

**FILED**

**JUL 28 2011**

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

NO. 28671-1-III

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

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STATE OF WASHINGTON,

Respondent,

v.

KEIR WALLIN,

Appellant.

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

The Honorable John M. Antosz, Judge

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SUPPLEMENTAL BRIEF OF APPELLANT

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A. SUPPLEMENTAL ISSUE

On July 11, 2010, this Court stayed appellant Keir Albert Wallin's case pending a Supreme Court decision in State v. Martin, 171 Wn.2d 521, 252 P.3d 872 (2011). After Martin was decided and had mandated, this Court lifted the stay and ordered supplemental briefing to discuss the applicability of that decision.

B. SUPPLEMENTAL ARGUMENT

The issue raised in Wallin's case is whether the State violated appellant's article I, section 22<sup>1</sup> rights when the prosecutor elicited testimony that Wallin had heard the State's witnesses and evidence prior to testifying, thus suggesting he had tailored his testimony. Brief of Appellant (BOA) at 7-28. The same issue was raised in Martin.

In Martin, the Washington Supreme Court unanimously agreed article I, section 22 provides greater protections than does the Sixth Amendment. 252 P.3d at 877, 880-81, 884. The Court split 5-4, however, when determining whether the article I, section 22 precludes the prosecutor from suggesting the defendant tailored

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<sup>1</sup> Article I, section 22 of the Washington State Constitution guarantees a criminal defendant "the right to appear and defend in person, or by counsel, ... to testify in his own behalf, [and] to meet the witnesses against him face to face."

his testimony as a result of his exercising both his right to be present at trial and his right to testify on his own behalf.

The majority held that prosecutorial suggestions of tailoring are appropriate during cross-examination because this type of examination “will assist the finder of fact in determining whether the defendant is honestly describing what happened.” *Id.* at 879. Four Justices<sup>2</sup> disagreed, explaining:

Article I, section 22 explicitly guarantees defendants the right to exercise their fair trial rights. The prosecution cannot ask a jury to draw an adverse inference, i.e., impeach his credibility, from the defendant's exercise of a constitutional right. These comments imply all defendants are less believable simply as a result of exercising these rights; the exercise of this constitutional right is not evidence of guilt. These allegations demean “the truth-seeking function of the adversary process.” All criminal defendants alike have a constitutional right to be present at trial. It would therefore be unreasonable for a prosecutor to question a defendant's credibility based on his mere presence at trial. Permitting accusations of tailoring would chill the willingness of defendants to testify. This undermines the core principle of our criminal justice system—that a defendant is entitled to a fair trial. The court therefore should prohibit all accusations of tailoring at any stage of the trial, including cross-examination and summation, that impermissibly burden a defendant's right to be present at trial, and confront the witnesses

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<sup>2</sup> Justice Stevens agreed with the dissent's conclusion that article I, section 22 prohibits prosecutorial suggestions of tailoring; however, she would have held the error harmless under the facts of Martin's case. Thus, she wrote a separate concurrence. *Id.* at 880-83.

against him. This rule leaves ample opportunity for the prosecution to impeach the credibility of a defendant on the basis of specific instances of inconsistent testimony, and allows the trier of fact to draw its own reasonable inferences based on the evidence, rather than rely, even in part, on accusations that the defendant was able to shape his testimony simply because the defendant was present, as he had a right to be, at his own trial.

Id. at 880, 884 (citations and footnotes omitted). The dissent's reasoning is sound.

It is appellant's position Martin is wrongly decided. Nevertheless, he is aware this Court is bound by it. Appellant notes his objection here, however, because he may decide to ask the Supreme Court to reconsider its very close decision on this important constitutional issue. See, Payne v. Tennessee, 501 U.S. 808, 828, 111 S.Ct. 2597 (1991) (governing decisions should not be blindly followed when they are badly reasoned); Greene v. Rothschild, 68 Wn.2d 1, 8, 402 P.2d 356 (1965) (explaining stare decisis does not apply when to do so would perpetuate error).

C. CONCLUSION

Martin applies to this case, but appellant respectfully submits it is wrongly decided.

DATED this 25 day of July, 2011.

Respectfully submitted,

NIELSEN, BROMAN, & KOCH, PLLC

A handwritten signature in black ink, appearing to read "J. Dobson", is written over a horizontal line.

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