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No. 63444-5-I

COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION ONE

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STATE OF WASHINGTON,

Respondent,

v.

AZAZI YOHANNES,

Appellant.

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

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APPELLANT'S REPLY BRIEF

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MAUREEN M. CYR  
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

1. THE PROSECUTOR'S COMMENTS  
APPEALING TO THE JURORS' CULTURAL  
BIASES AMOUNTED TO MISCONDUCT  
WHEN VIEWED IN THE CONTEXT OF THE  
ISSUES IN THE CASE AND THE EVIDENCE  
ADDRESSED IN THE COMMENTS

The State contends this Court must analyze the prosecutor's comments made during examination of the witnesses separately from the comments made during closing argument. SRB at 31 (citing State v. Wright, 76 Wn. App. 811, 820, 888 P.2d 1214 (1995)). But that is incorrect. As set forth in the opening brief, Mr. Yohannes' argument is that the prosecutor's comments during examination of the witnesses improperly injected the issue of race and culture into the trial. The prosecutor's comments during closing argument encouraged the jury to view Mr. Yohannes through the lens of the cultural stereotype that was earlier established during examination of the witnesses. This Court must examine all of the identified comments together in order to determine whether they constituted misconduct and whether they were prejudicial.

The case law supports this approach. It is well established that allegedly improper statements must be viewed within the context of the prosecutor's entire argument, the issues in the case, the evidence discussed in the argument, and the jury instructions.

See, e.g., State v. Brown, 132 Wn.2d 529, 561, 940 P.2d 546 (1997). The case law does not support the State's argument that each alleged instance of misconduct must be viewed separately from the others.

The State relies on State v. Wright, 76 Wn. App. 811, 888 P.2d 1214 (1995) to support its argument that each claim of misconduct must be analyzed separately from the others. In Wright, during cross-examination, the prosecutor asked Wright about discrepancies between his and the police officers' testimonies. Id. at 819. In each instance, the prosecutor elicited testimony from Wright that his version of the events differed from that of the officers because the officers "got it wrong." Id. at 819-20. The Court held that although it is misconduct for a prosecutor to ask a witness whether another is lying, it is merely "objectionable" to ask a witness whether another witness was mistaken or "got it wrong." Id. at 821-22. Unlike questions about whether someone is lying which are unfair to the witness because there may be other explanations for discrepancies in testimony, questions about whether another witness was mistaken do not have the same potential to prejudice the defendant or show him or her in a bad light. Id. at 822.

Thus, contrary to the State's suggestion, Wright does not stand for the proposition that a prosecutor's comments during examination of a witness cannot amount to misconduct but can instead be only "objectionable." Wright reiterates that *some* questions asked during examination of the witnesses are not merely objectionable but may amount to misconduct. That principle is also well-established in the case law. See, e.g., State v. Copeland, 130 Wn.2d 244, 922 P.2d 1304 (1996) (prosecutor's question during cross-examination regarding witness's prior offense was improper); State v. Jones, 144 Wn. App. 284, 294-95, 183 P.3d 307 (2008) (prosecutor's questions during examination of witness which elicited otherwise inadmissible and inflammatory hearsay to the effect that the confidential informant was afraid of testifying, implying he was afraid of Jones, were improper).

Here, as argued in the opening brief, the prosecutor's questions of the witnesses regarding the patriarchal views of Eritrean society were improper not merely because they elicited irrelevant testimony, but because they injected the issue of race and culture into the trial and encouraged the jury to convict Mr. Yohannes based on his association with Eritrean society.

The State also argues that the prosecutor's comments during closing argument—to the effect that Mr. Yohannes raped his wife in order to subjugate her and "put her in her place"—were not improper because they made no reference to race or culture. SRB at 41. But again, those comments must be viewed in the context of the prosecutor's earlier questioning of the witnesses, which elicited testimony that Eritrea is a patriarchal society that subjugates women. The prosecutor's comments during closing argument encouraged the jury to view Mr. Yohannes through the lens of the cultural stereotype that was earlier established through the witnesses' testimonies.

