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NO. 62316-8-1  
CONSOL.

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

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STATE OF WASHINGTON,

Respondent,

v.

EMIR BESKURT,

Appellant.

RECEIVED  
COURT OF APPEALS  
DIVISION ONE  
OCT 19 2009

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

The Honorable Susan J. Craighead

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APPELLANT'S REPLY BRIEF

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Susan F. Wilk  
Attorney for Appellant

WASHINGTON APPELLATE PROJECT  
1511 Third Avenue, Suite 701  
Seattle, Washington 98101  
(206) 587-2711

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A. ARGUMENT IN REPLY

The trial prosecutor committed reversible misconduct by disparaging defense counsel, urging the jury to draw a negative inference from Beskurt's exercise of his constitutional rights, and inviting conviction based on matters outside the record and improper appeals to the jurors' sympathies or prejudices. Yet the State contends that the repeated instances of prosecutorial misconduct were "provoked or invited." Br. Resp. at 1. But defense counsel does not "invite" the State to engage in misconduct by vigorously defending his client, nor may misconduct be excused on the basis that it was "provoked."

The State alternatively attempts to argue that the prosecutor's improper remarks were "inadvertent" or mere rhetorical flourish. Br. Resp. at 58, 84, 99. This claim, too, is unavailing.

The State last asserts that the errors were waived or harmless. The State is incorrect. The evidence of nonconsensual sex was controverted. Even despite the State's misconduct, some jurors were unpersuaded by the complainant's claims of forcible compulsion. 25RP 5. The State cannot prove beyond a

reasonable doubt that absent the egregious misconduct, the jurors would have convicted Beskurt. The conviction must be reversed.

1. BESKURT'S COUNSEL DID NOT 'INVITE' THE PROSECUTOR TO COMMIT MISCONDUCT BY VIGOROUSLY CROSS-EXAMINING THE COMPLAINANT.

The right of an accused person "to be confronted with the witnesses against him" comes to us "with a lineage that traces back to the beginning of Western legal culture," and possibly predates the right to jury trial. Coy v. Iowa, 487 U.S. 1012, 1015-16, 101 L.Ed.2d 857 (1988). It is the "literal right to 'confront' the witness at the time of trial that forms the core of the values furthered by the Confrontation Clause[.]" California v. Green, 399 U.S. 149, 157, 90 S.Ct. 1930, 26 L.Ed.2d 489 (1970). "[T]here is something deep in human nature that regards face-to-face confrontation between accused and accuser as 'essential to a fair trial in a criminal prosecution.'" Coy, 108 S.Ct. at 1017 (quoting Pointer v. Texas, 380 U.S. 400, 404, 85 S.Ct. 1065, 13 L.Ed.2d 923 (1965)).

Discussing the historical antecedents of our constitutional right of confrontation, Justice Scalia wrote,

Shakespeare was thus describing the root meaning of confrontation when he had Richard the Second say, "Then call them to our presence-face to face, and

frowning brow to brow, ourselves will hear the  
accuser and the accused freely speak...”

Coy, 487 U.S. at 1016 (quoting Richard II, Act 1, sc. 1).

Closely tied to the right of complete cross-examination is the  
right of an accused person to present a defense.

If anything, the confrontation guarantee may be  
thought, along with the right to compulsory process,  
merely to constitutionalize the right to a defense as  
we know it, a right not always enjoyed by the  
accused, whose only defense prior to the 17<sup>th</sup> century  
was to argue that the prosecution had not completely  
proved its case.

California v. Green, 399 U.S. at 176 (Harlan, J., concurring).

