

## “Taylored” Testimony, Tailored Closing By: Lance M. Hester; March 2002

A very recent case out of Division I holds that the following narrative during closing argument did not violate a defendant’s right to be present at trial:

“(the defendant) had the opportunity to read this discovery for 18 months, that he had the opportunity to hear what every witness said, and that he had the opportunity to tailor his story to fit the evidence after he heard it all.”

State v. Miller, \_\_\_\_ Wn.App. \_\_\_\_ (February 19, 2002).

The decision relied on a recent US Supreme Court opinion while reversing Washington precedent on this issue.

Previously the state Supremes held that it was improper for a prosecutor to argue to a jury that a defendant has had a “unique opportunity to be present at trial and hear all the testimony against him.” The court reasoned that that sort of comment violated on the defendant’s Sixth Amendment rights to be present at trial and to confront witnesses against him. Miller, supra., (citing State v. Johnson, 80 Wn. App. 337, 341 (1996).

Later, the state court allowed the rule from Johnson to be eroded a bit when it allowed the State to argue that the defendant had manufactured “an exculpatory story consistent with the available facts.” State v. Smith, 82 Wn. App 327, 335 (1996). As long as the focus of the argument was not on the exercise of the constitutional right itself, the court held that such an argument was acceptable. Id.

In 2000 the US Supreme Court held contrary to then-existing Washington case law in Portuondo v. Agard, 529 U.S. 61 (2000). The trial court in Portuondo allowed the prosecutor to state that the defendant, “unlike all the other witnesses,” had the benefit of “(getting) to sit here and listen to the testimony of all the other witnesses before he testifies.” Id., at 64. The Supreme Court rejected arguments that the statement violated the defendant’s Fifth, Sixth, and Fourteenth Amendment rights to be present at trial, to confront witnesses, and to due process.

Washington State Court of Appeals, Division One, thus held in Miller, that Portuondo “effectively overrules” Johnson and Smith and upheld the murder conviction in the case before it.

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