No. 83709-1

SANDERS, J.* (dissenting) — I firmly agree with the majority that article I, section 22 of the Washington Constitution affords greater protection in this instance than the Sixth Amendment to the United States Constitution. However, I cannot join the majority's ill-reasoned decision which interprets article I, section 22 as being compatible with inferences of tailoring during cross-examination.

ANALYSIS

We are asked to decide whether the State may attack a defendant's credibility by implicitly criticizing the defendant for exercising the constitutional rights to review pretrial evidence against him, be present at trial, and confront the witnesses against him.

I. Article I, Section 22 Guarantees Defendants Fundamental Rights

A defendant is a unique type of witness. "[A] criminal defendant is not simply another witness. Those who face criminal prosecution possess fundamental rights that are 'essential to a fair trial.'"[1] *State v. Daniels*, 182 N.J.

* Justice Richard Sanders is serving as a justice pro tempore of the Supreme Court pursuant to Washington Constitution article IV, section 2(a).

80, 97, 861 A.2d 808 (2004) (quoting *Pointer v. Texas*, 380 U.S. 400, 403, 85 S. Ct. 1065, 13 L. Ed. 2d 923 (1965)). Article I, section 22 of the Washington State Constitution guarantees a criminal defendant "the right to appear[2] and defend in person, or by counsel, . . . to testify in his own behalf, [and] to meet the witnesses against him face to face." This bundle of rights provides the basis of a fundamentally fair trial. The "[p]rosecutorial comment suggesting that a defendant tailored his testimony inverts those rights, permitting the prosecutor to punish the defendant for exercising that which the Constitution guarantees."[3] *Daniels*, 182 N.J. at 98.

During cross-examination, the prosecutor here twice emphasized the

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[1] On at least three occasions, the Supreme Court "has elevated the rights of testifying defendants above legitimate state concerns about the reliability of their testimony." Alexander G.P. Goldenberg, *Interested, But Presumed Innocent: Rethinking Instructions on the Credibility of Testifying Defendants,* 62 N.Y.U. Ann. Surv. Am. L. 745, 768 (2007); *Brooks v. Tennessee*, 406 U.S. 605, 611, 92 S. Ct. 1891, 32 L. Ed. 2d 358 (1972) (striking down a rule requiring defendants testifying on their own behalf to do so prior to all other witnesses and holding the Fifth Amendment privilege against self-incrimination can only be exercised effectively once a defendant has had the opportunity to hear other witnesses); *Geders v. United States*, 425 U.S. 80, 91, 96 S. Ct. 1330, 47 L. Ed. 2d 592 (1976) (holding sequestering a testifying defendant and preventing him from consulting with his attorney during a trial recess violated his Sixth Amendment right to counsel); *Rock v. Arkansas*, 483 U.S. 44, 61-62, 107 S. Ct. 2704, 97 L. Ed. 2d 37 (1987) (holding defendant's right to testify includes the right to do so after hypnosis, a privilege that may be denied to other witnesses).

[2] The Supreme Court has described the right of defendants to be present at their trials as "[o]ne of the most basic of the rights guaranteed by the Confrontation Clause." *Illinois v. Allen*, 397 U.S. 337, 338, 90 S. Ct. 1057, 25 L. Ed. 2d 353 (1970).

[3] The testifying defendant must decide to either present himself at trial, and risk being discredited by his presence, or absent himself from trial and avoid the risk.

defendant's exercising his constitutional right to review the evidence against him and be present at trial.[4] The majority characterizes the prosecution's

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[4] A: . . . . I'm saying this time, because of prior testimony, that I heard, said that the shop was closed at 1:00 a.m., so it was before 1:00 a.m.

Q: And you've had the advantage of hearing all the testimony before you testified today, correct?

A: Obviously I have been sitting in that seat the whole time, yes.

Q: And you've also had the advantage of knowing what people were going to say ahead of time, wouldn't you agree with me?

A: No, I didn't know what anybody was going to say ahead of time.

Q: You didn't get to read the police reports?

