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COURT OF APPEALS, DIVISION III  
OF THE STATE OF WASHINGTON

COURT OF APPEALS  
DIVISION III  
STATE OF WASHINGTON  
By \_\_\_\_\_

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THE STATE OF WASHINGTON, Respondent

v.

KEVIN LEE HILTON, Appellant

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APPEAL FROM THE SUPERIOR COURT  
FOR BENTON COUNTY

NO. 02-1-00446-0

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SUPPLEMENTAL BRIEF OF RESPONDENT REGARDING  
APPLICABILITY OF *STATE V. MARTIN*

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## ARGUMENT

1. *STATE V. MARTIN*<sup>1</sup> PUTS TO REST THE DEFENDANT'S ARGUMENT THAT THE PROSECUTOR COMMITTED MISCONDUCT BY ASKING HIM IN CROSS-EXAMINATION THE "YOU HEARD ALL THE TESTIMONY" QUESTION.

A. The holding is directly on point concerning arguments 4(a), (b), (c,) and (d) in the defendant's brief. (App. Brief at 115-125).

As held in *Martin*, "[S]uggestions of tailoring are appropriate during cross-examination, is compatible with the protections provided by article I, section 22." *State v. Martin*, No. 83709-1, slip op. at 15, 2011 WL 1896784 Wash. (May 19, 2011). "In sum, we believe that in a case such as the instant, where the credibility of the defendant is key, it is fair to permit the prosecutor to ask questions that will assist the finder of fact in determining whether the defendant is honestly describing what happened." *Id.* at 16.

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<sup>1</sup> *State v. Martin*, No. 83709-1, 2011 WL 1896784 Wash. (May 19, 2011).

B. If any foundation is required in *Martin*, the defendant changed his version of events repeatedly after learning what the facts and evidence revealed.

1. *Martin does not require that the defendant open the door to allow such questions.*

The defendant may read into *Martin* a requirement that the defendant must open the door to such questions on cross-examination. That is not the holding in *Martin*. The defendant in *Martin* stated that he had based part of his testimony on evidence from other witnesses. However, the holding was that a defendant is subject to cross-examination, including questions suggestion tailoring of his/her testimony. *State v. Martin*, No. 83709-1, Slip Op. at 16.

2. *Nevertheless, the defendant repeatedly changed his version of events to fit with evidence.*

There are numerous examples. The defendant told Detectives Randy Taylor and Corporal Brian

Ruegesegger that he went grocery shopping at Winco during the evening of March 20, 2002, the night of the murders. (RP 1806-08, 1853-54). After learning that the Winco security tapes did not show he was there during the time frame, he changed his story and claimed that he went to an Albertsons. (RP 1953, 3528).

Another example: The defendant stated he returned a checked-out book to the Richland Public Library during the evening of March 20, 2002. (CP 416). The book was actually returned on March 19, 2002. (RP 2158-59). The defendant's testimony changed to reflect this: On the witness stand he claimed he may have returned a paperback book that would not require a check-in. (RP 3529-31).

Another example: The defendant told the police on March 26, 2002 that he sold a firearm to an unknown person at a gun show in Walla Walla about six to eight months before. When learning that there was no gun show in Walla Walla six to

eight months before, and that the most recent gun show in Walla Walla was about 14 months ago, the defendant said his earlier statement was just a guess. (RP 3554).

3. *In any event, the defendant directly opened the door to the cross-examination question.*

The defendant's ability to hear the testimony by sitting at the trial was raised by the defense:

"By Mr. Connick:

Q [Mr. Connick]: Kevin, you sat through this trial and heard the testimony, correct?

A [Mr. Hilton]: Yes." (RP 3518).

The prosecutor, Mr. Johnson, asked the defendant virtually the same question:

"Q. You have been through one prior proceeding and heard testimony in this case; is that true?

A. Yes.

Q. And you've sat right in that chair and heard all the testimony in this case; isn't that true?

A. Yes." (RP 3563).

C. The timing of the Supreme Court's grant of review in *Martin* is also noteworthy.

Since the defendant did not object to the question, he must show on appeal that the prosecutor's conduct was flagrant and intentional. During the trial in 2008, the question was clearly allowed under *State v. Miller*, 110 Wn. App. 283, 40 P.3d 692 (2002). The Supreme Court granted review of *Martin* on February 10, 2010. From that date (2-10-10) until the decision in *Martin* on May 19, 2011, it could be argued that there was some indecision concerning the "you heard all the evidence" question.

If a prosecutor asked such a question during that window of time, perhaps the State was on ice

which could melt. If it was before that window, as here, or after that window, the State's footing was secure.

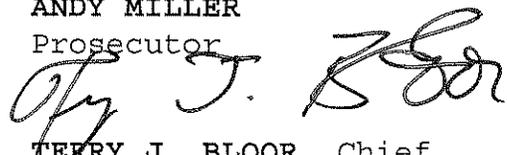
If there is any remaining question, the timing of the grant of review of *Martin* shows that the State acted appropriately.

### CONCLUSION

*State v. Martin* puts to rest the defendant's argument of prosecutorial misconduct regarding the "you heard all the testimony" question.

RESPECTFULLY SUBMITTED this 3rd day of June 2011.

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