No. 31167-8-III

IN THE COURT OF THE APPEALS
OF THE STATE OF WASHINGTON

DIVISION III

THE STATE OF WASHINGTON, Respondent

v.

JOHN HENRY MARKWELL, Appellant.

BRIEF OF RESPONDENT

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SUBSTANTIVE FACTS

Between July 20, 2011 and August 13, 2011, John Henry Markwell was held in the Garfield County Jail. RP 373-74. During this time, Markwell was housed with other inmates including Charlie Hopkins, Michael Burke and Dustin Warren. RP 374.

Markwell was very talkative and regularly told stories while in the jail. RP 474, 521. Markwell would often talk about prison, working out/lifting weights, and his involvement in fights. RP 407, 467, 474, 475, 481. Markwell told the other inmates about how he had stomped a man's head in while in prison, and how he had beat people for snitching. RP 407.

Markwell was loud and demanding, often times threatening other inmates. Markwell forced Charlie to clean the jail common area every time it was dirty and after every meal. RP 399-400, 467-68, 506. If Charlie did not comply, Markwell would raise his voice, scream at Charlie and throw items. RP 400, 411, 475, 476. Charlie was frightened by these acts. RP 477. On one occasion, while mopping, Charlie brushed Markwell's foot with the mop, only to have Markwell erupt telling Charlie to get the mop away from him or he would kick his head in. RP 389. Markwell threatened Charlie while discussing "snitches." Markwell explained to Charlie that if he ever snitched on

him, Charlie's friends and family would not be safe, even with the protection of law enforcement. RP 410. Markwell would also regularly threaten Charlie through use of threats of future harm in order to entice compliance. RP 400, 477.

Markwell controlled the other inmates. As noted above, Markwell forced Charlie to clean the jail. Markwell claimed Charlie as "his property" and told Charlie that he will do as he is told. RP 412. Markwell also forced Michael Burke to move out of his own cell and then ordered Charlie to move into that cell with Markwell. RP 401, 480. Although Charlie refused to move, Markwell moved Charlie's belongings into the new cell. RP 401. In addition to being forced to move out of his jail cell, Markwell would control Burke generally with threats to kick his ass. RP 488. Burke was at one point forced to "throw towels" although he did not want to do so. RP 515-16. When Burke refused to do as he was told, Markwell told him he would do it or else Markwell would break his neck. RP 515-16. Charlie witnessed Markwell to make these threats. RP 410. Burke did what Markwell told him to do because he was intimidated and did not want to fight Markwell. RP 481.

Charlie also witnessed Markwell get aggressive with law enforcement. On one occasion Garfield County Deputy Sheriff Melcher approached the jail door and spoke to Markwell. Markwell

responded by raising his voice at the deputy and telling him that he (Deputy Melcher) was to address Markwell with more respect. RP 411.

Charlie Hopkins was a small, timid individual, approximately 5'8" tall, and weighed 140 lbs. RP 399, 533. Charlie was intimidated by Markwell. RP 407. Markwell was at the time approximately 6'1" tall, weighed 240 lbs, was in shape, and had multiple tattoos. RP 399, 475, 476, 532, 533. Michael Burke who was 5'11" and 190 lbs, was also intimidated by Markwell's size, appearance and stories of fighting. RP 475-476. Burke described Markwell as 'a big scary guy.' RP 475. Burke felt he could not stand up for himself against Markwell, nor could he standup for Charlie who he thought was the smallest person in the jail. RP 477-78.

Dustin Warren, who was 6'2" and 200 lbs, also found Markwell to be a big and intimidating guy, even though he was only in the jail with him for an estimated three hours. RP 521, 533. During that short time, Warren noted that Markwell was always talking and telling stories (including stories of violence). RP 523. Warren witnessed Markwell to be 'short' with Charlie and Burke, and would not give either any room to speak. RP 521.

After continually questioning Charlie Hopkins as to why he was in jail, Markwell learned that Charlie was incarcerated for sexual

assault/rape of a child. RP 406, 451. With this information, Markwell began telling Charlie that an offender like him should expect to have his property stolen, that he would be attacked, beaten, and shanked while in prison. RP 406, 481. Markwell told Charlie that he would likely be placed in protective custody, but that protective custody was placement "in the hole." RP 411-12. Markwell described "the hole" as a small cell where Charlie would be placed by himself with nothing to do; that his food would be served to him through a door; and that he would not get out except to shower. RP 411-12. Markwell also made it a point to explain to all the other inmates that Charlie was in jail because he was a sex offender. RP 466. At one point, Markwell even gave Michael Burke the advice, that if he (Burke) was ever in prison with Charlie Hopkins it "would be a smart thing to jump on him and hurt him." RP 481.

While instilling fear in Charlie Hopkins, Markwell concurrently offered to help him by writing him a "letter from home." The letter stated:

> "Charlie Hopkins is an awesome homosexual that has his mind right. He deserves a fair chance and has proven himself as he has done with me. His mother is also my woman, so this woman here is a part of my family. Handle with care. Handle fair. Charlie deserves to be safe and spoiled"

signed by Markwell using his prison name "Hog Leo." RP 391-92. Markwell told Charlie that the letter would protect him from harm while in prison. RP 392. Charlie believed he needed the letter to protect him

from all the harm described to him by Markwell. RP 393, 469-470. Although Charlie did not know better, the letter was likely written to further victimize him while in prison by informing the other prisoners that he was a homosexual that could be "used." RP 251.

Through the use of implied threats, express threats and physical force, Markwell forced Charlie to have sexual intercourse with him on three separate occasions.

On the first occasion, Markwell told Charlie that he was going to give Markwell oral sex. RP 385. Charlie refused by saying no. RP 385. Markwell told Charlie he needed to make "the letter" true in order to have his protection. RP 393. After repeated demands by Markwell, Charlie did not believe he could refuse, so he went into his cell with Markwell. RP 469, 478, 507. As they walked into the cell, Markwell invited Burke to come watch, to which Burke declined. RP 478-79. While in the cell, Markwell demanded Charlie give him oral sex, placed his hands on Charlie's head and held Charlie's head in place. RP 388. With Markwell's penis in Charlie's mouth, Markwell held Charlie's head and prevented him from removing it although Charlie tried to do so. RP 388. After Markwell finished with Charlie, he walked back into the common area and told the other inmates that Charlie wasn't bad, and that they too should go try it. RP 389, 479.

The second act of sexual intercourse occurred in Burke's jail cell.

RP 400. Markwell proceeded to remove Charlie's pants although Charlie resisted. RP 409-10. Once Charlie's pants were taken down, Markwell's penis penetrated Charlie's anus. RP 401. Charlie complained that it hurt, so Markwell told Charlie to give him a blowjob to finish. RP 403. Charlie complied with the order. RP 403.

The third act of sexual intercourse was oral sex. Markwell ordered Charlie to give him a blowjob. RP 403. After repeated requests and demands, Charlie gave in and performed oral sex. RP 401, 403. Charlie did not believe he was in a position to refuse. RP 405.

