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No. 61127-5-1

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

FILED
COURT OF APPEALS DIV. #1
STATE OF WASHINGTON
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STATE OF WASHINGTON,
Respondent,
v.
TIMOTHY MARTIN,
Appellant.

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

The Honorable Richard J. Thorpe

APPELLANT'S REPLY BRIEF

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A. ARGUMENT

CROSS-EXAMINATION IMPLYING THAT MR. MARTIN TAILORED HIS TESTIMONY VIOLATED HIS RIGHTS TO PRESENCE, CONFRONTATION, AND A FAIR TRIAL.

1. The prosecutor violated Mr. Martin's constitutional rights by implying that he had tailored his testimony without any evidence that he did so. In addition to the cases discussed in Appellant's Opening Brief, other courts have found that a defendant's constitutional rights are violated when the prosecutor implies, without evidence, that the defendant has tailored his testimony.

The Minnesota Supreme Court took up the Portuondo Court's invitation to consider the question under state law.¹ State v. Swanson 707 N.W.2d 645, 657 (Minn. 2006). The Minnesota Court noted its prior ruling that a defendant's right to be present at trial is protected by the Sixth and Fourteenth Amendments. Id. citing Ford v. State, 690 N.W. 2d 706, 711-12 (Minn. 2005). Thus, the Court held:

[T]he prosecution cannot use a defendant's exercise of his right of confrontation to impeach the credibility of his testimony, at least in the absence of evidence that the defendant has tailored his testimony to fit the state's case. Without specific evidence of tailoring, *such questions and comments by the prosecution*

¹ Portuondo v. Agard, 529 U.S. 61, 673, n.4., 120 S.Ct. 1119, 146 L.Ed.2d 47 (2000).

imply that all defendants are less believable simply as a result of exercising the right of confrontation.

Id. at 658 (emphasis added), citing Commonwealth v. Gaudette, 441 Mass. 762, 808 N.E.2d 798, 801-03 (2004). Other decisions have repeatedly affirmed this rule. State v. Mayhorn, 720 N.W.2d 776, 790 -791 (Minn.,2006) (with no evidence that defendant tailored his testimony, prosecutor's implications that he did so constituted misconduct); State v. Dobbins, 725 N.W.2d 492, 507 (Minn. 2006) (in the absence of evidence of actual tailoring, prosecutor's cross-examination of defendant, highlighting that he did so was misconduct, albeit harmless); State v. Ferguson, 729 N.W.2d 604, 616 -617 (Minn.App.,2007) (because defendant's story changed significantly after he obtained discovery, the prosecutor had evidence of tailoring; pointing that out was not misconduct); State v. Ali, 752 N.W.2d 98, 105 (Minn.App.,2008) (prosecutor's argument that defendant tailored his testimony to the *law* of self-defense – but not to the State's evidence – was not misconduct); State v. Leutschaff, 759 N.W.2d 414, 419 (Minn.App.,2009) (although defendant's omissions in his statements to police created "arguable suspicion" that he did tailor his testimony, prosecutor's limited questioning along those lines

came “dangerously close” to violating the Swanson rule; State admonished to adhere to Swanson in the future).

Similarly, the New York Court of Appeals remanded for a new trial where the prosecutor’s misconduct included the statement that the defendant “‘had all the time in the world to tailor his testimony’ to conform to the People’s proof ,” thereby violating his right to a fair trial. People v. Brown, 26 A.D.3d 392, 393, 812 N.Y.S.2d 561, 563 (N.Y.A.D. 2 Dept.,2006). In other post-Portuondo cases, New York prosecutors also committed misconduct, requiring reversal, by accusing the defendant of tailoring his testimony (People v. Pagan, 2 A.D.3d 879, 880, 769 N.Y.S.2d 741 (N.Y.A.D. 2 Dept.,2003)) or “fabricat[ing]” his defense after having had “the benefit of counsel” (People v. Washington, 278 A.D.2d 517, 518, 718 N.Y.S.2d 385 (N.Y.A.D. 2 Dept.,2000)).

2. The error was not harmless. Here, there was no indication that Mr. Martin tailored his testimony. The State has not offered any such evidence. Contrary to the State’s assertions, the evidence against Mr. Martin was not overwhelming. Numerous problems with the State’s evidence – most notably contradictions in Ms. Sobiano’s identification of Mr. Martin, her inconsistent

description of the kidnapper, questions about Ms. Summers' credibility, and glaring inconsistencies in her testimony – are all discussed in Appellant's Opening Brief. The implication that Mr. Martin tailored his testimony could undermined Mr. Martin's credibility enough to tip the scales in the jurors' minds, allowing them to overlook the flaws in the State's evidence.

The State's Brief also contains some incorrect representations of the evidence. Mr. Martin did not, as asserted, "admit[] he was the person hiding in the bushes" near the library. SRB at 7.

Nor did the State ever offer any theory as to how Mr. Martin traveled from the library to the crime scene in such a short time. According to the most reliable evidence offered, Mr. Martin left the Marysville Library after 7:25pm (according to the computer data sheet) but the kidnapper was in the Rubatinos' driveway by 8:30pm (according to Ms. Rubatino, who was certain of the time because she recalled she was watching a television program which she watches every week). 12/4/07RP 71-72; 12/10/07RP 57. The State suggests Mr. Martin hitchhiked from the library to the Rite Aid where the kidnapping occurred, 7.28 to 8.5 miles away. 12/11/07RP 147. If so, he had a maximum of one hour to flag

down a ride, commit the kidnapping, and drive to the Rubatino residence. This theory strains credulity. In addition, it was raining that night, and under the State's theory, Mr. Martin would not have had time to dry off after standing in the rain hitchhiking, but Ms. Subiano never said the kidnapper was wet.

The State asserts that the improper inquiry was "not in any way a comment on the defendant's exercise of his right to testify, be present at trial, or confront the witnesses." SRB at 37. This ignores the reality of the situation. Although the prosecutor can and should test the credibility of a testifying defendant, the defendant is not, as the State seems to argue, just like any other witness. Unlike other witnesses, the defendant is guaranteed the right to be present during his entire trial ("[o]ne of the most basic of the rights guaranteed by the Confrontation Clause"²), the right to confront other witnesses face-to-face, and the right to choose whether or not to testify. These rights do not dissipate when the defendant takes the stand. According to the State, by exercising these rights, the defendant *necessarily* invites the prosecutor to draw attention to the fact that he has had, theoretically, the opportunity to tailor his

² *Illinois v. Allen*, 397 U.S. 337, 338, 90 S.Ct. 1057, 25 L.Ed.2d 353 (1970).

testimony. This creates an automatic and unavoidable burden on the credibility of *all* defendants.

B. CONCLUSION

For the reasons set forth above and in his Opening Brief, Mr. Martin respectfully requests that this Court reverse his convictions.

DATED this 15th day of April, 2009.

Respectfully submitted,



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

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 TIMOTHY MARTIN,)
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 Appellant.)

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I, MARIA ARRANZA RILEY, STATE THAT ON THE 16TH DAY OF APRIL, 2009, I CAUSED THE ORIGINAL **REPLY BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS - DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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