The State suggests that the prosecutor's comments were not prejudicial because there was no direct testimony about Mr. Yohannes' ancestry. SRB at 37 n.12. This Court should reject that suggestion, as the record is clear that Mr. Yohannes had a close association with Eritrea and spent a substantial part of his life there. Ms. Araya testified she met Mr. Yohannes in Eritrea in 1997 or 1998, in high school. 2/24/09RP 103. They became engaged in 2005, in Eritrea. 2/24/09RP 104. Mr. Yohannes moved to the United States in 1998, and lived here from 2001 to 2004. 2/24/09RP 104. But then he returned to Eritrea and the couple

were married there in 2006. 2/24/09RP 104-05. They moved to the United States soon thereafter. 2/24/09RP 104-05.

Finally, the State contends Mr. Yohannes waived his right to complain about the prosecutor's improper comments on appeal, by not raising an objection below. But the failure to object to misconduct does not waive the issue on appeal if the remark amounts to a manifest constitutional error. State v. Dixon, 150 Wn. App. 46, 57, 107 P.3d 459 (2009). Further, where a prosecutor's remarks are so flagrant and ill-intentioned that they evince "an enduring and resulting prejudice," the court will grant relief without regard to whether there was a trial objection. State v. Fisher, 165 Wn.2d 727, 747, 202 P.3d 937 (2009).

As stated in the opening brief, appeals to racial bias violate the right to a fair trial. The prosecutor's comments appealing to the jurors' racial and cultural biases in this case were flagrant and ill-intentioned and amounted to a manifest constitutional error that may be raised for the first time on appeal.

2. THE STATE DID NOT PROVE THE ELEMENT  
OF FORCIBLE COMPULSION BEYOND A  
REASONABLE DOUBT

First, it is notable that the State encourages this Court to disregard the trial testimony of the State's key witness—Lia Araya.

At trial, Ms. Araya testified that she was unconscious during the rape and never felt or observed Mr. Yohannes having intercourse with her or ejaculating on her face. 2/24/09RP 127-28, 132-35, 140, 142. Ms. Araya's trial testimony therefore supports Mr. Yohannes' argument that the State did not prove he used forcible compulsion to commit the alleged rape.

Instead, the State encourages this Court to focus on Ms. Araya's hearsay statements, in which she gave inconsistent accounts of what occurred.

The State contends it proved Mr. Yohannes used forcible compulsion to commit the rape, as "the defendant's violent act of striking Lia and knocking her unconscious was the physical force that allowed him to have intercourse with her." SRB at 13.

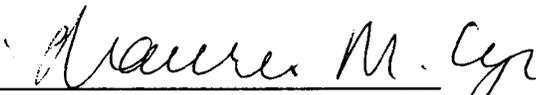
But in order to prove forcible compulsion, the State must prove beyond a reasonable doubt that the defendant used force to overcome the victim and have intercourse against her will. State v. McKnight, 54 Wn. App. 521, 527, 774 P.2d 532 (1989). The State must prove "the force exerted was *directed* at overcoming the victim's resistance and was more than that which is normally required to achieve penetration." Id. at 528 (emphasis added).

Here, even when viewed in the light most favorable to the State, the evidence does not show Mr. Yohannes used force *for the purpose* of overcoming Ms. Araya's resistance to the rape. There is no evidence that Mr. Yohannes had the intent to rape Ms. Araya when he struck her and knocked her unconscious. Instead, assuming the truth of the State's evidence, Ms. Araya was incapable of consent by reason of being physically helpless or mentally incapacitated. The State therefore could have charged Mr. Yohannes with second degree rape under a different prong of the statute, RCW 9A.44.050(1)(b). But because the State did not prove the use of force *was directed at* overcoming Ms. Araya's resistance, the State did not prove second degree rape as charged, under RCW 9A.44.050(1)(a).

**B. CONCLUSION**

For the reasons set forth above and in the opening brief, Mr. Yohannes' conviction for second degree rape must be reversed and dismissed, or reversed and remanded for a new trial.

Respectfully submitted this 25th day of August 2010.

  
MAUREEN M. CYR (WSBA 28724)  
Washington Appellate Project 91052  
Attorneys for Appellant