PROCEDURAL HISTORY

The Defendant, John Henry Markwell, was charged by Amended Information with three counts of Rape in the Second Degree. A pre-trial hearing was held on May 3, 2012, whereby the Defendant's *Knapstad* motion to dismiss for lack of evidence was denied; and Defendant's motion to exclude the testimony of expert witnesses Stephen Lindsley and Robert Jackson was also denied. A Jury Trial was held in the Garfield County Superior Court on May 7 - 9, 2012. On the last day of trial, the jury returned a verdict of guilty for each of the three crimes charged.

III. ARGUMENT

A. SUFFICIENT EVIDENCE OF FORCIBLE COMPULSION EXISTS TO SUPPORT THE FINDINGS OF GUILT.

The defendant claims that there is insufficient evidence of forcible compulsion to uphold the convictions for three counts of Rape in the Second Degree. The test for determining the sufficiency of the evidence is whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found the essential elements of the charged crime beyond a reasonable doubt. *State v. Embry*, 171 Wn.App. 714, 287 P.3d 648 (Div. II 2012). Sufficiency challenges admit the truth of the State's evidence and all reasonable inferences drawn from it. *Id.* In determining the sufficiency of the evidence, the Court considers circumstantial evidence as no less reliable than direct evidence. *Id.* The trier of fact makes determinations of credibility, and the Court will not review those determinations on appeal. *Id.* The Court must also defer to the trier of fact on issues of conflicting testimony and the persuasiveness of evidence. *Id.*

Forcible compulsion can be: 1) physical force which overcomes resistance; and/or 2) an implied threat that places a person in fear of death or physical injury to himself or others. At trial, Charlie Hopkins testified that the defendant used physical force which overcame his

resistance on two separate occasions. When describing the first incident of rape, Charlie stated that the defendant: "took his hand & put it on the back of my head"; "held my head – held my head on him"; "he kept it on the back of my head so that I couldn't take it off of him"; and that he (Charlie) had tried to take his head off of Markwell. RP 388. In short, Charlie made an effort to resist the defendant by attempting to remove the defendant's penis from his mouth only to be overcome by the force of the defendant's hands on his head.

When describing a subsequent (and separate) act of rape, Charlie described the acts leading up to anal penetration by testifying that he was: wearing striped pants; that the defendant removed those pants by pulling them down; and that he had resisted this by trying, but failing, to pull his pants back up. RP 409-10. Again, the defendant used force to remove Charlie's pants and to keep those pants removed although Charlie resisted by trying to remain clothed and covered.

In *State v. McKnight*, the Court of Appeals upheld a Second Degree Rape conviction based on forcible compulsion where the defendant used physical force to overcome the victim's resistance. *State v. McKnight,* 54 Wn.App. 521, 774 P.2d 532 (Div. I 1989). The physical force used by the defendant included slowly pushing the victim into the prone position although she said no; and removing the

victims clothing although she asked him to stop. *Id.* at 523-24. "[T]he acts of slowly pushing C to a prone position and then removing her clothes in response to the victim's requests that the advances stop manifest a degree of force greater than that which is inherent in the act of intercourse. A reasonable juror could ... infer from the evidence that these were acts of force over and above what is necessary to achieve intercourse and that these acts were employed to overcome C's resistance." *Id.* at 528. Although the victim did not physically resist her attacker, the court ruled that forcible compulsion need not require a showing of physical resistance in all cases.

McKnight is relevant to the case at hand, in that it shows the physical force employed by the perpetrator need not be egregious, nor the resistance by the victim great, if at all. The defendant, Markwell, did use physical force to overcome Charlie's resistance in that he held Charlie's head on his penis although Charlie tried to push off; and Markwell did use physical force to remove Charlie's pants although Charlie attempted to keep them on.

The court must assume the truth of the state's evidence and must view it most favorably to the state. Therefore the court must assume Charlie Hopkins' testimony, as outlined above, is true as to two of the three counts of rape.

In addition to evidence of physical force, the State produced

sufficient evidence of "forcible compulsion" through "implied threat" to justify the jury's verdict on all three counts of rape. Evidence of forcible compulsion by implied threat is sufficient if there is evidence that the defendant impliedly threatened to cause death or bodily injury to the victim or another. RCW 9A.44.010(6). The State is required to introduce some evidence from which the jury could infer not only did the victim perceive a threat, but also that the defendant in some way communicated his intention to inflict physical injury in order to coerce compliance. *State v. Weisberg*, 65 Wn. App. 721, 829 P.2d 252 (Div. II, 1992).

The State argues that there is sufficient evidence that the defendant communicated an intention to physically injure the victim or another in order to coerce compliance. Markwell engaged in conduct suggesting he would injure the victim by creating an atmosphere where threats and demands were regular, stories of past violent acts were told, and the victim's actions were controlled and/or directed.

Through this common scheme or plan, Markwell made express threats. Markwell threatened inmate Michael Burke within earshot of the victim by stating he would break Burke's neck if he failed to do as he was ordered. RP 410, 516. The defendant told the victim that if he ever snitched on him, that his friends and his family wouldn't be safe. RP 410. When the victim was simply mopping the floor of the cell, the

mop brushed the defendant's foot causing the defendant to tell the victim to get the mop away from him or he was going to kick the victim's head in. RP 389. Michal Burke also testified that he heard the defendant threaten the victim generally, testifying that the defendant would tell the victim "'if you don't quit that' or 'you don't do this, I will kick your ass.'" RP 477.

The defendant controlled Charlie. As part of the defendant's controlling conduct toward the victim, the defendant forced Charlie to clean the jail common area when it became dirty and/or after each meal. RP 399-400, 506. Charlie testified that when he did not clean up after the defendant, the defendant would get mad at him, yell and would throw things. RP 400, 411. Charlie also testified he was forced to move into a cell with the defendant. Charlie did not want to move into the cell but the defendant told him he was moving and then physically moved Charlie's belongings into the new cell. RP 401, 480. Furthermore, the victim testified that the defendant claimed Charlie as his property. RP 412. Charlie had to do as he was told by the defendant because "what he said was the law," he "told me I am his and I will do what he says." RP 412.

In order to further control the victim in this case, the defendant attempted to isolate Charlie. Charlie testified that he reluctantly told the defendant why he was incarcerated and that he was headed to

D.O.C. RP 406. The defendant told the other inmates that Charlie was a sex offender, arguably to reduce any support the victim may gain from the other inmates. RP 466.

The defendant told the victim and the other inmates stories of violence. According to Michael Burke, the defendant told stories about fighting a couple times a week. RP 474. Dustin Warren, who was only around the defendant for an estimated three hours, testified that the defendant talked a lot and told a number of stories involving violence. RP 521, 523. The victim recalled the defendant telling stories of fighting including: a time where the defendant stomped a guy's head with his boots and that he beat people for snitching. RP 407. Arguably, these stories were told to educate the victim and the other inmates that the defendant was an experienced fighter who was willing to use force. In essence, he was warning the others that they did not want to fight him.