A: I got to read the police reports.

Q: And you didn't get to read witness statements?

A: I read witness statements, yes.

Q: And you weren't allowed to bring those reports and statements with you to court?

A: I read everything involved, yes.

Q: And you've had what, a little over a year to concentrate on what people were going to say, didn't you?

Verbatim Report of Proceedings (VRP) (Dec. 11, 2007) at 74-75.

Q: So in the pendency of this trial, you've had access of what the evidence was?

A: I've read the police reports, I've read your discovery, yes.

Q: And you've heard all the testimony so far?

A: So far, yes.

Q: And so you knew all that before you testified?

A: Yes.

Q: And so you knew exactly where your DNA [deoxyribonucleic acid] had been

tailoring arguments as specific, as opposed to generic, majority at 15 n.8; this distinction, however, has little practical value inasmuch as the approaches of both the majority and dissent in *Portuondo* afford no meaningful protection of a criminal defendant's constitutional bundle of rights. *See State v. Mattson*, 122 Haw. 312, 343, 226 P.3d 482 (2010) (Acoba, J., dissenting).[5] The prosecutor impugned Martin's credibility by pointing out Martin exercised his constitutional right to review pretrial discovery materials that the prosecution had a constitutional duty to furnish him. CrR 4.7. And by referencing the defendant's presence at trial the prosecution asked the jury to draw an unreasonable inference regarding the defendant's alleged lack of credibility. I do not suggest the prosecution may not question a defendant on cross-examination regarding his testimony. "[I]f there is evidence in the record that a defendant tailored his testimony, the prosecutor may cross-examine the defendant based on that evidence. However, at no time during cross-

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found in the car?

Id. at 79.

[5] The majority follows the reasoning of the *Mattson* majority. I note the *Mattson* majority relies only on article I, section 14 of the Hawai'i Constitution, whereas the dissent expands its analysis to also include sections 5 and 10. The Hawai'i Supreme Court has interpreted these provisions as *implying* a guarantee of fair trial rights. *State v. Peseti*, 101 Haw. 172, 180, 65 P.3d 119 (2003); *State v. Apilando*, 79 Haw. 128, 131, 136, 900 P.2d 135 (1995); *Tachibana v. State*, 79 Haw. 226, 231-32, 900 P.2d 1293 (1995); *State v. Santiago*, 53 Haw. 254, 259, 492 P.2d (1971). In contrast the Washington Constitution *explicitly* guarantees the rights, arguably providing greater protection than the Hawai'i Constitution.

examination may the prosecutor reference the defendant's attendance at trial or his ability to hear the testimony of preceding witnesses." *Daniels*, 182 N.J. at 99.

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.[6] These comments imply all defendants are less believable simply as a result of exercising these rights;[7] the exercise of this constitutional right is not evidence of guilt. These allegations demean "the truth-seeking function of the adversary process."[8] *Portuondo v. Agard*, 529 U.S. 61, 76, 120 S. Ct. 1119, 146 L. Ed. 2d 47 (2000) (Stevens, J., concurring); *id*. at 79 n.1

[6] "The rule against adverse inferences is a vital instrument for teaching that the question in a criminal case is not whether the defendant committed the acts of which he is accused. The question is whether the Government has carried its burden to prove its allegations while respecting the defendant's individual rights." *Mitchell v. United States*, 526 U.S. 314, 330, 119 S. Ct. 1307, 143 L. Ed. 2d 424 (1999) (holding the concerns that mandate the rule against negative inferences at a criminal trial apply with equal force at sentencing).

[7] "[T]he best and most simple explanation for coherent testimony is 'sheer innocence.'" William Bradley Smith, Case Note, *Criminal Procedure—Defendant's Right To Be Present at Trial—Prosecutor's Comments During Summation Regarding Defendant's Opportunity To Tailor Testimony to That of Preceding Witnesses*, 68 Tenn. L. Rev. 409, 425 (2001) (quoting *Portuondo*, 529 U.S. at 85 (Ginsburg, J., dissenting) ("If a defendant appears at trial and gives testimony that fits the rest of the evidence, sheer innocence could explain his behavior completely.")).