Nevertheless, the State claims Beskurt invited the  
prosecutor’s multiple improper comments here by engaging in a  
thorough cross-examination of the complainant. Br. Resp. at 60-  
85.<sup>1</sup> The State asserts that Bideratan’s counsel “badgered” the  
complainant, and thus the prosecutor’s arguments accusing  
defense counsel of “bullying” and “pounding” the complainant and

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<sup>1</sup> The appellate prosecutor accuses defense counsel of “pushing the  
envelope through their aggressive questioning”, Br. Resp. at 13, and of  
“determinedly cross-examining” the complainant, Br. Resp. at 40; and  
disparagingly characterizes counsels’ cross-examination as “vigorous,”  
“tenacious,” and “pointed.” Br. Resp. at 62, 64. Misleadingly implying that  
defense counsel conceded that there was some impropriety in their cross-  
examination (although the context makes plain that the import of counsels’  
remarks was to emphasize the recalcitrance of the State’s witnesses), the State  
quotes defense counsel as stating cross-examination was “torturous,” that they  
“pushed” the complainant in cross-examination, that cross-examination of the  
complainant was like “pulling teeth,” and that counsel “had to fight” to get  
admissions from her. Br. Resp. at 65.

asking questions that “bordered on the offensive” were appropriate. Br. Resp. at 73. This is a specious claim. An accused person does not “open the door” to prosecutorial misconduct by vigorously questioning a government witness regarding her testimony. State v. Jones, 144 Wn. App. 284, 295, 183 P.3d 307 (2008).

A criminal defendant can “open the door” to testimony on a particular subject matter, but he does so under the rules of evidence. A defendant has no power to “open the door” to prosecutorial misconduct.

Id.

In Jones, the prosecutor repeatedly committed misconduct by vouching for the credibility of law enforcement witnesses and inviting the jury to speculate about facts not in evidence. Id. at 295-98. On appeal, the State made the same contention proffered by the appellate prosecutor here: that Jones invited the improper comments. Rejecting this claim, the Court explained,

[T]he State misconstrues the doctrines of opening the door and invited error. The doctrines are not synonymous and neither excuses the State's fair trial duties here.

The “opening the door” doctrine is an evidence doctrine that pertains to whether certain subject matter is admissible at trial. The term is used in two contexts:

(1) a party who introduces evidence of questionable admissibility may open the door to rebuttal with

evidence that would otherwise be inadmissible, and (2) a party who is the first to raise a particular subject at trial may open the door to evidence offered to explain, clarify, or contradict the party's evidence.

Karl B. Tegland, Washington Practice: Evidence Law and Practice § 103.14, at 66-67 (5th ed. 2007). Because this “opening the door” doctrine pertains to the admissibility of evidence, it must give way to constitutional concerns such as the right to a fair trial.

Id. at 297-98.

By contrast, the “invited error” doctrine applies to the circumstance where a party induces the trial court to err. Id. at 298.

As the Court in Jones explained, the “invited error” doctrine may not be applied to sanction prosecutorial misconduct:

We have not found one published case in which a Washington court applied the invited error doctrine in the context of prosecutorial misconduct for which the trial court's alleged “error” is in entering a conviction against a defendant who did not receive a fair trial. We hold that the invited error doctrine does not apply to prosecutorial misconduct.

Id.

The Court in Jones also observed, “The prosecutor’s proper course of action was to object to Jones’s question. The prosecutor did not object.” 144 Wn. App. at 295. Similarly, here, the prosecutor did not object that Bideratan’s counsel was badgering the complainant or that his questions were not relevant. She

objected only to the form of a question and on the basis that the question had already been asked and answered. 11RP 158-60. Since the prosecutor did not attempt to avail herself of a remedy at the time of the allegedly “offensive” and “bullying” remarks by counsel, this Court should reject any claim that the prosecutor’s comments in closing argument were justified.<sup>2</sup> Beskurt did not “invite” prosecutorial misconduct by engaging in thorough cross-examination of the complainant.

2. THE PROSECUTOR’S IMPROPER REMARKS WERE DELIBERATE, PURPOSEFUL, AND REQUIRE REVERSAL.

a. The prosecutor’s claim that the defense was ‘forced’ to argue consent was not a permissible ‘tailoring’ argument, urged consideration of facts not in evidence, and denied Beskurt a fair trial. The prosecutor claims the argument that the defendants manufactured their consent defense in response to Bideratan’s DNA being found on the complainant was a permissible ‘tailoring’ argument. Citing Portuondo v. Agard, 529 U.S. 61, 120 S.Ct. 1119, 146, L.Ed.2d 47 (2000), the State contends, “When a defendant takes the stand, ‘his credibility may be impeached and his

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<sup>2</sup> In any event, the State has failed to support its argument with legal authority. RAP 10.3(a)(6).

testimony assailed like that of any other witness.” Br. Resp. at 56-58.