The defendant is much bigger than the victim. Charlie described himself as 5'8" tall, weighing 140 lbs. RP 399. Charlie believed the defendant to be about 6'0" and over 200 lbs. RP 399. Dustin Warren described the victim as 5'8" and 120 lbs; "little," "timid" and "shy." RP 533. Warren also described the defendant to be a "big and intimidating guy" at approximately 6'0" tall and 240 lbs. RP 532. Michael Burke described the defendant as being "a big scary guy,"

who was "in shape" at 6'2"-6'3" tall and 230-240 lbs. RP 475-476. Deputy Melcher also described the defendant's physical size as approximately 6 '0" tall and 220-240 lbs. RP 378. All witnesses confirmed that the defendant was much larger than the victim.

The defendant instilled into Charlie a fear of future harm. The defendant told the victim that because he was a sex offender he was going to be subject to harm in the prison system including being beaten and/or shanked. RP 406-07. The defendant then explained that he could protect the victim in prison by writing him a "letter from home." RP 390-93. The defendant gave the victim the letter explaining that it would protect Charlie in prison. RP 390-93. However, after providing the letter, the defendant told Charlie he "needed to make the letter true." RP 393. A reasonable juror could infer that a statement like "you need to make this true," could be interpreted to mean "you need to make this true ... or else I will take it back and you will then be subject to all the harm I previously described."

The fact that the victim has been convicted of a sex offense is also relevant because as stated by Robert Jackson of the Dept. of Corrections, those convicted of sex offenses are truly a safety concern while incarcerated. RP 253, 255. Jackson stated that within the hierarchy of offenders, sex offenders are at the bottom. RP 253.

He also stated that sex offenders are targeted for assault and that they need to be protected from other inmates. RP 253, 255. Jackson also testified that he has seen new inmates bring with them to D.O.C., letters and/or photographs wherein that inmate is being "vouched for" by another. RP 248-50. Jackson's testimony is material because it confirms the truth of potential future harm to the victim. Jackson's testimony is material because it confirms the notion that a new inmate can be protected through "vouching" by another. Ultimately, this testimony aided the trier of fact in determining whether or not the defendant impliedly threatened harm to the victim in the future if the victim did not have sex with him.

Taking into consideration all of the evidence produced at trial: that Charlie was afraid of the defendant due to the defendant's previous threats to harm him; Charlie had witnessed the defendant threaten others; that the defendant had yelled and showed aggression by throwing items when Charlie did not comply with orders; that the defendant created a fear in the victim of future harm, being beaten, and/or shanked in prison; that the defendant had then offered to protect the victim by writing a letter; that the defendant implied that Charlie had to give into the sexual contact or the defendant would withdraw the letter of protection; that the defendant told Charlie that if he snitched, his friends and family would not be safe; that the

defendant was much larger than the victim; that Charlie was told he was owned by the defendant and was therefore required to do as the defendant ordered; as well as the defendant, on multiple occasions, telling Charlie and the other cellmates that he had willingly assaulted others and had been involved in other acts of violence; a rational juror could find there is sufficient evidence to support that not only did the victim perceive a threat, but that the defendant had acted in such a way as to communicate a threat.

In *State v. Bright,* 129 Wn.2d 257, 916 P.2d 922 (1996), Tribal Police Officer Fred Bright arrested Ms. L. on an outstanding tribal warrant. While transporting Ms. L. to jail, Bright allowed her to sit in the front passenger seat. *Id.* at 263. During that time Bright fondled Ms. L's breasts and a short time later grabbed the back of her neck and forced her to engage in an act of fellatio as he was driving down the highway. *Id.* Ms. L. said resistance proved painful and futile, as she was unable to lift her head from Respondent's lap because of the tight grip he had on her neck. *Id.* According to Ms. L., Bright then stopped the car on a dirt road, removed what appeared to be a condom from a brief case and got out of the patrol car. *Id.* Ms. L. said that a few moments later he opened the passenger door and ordered her to get out, drop her pants and underwear, lean against the car, and face away from him. *Id.* She testified that, fearing for her safety,

she complied with his orders and that Bright then engaged her in an act of vaginal intercourse. *Bright,* 129 Wn. 2d at 263. According to Ms. L., at all times during the encounter Respondent was armed with the handgun he carried in a holster strapped to his waist, and his rifle was on the back seat of the patrol car. *Id.* Ms. L. stated she was aware of the presence of both weapons during the encounter, but at no time did Respondent directly use or threaten to use either weapon to gain her compliance. *Id.* at 263-64. However, Ms. L. testified she thought about trying to get away while the patrol car was stopped, but feared Respondent might falsely accuse her of attempting to flee from custody, and possibly even shoot her. *Id.* at 264. The Supreme Court ultimately upheld the implied threat including the communication of the implied threat, stating:

> "by his knowing decision to remain armed while he assaulted and raped Ms. L., Respondent Bright communicated to his victim his intent to use his weapon if she resisted. From the record in this case we can conclude that Respondent Bright deliberately contrived the factors of the guns, his nonregulation transport of a woman prisoner, his choice of a remote locale, and his use of force—all with the intent to create a situation threatening enough to reduce Ms. L. to helplessness." *Id.* at 272. "The jury obviously believed Ms. L. It properly decided the sum of Defendant's conduct demonstrated an intent to use his weapons to defeat any resistance by his victim." *Id.* at 273.

Bright is very helpful in the case at hand. Although neither defendant, Markwell or Bright, expressly threatened harm if their respective victims did not have intercourse with them, each created a

situation threatening enough to reduce their victims to helplessness. Each defendant demonstrated an intent to use force to defeat any resistance by the victim.1

RCW 9A.44.020(1) states: in order to convict a person of any crime defined in this chapter (including Rape 2nd Degree) it shall not be necessary that the testimony of the alleged victim be corroborated. Taking this statute into consideration, presuming the above testimony as true and also reviewing the evidence in a light most favorable to the State, this court must find that there is sufficient evidence from which a rational trier of fact could have found the essential element of physical force which overcame resistance, *or* an implied threat which caused the victim to fear death or substantial bodily injury. The defendant did use physical force *and* the implied threats of future harm to overcome the victim's resistance of sexual contact.

B. THE TRIAL COURT PROPERLY ALLOWED TESTIMONY OF EXPERT WITNESSES.

At trial, the State was entitled to introduce the testimony of expert Robert Jackson, Investigator of the Department of Corrections,

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1 *See also: State v. Hentz,* 99 Wash.2d 538, 544, 663 P.2d 476 (1983) A threat that one has a deadly weapon is equally terrifying and effective whether or not the perpetrator actually possesses a deadly weapon, in light of the personal nature of the crime and the inability of a victim to defend against a bullet or other deadly force. *and State v. Coe,* 109 Wash.2d 832, 845, 750 P.2d 208 (1988). The effect upon the victim is the same whether the deadly weapon is actually seen or merely described, by removing the possibility of self-defense.

as well as expert Stephen Lindsley, Licensed Mental Health Counselor. The two witnesses were allowed to testify based on a pre-trial ruling issued by visiting Judge Mitchell of Benton County.