[8] The majority's holding fails to advance the search for truth because it does not consider the fact that testimony is often consistent because it is truthful. *See Portuondo*, 529 U.S. at 79 n.1 (Ginsburg, J., dissenting).

(Ginsburg, J., dissenting). 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.[9] Permitting accusations of tailoring would chill the willingness of defendants to testify. *See* J. Fielding Douthat, Jr., *A Right to Confrontation or Insinuation? The Supreme Court's Holding in* Portuondo v. Agard, 34 U. Rich. L. Rev. 591, 612-13 (2000) ("'[The inference] is a penalty imposed by courts for exercising a constitutional privilege. It cuts down on the privilege by making its assertion *costly*.'" (alteration in original) (quoting *Griffin v. California*, 380 U.S. 609, 614, 85 S. Ct. 1229, 14 L. Ed. 2d 106 (1965))). This undermines the core principle of our criminal justice system – that a defendant is entitled to a fair trial. *See Daniels*, 182 N.J. at 98. 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 against him.[1] 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

[9] "When a tailoring insinuation based solely on the defendant's presence in the courtroom is made, the jury is told, indirectly, that the defendant is not to be believed simply because he is a defendant." J. Fielding Douthat, Jr., *A Right to Confrontation or Insinuation? The Supreme Court's Holding in* Portuondo v. Agard, 34 U. Rich. L. Rev. 591, 615 (2000).

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. *See Mattson,* 122 Haw. at 329 (Acoba, J., dissenting).

II. Harmless Error

Constitutional error is "subject to harmless error analysis" where the error was harmless beyond a reasonable doubt. *State v. Watt*, 160 Wn.2d 626, 633, 160 P.3d 640 (2007) (citing *Delaware v. Van Arsdall*, 475 U.S. 673, 684, 106 S. Ct. 1431, 89 L. Ed. 2d 674 (1986)). If, without the constitutionally prohibited remarks, honest, fair-minded jurors might have acquitted Martin, the error cannot be deemed harmless. *Chapman v. California*, 386 U.S. 18, 25-26, 87 S. Ct. 824, 17 L. Ed. 2d 705 (1967).

The majority acknowledges "the credibility of the defendant is key." Majority at 16. Martin's credibility was the linchpin of his defense. The State's physical evidence was compelling but was easily explained by Martin's testimony, if the jury believed him. Evidence other than Martin's testimony also called the State's theory into question.[11] The prosecution asked the jury to draw

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[1] "[W]here the exercise of constitutional rights is 'insolubly ambiguous' as between innocence and guilt, a prosecutor may not unfairly encumber those rights by urging the jury to construe the ambiguity against the defendant." *Portuondo*, 529 U.S. at 77 (Ginsburg, J., dissenting) (citation omitted) (quoting *Doyle v. Ohio*, 426 U.S. 610, 617, 96 S. Ct. 2240, 49 L. Ed. 2d 91 (1976)).

[11] Jessica Sobania positively identified another man as the perpetrator; this man was never

an adverse inference from the exercise of Martin's constitutional rights; this tainted the credibility of Martin's entire testimony. We cannot know if the jury would have found Martin more credible absent the prosecutor's misconduct. Because a reasonable possibility exists that the verdict might have been more favorable to the accused in the absence of this error, the error cannot be harmless.

CONCLUSION

I reject an interpretation of our state constitution that presents the defendant with a Hobson's choice: exercise the right to be present at trial and testify, or sequester himself in order to prevent the taint of a tailoring accusation. I dissent.

AUTHOR:
Richard B. Sanders, Justice Pro Tem.

WE CONCUR:

fully investigated by the police. VRP (Dec. 4, 2007) at 42. Additional DNA was found on the steering wheel and dashboard, and it did not match samples collected from Martin, Sobania, or the children. VRP (Dec. 7, 2007) at 176, 187-90.