there been no DNA evidence, he would have remained silent or

presented some other excuse. The clear implication in this argument was that Bideratan would make up any lie to avoid conviction. Defense counsel objected and the trial judge sustained the objection to a portion of this argument. She refused to give a curative instruction or grant a mistrial, however.

The prosecutor also characterized Mr. Bideratan's attorney's behavior as bullying and trickery and told the jury that his cross-examination "bordered on the offensive." Comments that demean the role of defense counsel are improper. *State v. Warren*, 165 Wash.2d 17, 29-30, 195 P.3d 940 (2008). They impugn the integrity of the adversary system and are inconsistent with the prosecutor's obligation to ensure a verdict is free from prejudice and based on reason rather than passion. *Viereck v. United States*, 318 U.S. 236, 247-48, 63 S.Ct. 561, 87 L.Ed. 734 (1943); *State v. Echevarria*, 71 Wash.App. 595, 598, 860 P.2d 420 (1993). see generally *State v. Reed*, 102 Wash.2d 140, 145-48, 684 P.2d 699 (1984) (improper for prosecutor to urge jury not to be swayed by defendant's "city lawyers"); *State v. Neslund*, 50 Wash.App. 531, 562, 749 P.2d 725 (1988) (recognizing that attacks on defense counsel's integrity may be reversible misconduct); *State v. Negete*, 72 Wash.App. 62, 66-67, 863 P.2d 137 (1993) (improper for prosecutor to argue that defense counsel is being paid to twist the words of a witness).

There is nothing in the record to suggest that Bideratan's counsel engaged in anything other than the presentation of a vigorous defense. This was the defendant's right and defense counsel's duty. It was misconduct for the prosecutor to suggest that it was a reason to reject Bideratan's defense. And, it was an improper call for the jury to sympathize with Ms. Wasmer.

The prosecutor also argued that the defense was trying to trick the jury by obfuscating the facts or the law. *Bruno v. Rushen*, 721 F.2d 1193, 1194 (9th Cir.1983) (prosecutor's remarks improper where they suggest "that all defense counsel in criminal cases are retained solely to distort the facts and camouflage the truth in an abominable attempt to confuse the jury as to their client's involvement with the alleged crimes"). In *Warren*, supra, the prosecutor committed similar misconduct by alleging that "mischaracterizations" in defense counsel's closing were "an example of what people go through in a criminal justice system when they deal with defense attorneys," and described the argument as "a classic example of 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." *Warren*, 195 P.3d at 946. The court held the comments improper but not so flagrant and ill intentioned that no instruction could have cured them. In *Warren*, however, the remarks were not part of a well-developed theme, and the court specifically referenced the weight of evidence favoring conviction. *Id.*

Here the prosecutor's theme, beginning in voir dire and continuing through closing argument, was to disparage the defendant's constitutional rights, including the right to notice of the prosecution's case, remain silent or to testify and the right to present a vigorous defense through counsel. And the evidence was not overwhelming. The jury did not convict Mr. Bideratan as charged but rather concluded that he committed only the lesser-included offense.

It is true that defense counsel did not object to some of these improper comments. But it would be unfair to permit the prosecutor to call defense counsel a bully and then require defense counsel to come to his own defense by objecting in front of the jury. In fact, the objection might seem to confirm the prosecutor's remarks that defense was bullying the prosecution. These remarks as a whole were flagrant and ill intentioned. Given the other attempts to deprive Bideratan of his right to present a defense and his right to a fair trial, the enduring and resulting prejudice that could not have been neutralized by an admonition to the jury.

4. *BIDERATAN WAS DEPRIVED OF HIS RIGHT TO A FAIR TRIAL AND HIS RIGHT TO PRESENT A DEFENSE BY THE CUMULATIVE TRIAL ERRORS INCLUDING THE STATE'S IMPROPER JURY VOIR DIRE QUESTIONS THAT IMPROPERLY INDOCTRINATED WITH THE STATE'S VIEW OF THE FACTS, THE IMPROPER EXCLUSION OF EVIDENCE RELEVANT TO BIDERATAN'S CLAIM THAT THE VICTIM CONSENTED TO SEXUAL INTERCOURSE AND BY THE STATE'S HIGHLY IMPROPER CLOSING ARGUMENTS.*

Whether rooted directly in the Due Process Clause of the Fourteenth Amendment, or in the Compulsory Process or 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) (citations omitted) (quoting *California v. Trombetta*, 467 U.S. 479, 485, 104 S.Ct. 2528, 81 L.Ed.2d 413 (1984)). A defendant is entitled to a new trial when errors, even though individually not prejudicial, cumulatively result in a trial that was fundamentally unfair because he was consistently denied the opportunity to adequately present his defense. See *State v. Greiff*, 141 Wash.2d 910, 929, 10 P.3d 390 (2000).