Expert testimony is admissible if the witness qualifies as an expert and if the witness's testimony would be helpful to the jury. *In re Detention of Coe,* 160 Wn.App. 809, 250 P.3d 1056 (Div.III 2011). Practical experience is sufficient to qualify a witness as an expert. *State v. Weaville,* 162 Wn.App. 801, 256 P.3d 426 (Div.I 2011). Expert testimony is helpful to the jury if it concerns matters beyond the common knowledge of the average layperson and is not misleading. *State v. Groth*, 163 Wn.App. 548, 261 P.3d 183 (Div.I 2011). Courts generally interpret the possible helpfulness of expert testimony to the trier of fact broadly and will favor admissibility in doubtful cases. *Id.* Expert testimony will be considered helpful to the trier of fact when its relevance can be established. *State v. Atsbeha*, 142 Wn.2d 904, 16 P.3d 626 (2001). The trial court has wide discretion in ruling on the admissibility of expert testimony. *Miller v. Likins,* 109 Wn.App. 140, 34 P.3d 835 (Div. I 2001). A trial court's admission or exclusion of expert testimony is reviewed for abuse of discretion. *Philippides v. Bernard,* 151 Wn.2d 376, 393, 88 P.3d 939 (2004).

Robert Jackson has been employed with the Washington

Department of Corrections, Walla Walla State Penitentiary for 19 years. RP 233. During his 19 year career, Mr. Jackson has been employed as a Correctional Mental Health Counselor I, II, and III; as well as Corrections Specialist III. RP 233. Mr. Jackson's most recent role has been that of Chief Investigator of the Intelligence and Investigations Unit, where he has been so employed since April of 2009. RP 233. The State argues that 19 years of employment at the Washington State Penitentiary is sufficient professional experience to allow him to qualify as an expert for purposes of discussing "prison culture" broadly, and more specifically, issues including: safety concerns for sex offenders & protective custody; violence within prison; hierarchy of offenders; how to earn respect/gain rank; and prison slang/terminology.

An issue in the case at hand was the type of 'threats' being made to the victim. Included in the threats that were perceived by the victim were ramifications that may occur once the victim was received within the Department of Corrections (prison). Included in these latent threats is one claim by the defendant, that the victim was the defendant's "woman." These comments made by the defendant may be less than obvious to a lay juror, but would be well understood to those involved in jail and/or prison system. This testimony was admitted to aid the jury in interpreting the language of the State's

primary witnesses and to put into context the threats made to the victim.

Robert Jackson's testimony is relevant for the very reason that it is helpful to the jury. Relevant evidence is evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence. ER 401. All relevant evidence is admissible.ER 402. Under the modern rules of evidence, the threshold to admit relevant evidence is low, and even minimally relevant evidence is admissible. *Kappelman v. Lutz,* 167 Wn.2d 1, 217 P.3d 286 (2009). Evidence should be considered in the light of all the other evidence to determine whether it has a reasonable connection to material issues to be relevant. *State v. Bebb,* 44 Wn.App. 803, 723 P.2d 512 (Div. III 1986).

The testimony of Mr. Jackson is relevant because it helped explain to the jury why comments made by the defendant and received by the victim, were actual threats. That smaller, weaker individuals, and those in prison for sex offenses could be at risk of real harm. The expert also aided the jurors in interpreting slang terms that have specific meanings within prison. In short, Mr. Jackson's testimony assisted the trier of fact understand the State's theory of

the case.[2]

The testimony of Stephen Lindsley was also admissible. Mr. Lindsley is currently licensed by the State of Idaho as a Licensed Clinical Professional Counselor and Certified Psychosexual Evaluator and is licensed in the State of Washington as a Mental health Counselor and as a Certified Sex Offender Treatment Provider. RP 269. Mr. Lindlsey has a Master's Degree and has been involved in this professional mental health field for 35 years. RP 268. The State argues that this is sufficient education and experience to claim Mr. Lindsley as an expert in the mental health field.

Mr. Lindlsey previously interviewed and evaluated the victim in the case at hand. Based on his education, training, and observations of the victim, Mr. Lindlsey testified to the victim's intellectual functioning, emotional development and vulnerability to exploitation. This is relevant to the case because it could aid the jurors in interpreting the victim's actions and testimony in court, as well as the victim's claimed actions and reactions in relation to the defendant.

As is stated in *Weisberg*, when determining the necessary

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2 See *State v. Campbell*, 78 Wn.App. 813, 901 P.2d 1050, (Div II 1995) The State's gang experts explained the meaning of gang terminology and symbols, the types of criminal activities in which gangs were involved, gang codes of conduct and discipline of violators, gang interactions with other gangs and "wannabe" gang members, and the organizational structure and history of gangs. ER 702 allows an expert to testify if "specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue". The expert testimony on gang terminology and gang symbols assisted the trier of fact understand the State's theory of the case and was relevant to show

element of forcible compulsion, there must be some evidence from which the jury could infer that not only did the victim perceive a threat, but also that the defendant in some way communicated a threat.[3] The State must therefore provide evidence of a subjective belief in addition to objective facts from which a threat may be inferred. This requirement puts into issue the victim's state of mind. The proffered expert testimony was intended to aid the juror in understanding the victim and his state of mind. Mr. Lindsley did testify to the victim's intellectual functioning, emotional development and vulnerability. This testimony was based on his education, training and his direct observations of the victim.

The State's expert witnesses each have the appropriate credentials to be deemed experts and their testimony was relevant to the issues presented at trial.

The defense claims that Robert Jackson's testimony prejudiced the defendant by likening him with security threats, others guilty of assault, those who introduce drugs into prison and even murder, and was thereby unfairly prejudicial. It is assumed this claim is based on Mr. Jackson's testimony whereby he described his employment history within D.O.C. While describing the multiple positions he has

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Campbell's premeditation, intent, and motive.

3 See Also *State v. Lubers*, 81 Wn.App. 614, 915 P.2d 1157 (Div. II 1996) it was the jury's place to determine whether the victim's belief thatshe was being threatened was

held at D.O.C., Jackson described his current position:

> A. "My current title is Investigator III, also known as chief investigator."
> Q. "What does the chief investigator do?"
> A. "We investigate criminal activity within the walls of the penitentiary. It could be anything from assaults, drug introductions, attempted murders, and so on."
> Q. "How long have you had this title?"
> A. "Since -- April of 2009." RP 233.

By simply stating his current title and duties, the witness has not directly or indirectly inferred that the defendant has committed any of those things the witness is currently assigned to investigate. Within the same line of questioning, the witness also described his employment history for the past 19 years with D.O.C. including:

> "I was a correctional mental health counselor I, II and III. Those are various titles within our mental health unit. Corrections mental health counselor I was a -- like a ward attendant. II, correctional mental health counselor II was -- I carried a caseload of approximately 25 inmates. And then as a correctional mental health counselor III, I was actually our first level supervisor of our inpatient mental health unit. I have also been a corrections specialist III, where I focused on security threat groups, what you would call gangs, inside the prison, and their hierarchy." RP 233.

The defendant's work history was simply introduced to explain why and/or how he was knowledgeable as to prison culture. No testimony was provided that the defendant had ever been investigated by the witness, nor that the witness had any direct observation of the

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credible.

defendant. The defense has exaggerated the trial testimony in order to make its claim that this witness has somehow implied the defendant shared characteristics of other offenders.