The constitutional justification for permitting tailoring arguments is that the prosecutor is not prohibited from making an argument – e.g., that the defendant had the opportunity to tailor his testimony – that the jury is otherwise permitted to infer. Portuondo v. Agard, 529 U.S. at 67-68. But this prosecutor’s argument far exceeded the permissible bounds of a “tailoring” argument. Ms. Keating did not contend that the defendants tailored their defense in response to the testimony of the State’s witnesses, but instead alleged that the State’s evidence “forced” the defendants perjure themselves. 22RP 38-39.

A second, bigger problem with the State’s claim on appeal is that unlike Bideratan, Beskurt did not testify. For this reason, the prosecutor was prohibited under the Fifth Amendment from commenting on his silence, or arguing that he manufactured a defense. Griffin v. California, 380 U.S. 609, 614-15, 85 S.Ct. 1229, 14 L.Ed.2d 106 (1965). Even though Beskurt exercised his Fifth Amendment rights, the prosecutor argued, “the fact that that DNA was there prevented Mr. Bideratan or any of the other defendants from getting up here and saying, ‘Never happened, don’t know what

she's talking about, we never had sex.'" 22RP 38. Thus, even assuming the State's arguments were proper under the Sixth Amendment (although they were not), the prosecutor bootstrapped the fact that Bideratan testified to cast unwarranted aspersions on Beskurt, who exercised his right to silence.

Presumably recognizing the impropriety of Ms. Keating's comment, the appellate prosecutor claims the remark was inadvertent. Br. Resp. at 58. There is no basis in the record for this conclusion. Ms. Keating did not apologize for the remark or explain that she made an error. This Court should reject any suggestion that the remark was unintentional.

b. The comments on Beskurt's right to confrontation were egregious misconduct that warrant reversal even absent objections from defense counsel. The State acknowledges that a prosecutor may not urge a jury to draw an adverse inference from the exercise of constitutional rights. Br. Resp. at 89. But, analogizing this case to State v. Gregory, 158 Wn.2d 759, 147 P.3d 1201 (2006), the State asserts the numerous comments here were not improper. Br. Resp. at 90-94. The analogy is inapt.

In Gregory, the Court held that in determining whether prosecutorial arguments violate the defendant's constitutional

rights, the appropriate inquiry is “whether the prosecutor manifestly intended the remarks to be a comment on that right.” Gregory, 158 Wn.2d at 807. In concluding that the prosecutor’s comments did not infringe Gregory’s constitutional right to confrontation,<sup>3</sup> the Court reasoned, “The State did not specifically criticize the defense’s cross-examination of R.S. or imply that Gregory should have spared her the unpleasantness of going through trial.” Id.

Here, by contrast, Ms. Keating told the jury that defense counsel “bullied” the complainant and that counsel’s questions “bordered on the offensive,” argued that face-to-face confrontation was a hardship for the complainant, and repeatedly urged the jury to conclude that it was unjust for Beskurt and his co-defendants to have subjected her to a trial. This case is therefore unlike Gregory, like State v. Jones, 71 Wn. App. 798, 811, 863 P.2d 85 (1993), in which the Court found the prosecutor’s arguments violated the defendant’s Sixth Amendment rights.

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<sup>3</sup> In Gregory, the prosecutor simply asked, “how do you feel about having to testify in court and be ... cross-examined?” 158 Wn.2d at 805. The prosecutor then read the victim’s response to this question to the jury in closing argument. Id. By contrast, during trial Ms. Keating asked multiple questions regarding the effect of face-to-face confrontation on the victim and in closing argument repeatedly made improper references to the young men’s exercise of their trial rights. See Br. App. at 10-14.