As demonstrated above, beginning with jury selection and continuing through closing, the state errors either individually or cumulatively, deprived Bideratan of his right to present a defense and to demonstrate to the jury that Wasmer consented to sex with him.

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

The trial court erred in imposing 36 to 48 months of community custody. The Sentencing Guidelines Commission (SGC) established community custody ranges according to offense category. WAC 437-20-010; RCW 9.94A.850; *State v. Davis*, 146 Wn. App. 714, 726, 192 P.3d 29 (2008). The length of the term depends on the crime of conviction and type of sentence. For some offenses, the term of community custody is set by statute. Other offenses are subject to a community custody range established by the Sentencing Guidelines Commission. RCW 9.94A.850(5); Chapter 437-20 WAC. Wash. Sentencing Guidelines Comm'n, Adult Sentencing Manual I-43 (2008).

Third degree rape is generally subject to 36 to 48 months of community custody. WAC 437-20-010; RCW 9.94A.030(42)(a)(i). But RCW 9.94A.545(1) states:

Except as provided in RCW 9.94A.650 and in subsection (2) of this section, on all sentences of confinement for one year or less, in which the offender is convicted of a sex offense . . . the court may impose up to one year of community custody, subject to conditions and sanctions as authorized in RCW 9.94A.715 and 9.94A.720.

(emphasis added).

Bideratan was sentenced to 10 months of confinement for a sex offense. CP 28. Thus, RCW 9.94A.545(1) authorizes a maximum of one year of community custody for such a sentence. See *In re Sentences of Jones*,

129 Wn. App. 626, 630, 120 P.3d 84 (2005) (holding "RCW 9.94A.545 is clear on its face and unambiguously limits the court's authority to impose community custody in sentences for 12 months or less to the offenses listed in the statute."). The court erred in imposing a longer term.

6. *THE SEXUAL ASSAULT PROTECTION ORDER IS ILLEGAL BECAUSE IT EXCEEDS THE STATUTORY MAXIMUM TERM.*

When an offender is found guilty of a sex offense, any sentencing condition that restricts an offender's ability to contact the victim is referred to as a "sexual assault protection order." RCW 7.90.150(6)(a). By the statute's plain language, "[a] final sexual assault protection order entered in conjunction with a criminal prosecution shall remain in effect for a period of two years following the expiration of any sentence of imprisonment and subsequent period of community supervision, conditional release, probation, or parole." RCW 7.90.150(6)(c).

The trial court entered a sexual assault protection order set to expire on August 1, 2015. 9/04/08 RP 19, Supp. C. P. \_\_\_\_ (Sub. No 58, filed 9/04/08). Following conviction, Bideratan was remanded into the custody of King County Jail on August 1, 2008. He was sentenced on September 4, 2008. His term of confinement was 10 months and is lawfully subject to 12 months of community custody. The protection order must expire two years

after the expiration of period of community custody. Thus, the maximum expiration date falls well before the August 1, 2015 date set by the court.<sup>1</sup>

Sentencing errors can be raised for the first time on appeal. *State v. Bahl*, 164 Wn.2d 739, 744, 193 P.3d 678 (2008). This Court should therefore vacate the sentence and the sexual assault protection order and remand for imposition of a judgment and sentence and sexual assault protection order that complies with the law.

D. CONCLUSION

For the reasons stated Bideratan's conviction and sentence must be reversed.

Respectfully submitted this 30th day of June, 2009.

  
Suzanne Lee Elliott  
WSBA 12634

---

<sup>1</sup> There were, in fact, three no contact orders in this case. The Sexual Assault Protection Order that exceeds the statutory maximum, a 5 year no contact provision in the judgment and sentence, CP 18, and a "special condition" of no contact (that would appear to expire at the end of community supervision) in Appendix H to the judgment and sentence, CP 21.

Certification of Service by Mail

I declare under penalty of perjury that on June 30, 2009, I placed a copy of this document in the U.S. Mail, postage prepaid, to:

King County Prosecutor's Office  
Appellate Unit  
516 Third Ave.  
Seattle WA 98104

And to:

Mr. Samet Bideratan  
Apt. 41  
12205 SE 60<sup>th</sup> Street  
Bellevue, WA 98006

  
Suzanne Lee Elliott

FILED  
COURT OF APPEALS DIVISION  
STATE OF WASHINGTON  
2009 JUL -1 AM 10:36