The defendant further argues that witness Stephen Lindsley improperly vouched for the credibility of the victim, Charlie, and also opined as to the defendant's guilt. However, the defense has failed to direct the court to any such testimony. A review of Mr. Lindsley's testimony will reveal no such vouching for the victim, nor any inferences as to the defendant as a perpetrator. If the court were to review the transcripts, it will find that the victim's credibility was brought up solely through defense questioning for the purpose of attacking the victim's credibility. The following excerpts are in response to defense questioning:

> "Q. ...you said that Charlie tends to rely on poor memory, and he is not able to recall specific events very well; isn't that correct?
> A. When I say specific events, usually it is the sequence of events.
> Q. Correct. So you had then elaborated when we spoke, and you said that a lot of times he couldn't remember the actual sequence of what happened, and how it happened, and when it happened, correct?
> A. Right." RP 283-284.

> "Q. And when I asked you -- when I asked you whether that would mean that he wasn't necessarily being truthful and honest, you said that he was overemphasizing symptoms; isn't that correct?
> A. That is one possibility." RP 285.

> (While arguing to the court why the victim's admission of being

a homosexual was relevant)
"MS. GAUSE: Impeachment. Credibility. That is the gist of it, and that is why I repeated it, that he specifically asked Charlie, and Charlie said no. That is why I repeated that, and that's why I thought ..." RP 289.

"Q. In your report, and also in the interview that you and I did, you mentioned that Charlie often contradicts himself?
A. Yes." RP 294.

At trial, the witness did not improperly vouch for the victim, nor did he opine that the defendant was guilty.

Admission of expert witness testimony was not error as it was relevant, it likely aided the jury, and was clearly within the sound discretion of the trial court. Furthermore, neither witness improperly inferred the defendant was guilty of a crime, or improperly vouched for the credibility of the victim.

C. PROSECUTORIAL ERRORS DID NOT DENY THE DEFENDANT A FAIR TRIAL.

To establish prosecutorial misconduct, the defendant first bears the burden to establish that a prosecutor's conduct was improper. *State v. Pierce*, 169 Wn.App. 533, 280 P.3d 1158 (Div. II, 2012) citing *State v. Emery,* 174 Wn. 2d 741, 759-61, 278 P. 3d 653 (2012). If the defendant objected to the comments at trial, he must then show that the improper comments resulted in prejudice that had a substantial likelihood of affecting the verdict. *Emery*, 174 Wn. 2d at

760. If the defendant did not object at trial, the defendant is deemed to have waived any error, unless the prosecutor's misconduct was so flagrant and ill intentioned that an instruction could not have cured the resulting prejudice. *Id.* at 760-61. Under this heightened standard, the defendant must show that (1) "no curative instruction would have obviated any prejudicial effect on the jury" and (2) the misconduct resulted in prejudice that "had a substantial likelihood of affecting the jury verdict." *Id.* at 761. When reviewing a prosecutor's purportedly improper remarks, the court must do so in the context of the entire argument, the issues in the case, the evidence addressed in the argument, as well as the instructions to the jury. *State v. Gregory,* 158 Wn.2d 759, 810, 147 P.3d 1201 (2006).

Leading Questions. The defendant first claims that the prosecutor "continued to ask leading questions and make speaking objections" and therefore affected the defendant's right to a fair trial. The State concedes that leading questions and or speaking objections can be improper, but in the case at hand, were not such a departure from typical trial procedure so as to be deemed prejudicial error.

ER 611(c) states that "Leading questions should not be used on the direct examination of a witness except as may be deemed necessary to develop the witness' testimony." The principal test of a

leading question is: Does it suggest the answer desired? In order to elicit the facts, a trial lawyer may find it necessary to direct the attention of a witness to the specific matter concerning which his testimony is desired, and, if the question does not suggest the answer, it is not leading. *State v. Scott*, 20 Wn.2d 696, 149 P.2d 152 (1944). Even though the question may call for a yes or a no answer, it is not leading for that reason. *Id.* While the State is not going to review each of the objections for the court at this time, it is argued that not all of the objections were proper. For instance, on one occasion the State asked the victim "What did Mr. Markwell say to you prior to the blowjob?" RP 404. The defense objected as "leading" and the court sustained the objection. RP 404. In hindsight, it is difficult to predict the desired answer being sought by the prosecutor in this question.

Even if a number of objections were made to leading questions, it is not sufficient error. In *State v. Markham*, the appellate court found that the prosecutor was frequently admonished against asking leading questions. *State v. Markham*, 40 Wn. App 75, 697 P.2d 263 (Div. III, 1985). However the court found that this did not rise to the necessary level of prejudice, because if anything, it would make the prosecution, not the defense, look bad in the eyes of the jury. *Id.* The court held that leading questions which force the defense to object do not affect the jury to a level that constitutes prosecutorial

misconduct. *Id.*

In review of the trial proceedings, the conduct of the prosecutor in asking questions was not improper. When the defendant felt it was necessary to object to a question, he did so, and the court in turn made the appropriate rulings erring heavily on the side of caution for the defendant and his right to a fair trial.

The defendant claims that in addition to alleged error for asking leading questions, the prosecutor acted improperly by using "speaking objections." As argued by the defendant, speaking objections are not subject to a specific rule of evidence but are within each judge's discretion to determine propriety. Karl B. Tegland, Washington Practice, Evidence Law and Practice, §103.8 (5th ed. 2007). Speaking objections should be limited so as to disallow the introduction of argument or opinion during witness questioning. Based on a review of the transcripts, the defendant objected to the State's use of speaking objections twice during trial. RP 283, 287. The defendant's first objection to a "speaking objection" was in response to the State's listing of a number of reasons for its own objection to a question, including hearsay, beyond the scope of the question, relevance and unduly inflammatory. RP 283. After the defense objection, the court allowed the defendant to argue its objection, at which time the defendant chose not to argue its objection and ended questioning of

the witness. RP 283. The defendant objected to the State's use of a speaking objection a second time based on the state's objection "Judge, I am still objecting to all of this. I think if nothing else, under the rape shield law. I mean it does not matter whether or not the victim has had previous – (ended)" RP 287. The court then excused the jury to entertain argument from the lawyers. RP 287. While the State did begin to argue the objection prematurely, the simple fact of the matter is that the objection was made that the questioning was improper pursuant to the rape shield statute, and nothing prejudicial was introduced through argument or opinion prior to the court taking the appropriate action of excusing the jury. Nothing in the State's objections was improper.

The defendant has failed to meet his burden of showing a resulting prejudice that had a substantial likelihood of affecting the jury's verdict. What was introduced to the jury that was not otherwise admissible and that was of such importance that with substantial likelihood it affected the jury's decision? Furthermore, what action by the court was deficient so as to be unable to cure any potential improprieties of the prosecutor? The State argues there is no improper information being delivered to the jury and therefor there can be no prejudice. If any of the actions of the prosecutor were improper, the defendant is unable to prove a resulting prejudice or a substantial

likelihood that that prejudicial information affected the jury's result.