As noted in Beskurt's opening brief, the Eighth Circuit held comments like the prosecutor's argument here required reversal on habeas review despite a procedural default and inadequate objection below. Burns v. Gammon, 260 F.3d 892, 895-98 (8th Cir. 2001).<sup>4</sup> This Court should similarly hold that Ms. Keating's improper remarks require reversal.

3. THE FIFTH AMENDMENT VIOLATION DURING VOIR DIRE IS PRESERVED FOR REVIEW BECAUSE THE TRIAL COURT DID NOT ENDORSE THE PROSECUTOR'S SUGGESTION THAT THE PANEL BE DISMISSED.

The State concedes that Ms. Keating's comment on the defendants' Fifth Amendment rights was improper. Br. Resp. at 20-21. But the State claims that the error is not preserved for review because the defendants did not accept the prosecutor's invitation that the parties recommence voir dire with a fresh panel.<sup>5</sup> The State is incorrect. Upon hearing from all parties, the court did not endorse the prosecutor's offer, but instead stated, "I feel like we ought to keep trying." 3RP 60.

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<sup>4</sup> In asserting the remarks did not warrant reversal, the State mistakenly cites to the preceding opinion, in which the Court held the arguments were procedurally barred. Br. Resp. at 96 (citing Burns v. Gammon, 173 F.3d 1089, 1095 (8th Cir. 1999)). In the subsequent opinion, the Court reversed the conviction based upon the remarks. 260 F.3d at 897-98.

<sup>5</sup> While Bideratan's counsel stated he did not wish the panel to be dismissed because he wanted to preserve the constitutional error, Beskurt's counsel did not concur in this rationale, but rather voiced the concern that "a lot of time" had been invested already in the case. 3RP 58-60.

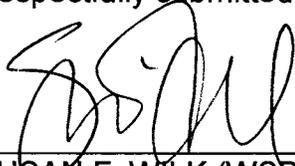
Likewise, the following day, although the court expressed frustration with the jury selection process and discussed the possibility of starting voir dire anew, after an objection from the prosecutor, the court ultimately decided not to recommence jury selection.<sup>6</sup> 3RP 126. Thus, the State's claim on appeal that the error is waived is not well-taken.

B. CONCLUSION

This Court should hold that multiple instances of egregious misconduct prevented Emir Beskurt from receiving a fair trial. His conviction should be reversed and remanded for a new trial.

DATED this 19<sup>th</sup> day of October, 2009.

Respectfully submitted:



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SUSAN F. WILK (WSBA 28250)  
Washington Appellate Project (91052)  
Attorneys for Appellant Emir Beskurt

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<sup>6</sup> The prosecutor stated, "as a prosecutor, I certainly don't want to be in the position of requesting a mistrial be declared and being then prohibited in some way from retrying the case." 3RP 125.

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

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|----------------------|---|-------------|
| STATE OF WASHINGTON, | ) |             |
|                      | ) |             |
| Respondent           | ) | NO. 62316-8 |
|                      | ) |             |
| v.                   | ) |             |
|                      | ) |             |
| EMIR BESKURT,        | ) |             |
|                      | ) |             |
| Appellant.           | ) |             |

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**DECLARATION OF SERVICE**

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

1. THAT ON THE 19TH DAY OF OCTOBER, 2009, A COPY OF **APPELLANT'S REPLY BRIEF** WAS SERVED ON THE PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL TO THE ADDRESSES INDICATED:

Randi Austell  
King County Prosecutors Office  
W554 King County Courthouse  
516 Third Avenue  
Seattle, WA 91804

Suzanne Lee Elliot  
Attorney for Samet Bideratan  
Hoge Building  
705 2<sup>nd</sup> Avenue, Ste. 1300  
Seattle, WA 98104-1797

Casey Grannis  
Attorney for Turgut Tarhan  
Nielsen, Broman & Koch  
1908 E. Madison  
Seattle, WA 98122

Emir Beskurt  
7343 19<sup>th</sup> Avenue N.E.  
Seattle, WA 98115

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x. Ann Joyce