Motions in Limine. In continuing his attack on the prosecutor's performance, the defendant next claims that the prosecutor ignored the court's rulings on motions in limine in failing to caution witness Dustin Warren about possible drug testimony, citing the court's statement that "As to utilizing Burke, or anybody other than Mr. Hopkins, to get in evidence of other bad acts, no, I am not allowing it in." RP 324. The defendant applies this quote somewhat out of context. The ruling of the court came the first morning of trial and was in the context of defense asking the court to disallow that State's questioning of witness Michael Burke about a threat the defendant had made to that witness. As stated by the court and the end of the discussion: "Unless some other door is opened, I am not inclined to allow this testimony of the threat to break the neck of Mr. Burke. And that is the ruling of the Court." RP 326.

At no time did the defendant request the court to rule on witness testimony as to statements of drug use although the defendant was aware that witness Warren had disclosed this information to law enforcement. While the defense may not be required to make such a request of the court, they certainly could have. While not in evidence, the State did not intend for such an answer to be introduced at trial and may have even warned the

witness not to include such information in an answer. Although the witness testified that the defendant talked about stories of previous drug use, the defendant timely objected, and the court took the appropriate action by ordering the jury to strike and disregard the statement.

The defendant also claims that the prosecutor erred in not warning witness Warren about excluding testimony about "shooting a guy in the foot." First, the state was not aware of such testimony ahead of time, and after being admonished by the court about the drug testimony, warned the witness that the State was simply looking for stories told in jail by the defendant about violence, in –line with the defendant's stipulation that they did not object to the introduction that "defendant told stories that include himself in violent acts." RP 320. In response to the warning from the court and counsel, the witness testified that the defendant told him a story in jail in which the defendant shot a guy in the foot. RP 523. The defendant timely objected and the court again ruled that the answer be stricken and the jury disregard the statement.[4] RP 523.

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4 *State v. Rafay*, 168 Wash.App. 734, at 835, 285 P.3d 83 (Div I., 2012). The trial court quickly sustained the defense's objection and directed the jury to disregard the remark. The deputy prosecutor immediately moved on to a proper argument. The court also instructed the jury that counsel's arguments were not evidence. Under the circumstances, the trial court's curative instruction was sufficient to obviate any potential prejudice. The improper comments did not affect the defendants' right to a fair trial.

A jury is presumed to have followed the court's instructions. *State v. Studebaker*, 67 Wn.2d 980, 983—84, 410 P.2d 913 (1966); *State v. Costello*, 59 Wn.2d 325, 332, 367 P.2d 816 (1962). Absent any evidence that the jury disregarded the court's orders to disregard the witness' statements, the court must presume that the jury did what they were ordered to do. Taking the court's orders to disregard during questioning, in conjunction with Jury Instruction #1 which states in part:

> "If evidence was not admitted or was stricken from the record, then you are not to consider it in reaching your verdict" and "One of my duties has been to rule on the admissibility of evidence. Do not be concerned during your deliberations about the reasons for my rulings on the evidence. If I have ruled that any evidence is inadmissible, or if I have asked you to disregard any evidence, then you must not discuss that evidence during your deliberations or consider it in reaching your verdict" RP 549-550.

the court thereby sufficiently instructed the jury to not rely on any evidence that was not properly admitted at trial.

Closing Argument. The defendant claims that the prosecutor committed misconduct during closing argument: by directing the jury's attention to the testimony of Stephen Lindsley; by discussing the jury instruction which allows the jury to consider the manner in which a witness testifies; by misstating the law on reasonable doubt; and improperly using a picture of an American flag in closing argument.

Of the claims made by the defendant with regards to an

improper closing, only one was objected to at trial. During closing argument the state discussed reasonable doubt. During that discussion, the state argued that beyond a reasonable doubt does not mean beyond all doubt and that it does not mean 100% certainty. RP 587. The defendant objected to this statement citing *State v. Warren*, 165 Wn.2d 17, 195 P.3d 940 (2008). The court sustained the defense objection and instructed the jury to disregard the statement; and the prosecutor quickly moved on to his next point. RP 588.

The State's argument was not improper. The court in *State v. Warren* found the argument that the defendant was "not entitled to the benefit of the doubt," was an improper statement because the defendant is in fact entitled to the benefit of the doubt. *Warren*, 165 Wn.2d at 26. However, the State did not make such an argument in the case at hand. The State argued that the term beyond a reasonable doubt, does not mean the State must prove the case beyond all doubt. RP 587. There are no cases that have held such a statement to be improper. In *State v. Emery*, the trial prosecutor stated:

> "Finally, in this case I want to point out that this entire trial has been a search for the truth. And it is not a search for doubt. I talked to you about the fact that you must find the defendant guilty beyond a reasonable doubt .... But reasonable doubt does not mean beyond all doubt and it doesn't mean, as the defense wants you to believe, that you give the defendant the benefit of the doubt."

The court reviewed this argument and found it to be improper, not

citing the language "beyond all doubt," but solely based on the language that the "defendant is entitled to the *benefit of the doubt*." *Emery,* 174 Wn. 2d at . 758.

If the Court were to find the prosecutor's statement may have been inappropriate, the fact that the court instructed the jury to not consider that line of the State's argument as well as providing the jury the proper instruction defining reasonable doubt, it sufficiently cured any deficiency in the trial. *Id.*[5] Furthermore, the defendant has failed to prove the required prejudice or the substantial likelihood of a different verdict had this statement not been made by the prosecutor.

No further objections were made during the prosecutor's closing argument at trial. Therefore the defendant is deemed to have waived any error, unless the prosecutor's misconduct was so flagrant and ill-intentioned that an instruction could not have cured the resulting prejudice. *Emery,* 174 Wn. 2d at 760-61, Under this heightened standard, the defendant must show that (1) "no curative instruction would have obviated any prejudicial effect on the jury" and (2) the misconduct resulted in prejudice that "had a substantial likelihood of affecting the jury verdict." *Id.* at 761. The defendant

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5 *Emery* - Even though the prosecutor mischaracterized the trial as a search for truth and undermined the presumption of innocence, we applied our established standard of review. Under this standard, we held that any prejudice was cured even though the trial court's curative instruction was imperfect.

cannot meet this burden.[6]

The defendant claims the prosecutor acted improperly by vouching for the victim's credibility by highlighting Stephen Lindsley's testimony. First, this argument fails because the defendant has failed to fully develop this argument with any offer as to actual impropriety. Second, the prosecutor never personally vouched for the credibility of the victim, but merely highlighted the testimony of another witness.[7] The prosecutor pointed out and explained the jury instruction on expert witnesses; reviewed part of Stephen Lindsley's testimony; and then asked the jury to consider the victim's testimony in conjunction with that of Mr. Lindsley. RP 584-85. Prosecutors have wide latitude to argue reasonable inferences from the facts concerning witness credibility. *State v. Stenson,* 132 Wn.2d 668, 727, 940 P.2d 1239 (1997).[8] And although Stephen Lindsley was referred to as an expert witness, the jury was instructed through Instruction #15 that:

A witness who has special training, education, or experience

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6 See Also: *State v. Hoffman,* 116 Wn.2d 51, 93, 804 P.2d 577 (1991).We do not reverse when the trial court could have corrected a prosecutor's improper remark by a curative instruction that defense counsel failed to request.

7 It is misconduct for a prosecutor to state *a personal belief* as to the credibility of a witness. But prejudicial error will not be found unless it is clear and unmistakable that counsel is expressing a personal opinion *State v. Brett,* 126 Wn.2d 136, 175, 892 P.2d 29 (1995)

8 See also: *State v. Gregory* 158 Wn 2d 759 (2006) - The prosecutor enjoys reasonable latitude in arguing inferences from the evidence, including inferences as to witness credibility. *State v. Curtiss*, 161 Wash.App. 673, 250 P.3d 496 (Div. 2,2011) – During closing argument, the state is allowed to draw inferences from the evidence as to why the jury would want to believe one witness over another.

> may be allowed to express an opinion in addition to giving testimony as to facts.
> You are not, however, required to accept his or her opinion. To determine the credibility and weight to be given to this type of evidence, you may consider, among other things, the education, training, experience, knowledge, and ability of the witness. You may also consider the reasons given for the opinion and the sources of his or her information, as well as considering the factors already given to you for evaluating the testimony of any other witness. RP 584.

Because the prosecutor did not personally vouch for the credibility of the victim, but rather pointed out the testimony of another witness (Lindsley) in asking the jury to determine the reasonableness of the victim's testimony, the prosecutor committed no error. Moreover, the jury was properly instructed that they need not accept the mental health counselor's opinions, and therefore this argument was not improper.

In an additional claim of prosecutorial error, the defendant asserts that the prosecutor acted improperly by impugning defense counsel. This argument too fails. In closing argument, the prosecutor pointed out jury instruction #1 which states in part:

> You are the sole judges of the credibility of each witness. You are also the sole judges of the value or weight to be given to the testimony of each witness. In considering a witness's testimony, you may consider these things: the opportunity of the witness to observe or know the things he or she testifies about; the ability of the witness to observe accurately; the quality of a witness's memory while testifying; the manner of the witness while testifying; any personal interest that the witness might have in the outcome or the issues; any bias or prejudice that the witness may have shown; the

> reasonableness of the witness's statements in the context of all of the other evidence; and any other factors that affect your evaluation or belief of a witness or your evaluation of his or her testimony. RP 582.

The prosecutor further directed the jury to recall the "manner" of the victim while he testified. RP 582-83. As part of this argument, the prosecutor recalled the testimony of Stephen Lindsley who stated that the victim would not be able to stand up to confrontation and/or standup to a dominant individual; that he would give up, give in, and/or agree with the person doing the questioning. RP 584-85. The State argued that the jury could take Stephen Lindsley's testimony and weigh it in conjunction with the victim's manner of testifying as he was being questioned by defense counsel. In effect, the jury could see for themselves that when the victim could not get out of the situation, he simply agreed with defense counsel in each of the questions that was being asked. As noted above, the prosecutor is given wide latitude in arguing inferences from the evidence at trial.

The line used by the prosecutor was: "When Charlie was questioned by a dominant appearing, maybe aggressive type defense attorney, didn't it seem like every answer was yes?" RP 585. The defendant did not object to this line of argument at trial. Accordingly, the defendant must demonstrate that the remark was so flagrant and ill-intentioned that no curative instruction would have been capable of

neutralizing the resulting prejudice. This he does not do. Defense counsel was not personally attacked. It would be an enormous stretch of the cited language above to find that these words were so ill-intentioned or such a flagrant attack on defense counsel to warrant a finding of prosecutorial misconduct. Moreover, this language cannot be deemed an impermissible denigration of defense counsel by likening him to his client. During closing argument, defense counsel described himself as being large with tattoos, making the correlation between himself and the defendant. "Now this whole thing about Mr. Markwell being large and with tattoos. I am six feet six inches, okay? That makes me a really dangerous guy, doesn't it? Well, maybe I am, I don't know." RP 591. If any impermissible correlation was drawn between the defendant and defense counsel, it was done by defense counsel himself, not the state.

The defendant further argues that the above question posed by the prosecutor to the jury at closing was also an impermissible comment on the defendant's right to an attorney. However, the defendant fails to state how these words could be interpreted to reach such a result. The prosecutor did not comment on the defense's ability to question witnesses, but again directed the jury to consider the manner in which the victim testified in conjunction with the testimony of Stephen Lindsley. For the sake of argument however, if

these words were deemed improper, it cannot be said that but for these words, the jury would not have found the defendant guilty.[9]

The last claim of prosecutorial error is assigned to the fact that the prosecutor used a picture of a U.S. flag in his power-point presentation at closing. The use of the flag was not improper. Nowhere in the record is it shown that the prosecutor made a direct comment on the U.S. flag and what that means to him or what it should mean to the jury. Nowhere in the record can the defendant show that the prosecutor inflamed the jurors' passions or prejudices by use of the flag. The prosecutor did not march about in the courtroom "waving the flag" and argue to the jury that it was their duty as Americans to find the defendant guilty. The use of the picture of the flag was simply a tie-in to the prosecutor's questioning in voire dire, wherein the flag was an illustrative subject for questioning the jurors on observation, investigation, and common sense. The State was unable to locate any case on point stating the actions of the prosecutor were improper. The prosecutor did not commit error.[10]

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9 Although these remarks may have touched upon the defendants' constitutional rights, remarks are not per se incurable simply because they touch upon a defendant's constitutional rights. *See State v. Smith,* 144 Wn.2d 665, 679, 30 P.3d 1245, 39 P.3d 294 (2001) ("Some improper prosecutorial remarks can touch on a constitutional right but still be curable."); *see also Warren,* 165 Wn.2d at 17, 195 P.3d 940

10 The prosecutor's misstatements "are not the type of comments which this court has held to be inflammatory," *State v. Brett,* 126 Wn.2d 136, 180, 892 P.2d 29 (1995), so there is no possibility that the prosecutor's statements engendered an "inflammatory effect," *State v. Perry,* 24 Wn.2d 764, 770, 167 P.2d 173 (1946). *See, e.g., State v. Belgarde,* 110 Wn.2d 504, 506–07, 755 P.2d 174 (1988) (prosecutor

With regards to each of the claims of prosecutorial misconduct based on the words and actions of the prosecutor, the jury was properly instructed in Instruction #1:

> The lawyers' remarks, statements, and arguments are intended to help you understand the evidence and apply the law. It is important, however, for you to remember that the lawyers' statements are not evidence. The evidence is the testimony and the exhibits. The law is contained in my instructions to you. You must disregard any remark, statement, or argument that is not supported by the evidence or the law in my instructions. RP. 551.

The jury is presumed to follow the court's instruction that counsel's arguments are not evidence. *Warren,* 165 Wn.2d at 29.

In the context of the full trial, the court should conclude the prosecutor's actions were not improper. But, in the event an act was improper, that impropriety did not rise to the level of incurable prejudice required to reverse the jury's verdicts.

D. TRIAL COURT PROPERLY DENIED THE DEFENSE MOTION FOR MISTRIAL.

The defendant claims the trial court erred by denying his motion for a mistrial after the surprise testimony of Dustin Warren.

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stated the American Indian group with which defendant was affiliated was " *'a deadly group of madmen* ' " and " *'butchers,'* " and told them to remember " *'Wounded Knee, South Dakota* ' " (quoting VRP)); *Reed,* 102 Wn.2d at 143–44, 684 P.2d 699 (prosecutor repeatedly called the defendant a liar, stated the defense had no case, said the defendant was a " *murder two,*" and implied the defense witnesses should not be believed because they were from out of town and drove fancy cars (quoting RP at 979–88)). The prosecutor's comments here, "simply do not rise to

Dustin Warren was housed with the defendant and the victim in the Garfield County jail for approximately three hours. RP 519, 534. During that time, Warren interacted with the defendant claiming that the defendant talked a lot, and that the defendant did not give the victim much room to speak. RP 521. When asked what the defendant talked about, Warren responded with "stories of previous drug use and...." RP 521-522. The defense made an appropriate objection and the court correctly sustained the objection ordering the jury to disregard the answer. RP 522. The prosecutor then spoke with the witness about limiting his answers to be acceptable to the court. RP 522. When asked a second time about the subject of the defendant's stories, the witness gave a more guarded and general answer of "violence." RP 523. When asked "what do you mean," the witness unexpectedly stated "...one story where he shot a guy in the foot." RP 523. Again, the defense objected and the court sustained the objection along with an order that the jury disregard the answer. RP 523. The defense moved for a mistrial, and the court denied the motion. RP 524, 529. Without speaking about the substance of the witness's answers, the court ordered the jury to disregard the witness's two previous answers. RP 531-532.

A court's denial of a motion for mistrial is reviewed for abuse of

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such level." *State v. Elmore,* 139 Wn.2d 250, 292, 985 P.2d 289 (1999).

discretion. *State v. Lewis,* 130 Wn.2d 700, 707, 927 P.2d 235 (1996). A trial court's denial of a motion for mistrial will be overturned 'only when there is a 'substantial likelihood' the prejudice affected the jury's verdict.' *State v. Russell,* 125 Wn.2d 24, 85, 882 P.2d 747 (1994). In determining if an irregularity affected the trial's outcome, the court should examine: (1) the seriousness of the irregularity, (2) whether it involved cumulative evidence, and (3) whether the trial court properly instructed the jury to disregard it. *State v. Hopson,* 113 Wn.2d 273, 284, 778 P.2d 1014 (1989). The trial judge is best suited to judge the prejudice of a statement. *State v. Weber,* 99 Wn.2d 158, 166, 659 P.2d 1102 (1983).

The defense argues that *State v. Escalona,* 49 Wn. App. 251, 742 P.2d 190 (Div. 1, 1987) is dispositive on this matter. In *Escalona,* the defendant was on trial for assaulting another man, Vela, with a knife. The trial court had granted a motion in limine to exclude the defendant's prior conviction for assault with a knife. *Id.* at 252. During cross-examination of Vela, after defense counsel had elicited the fact that Vela had been stabbed another time, but not by Escalona, counsel asked Vela if he was "very nervous on this particular day ... ?" Vela replied: "This [the previous stabbing] is not the problem. Alberto [Escalona] already has a record and had stabbed someone." *Id.* at 253. Defense counsel moved for a mistrial, but the trial court denied

the motion and instructed the jury to disregard the remark. *Id.* Division One held that the trial court should have granted the motion for a mistrial because the surprise testimony was extremely prejudicial and the limiting instruction was insufficient to cure the harm.

The defendant contends that because the surprise testimony in *Escalona* involved an assault with a weapon, all testimony of a potential assault with a weapon is grounds for a mistrial. However, as described in *State v. Condon,* 72 Wn.App. 638, 865 P.2d 521 (Div. 1,1993), *Escalona* is distinguishable from the present case. In *Escalona*, the improper statements indicated that the defendant had committed a crime similar or identical to the crime for which he was on trial. *Condon,* 72 Wn. App. at 649. Thus, the statements were extremely prejudicial because it was likely that jurors would conclude that the defendant had a propensity for committing that type of crime. *Condon,* 72 Wn. App. at 649. In the present case the defendant was not on trial for assault with a firearm, rather he was on trial for raping another male inmate while in jail. It is difficult to see the correlation between the two fact patterns, ie – that a person who would shoot another in the foot would have the propensity to rape.

In determining whether an irregularity affected the trial's outcome, this court is to examine: (1) the seriousness of the irregularity, (2) whether it involved cumulative evidence, and (3)

whether the trial court properly instructed the jury to disregard it. The State concedes that the surprise testimony was an irregularity, however, it was not sufficient to grant a new trial. The court in the present case did not exclude all mention of defendant's stories/bragging of violence, fights, and physicality. RP 317, 320, 530. The unexpected testimony of the witness was in line with the State's general theory of the case that the defendant was creating an atmosphere of fear and intimidation within the jail. However, the trial court believed the surprise testimony should not be considered by the jury because of its specific nature. It was not a question of allowing totally irrelevant testimony, it was a question of whether the probative value was outweighed by the prejudicial effect. Thus the seriousness of the surprise testimony is diminished. The fact that the unexpected testimony was cumulative to the testimony of Charlie, Burke and Warren who described the defendant's ongoing threats and stories which were used to temper their resistance, also weighs in favor of upholding the trial court's decision to deny the motion for mistrial. Lastly, the court properly instructed the jury to disregard the inadmissible testimony, and juries are presumed to follow the orders of the court. Based on these factors, there is not a substantial likelihood that the surprise testimony of Dustin Warren had any effect of the jury's verdict.

E. NO ERROR OR COMBINATION OF ERRORS DENIED THE DEFENDANT A FAIR TRIAL

A defendant in a criminal trial is entitled to a fair and impartial trial, but not a perfect one, for there are no perfect trials. *Brown v. United States*, 411 U.S. 223, 93 S.Ct. 1565 (1973). And although the defendant has alleged a number of errors, a review of the proceedings will find that those alleged errors are overstated. The defendant is unable to prove to the court that a substantial right was materially affected. When considering all the facts and circumstances in this case, there is no error or combination of errors which would probably have changed the outcome of the trial.

IV. CONCLUSION

In conclusion, the defendant has failed to meet his burden in proving an error, or errors, that were sufficient to warrant reversal and or remand to the trial court. The State respectfully requests this Court enter a decision affirming the Trial Court.

Dated this 2 day of May, 2013.

Respectfully submitted,

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COURT OF APPEALS
FOR THE STATE OF WASHINGTON
DIVISION III

STATE OF WASHINGTON, PLAINTIFF/RESPONDENT, VS. JOHN HENRY MARKWELL, DEFENDANT/APPELLANT.	NO. 31167-8-III CERTIFICATE OF MAILING

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT ON MAY 2, 2013, I SERVED A COPY OF THE BRIEF OF RESPONDENT IN THIS MATTER, TO:

EMILY M. GAUSE, LAW OFFICE OF JOHN HENRY BROWN, 200 DELMAR BLDG, 108 SOUTH WASHINGTON STREET, SEATTLE, WA 98104;

JOHN MARKWELL #979014, WALLA WALLA STATE PENITENTIARY, 1313 N. 13TH AVE., WALLA WALLA, WA 99362

SIGNED AT POMEROY, WASHINGTON ON MAY 2, 2013.

MATT NEWBERG

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