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NO. 53366-5-1

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

RICHARD H. WARREN,

Appellant.

FILED  
APPEALS DIV. #1  
2005 MAR 29 PM 4:33

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

The Honorable Michael Hayden

APPELLANT'S OPENING BRIEF

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A. ASSIGNMENTS OF ERROR REGARDING CONVICTIONS FOR THREE COUNTS OF RAPE OF A CHILD IN THE SECOND DEGREE (NS)

1. The trial court erred by admitting evidence that NS's younger sister alleged Warren had abused her, Warren was prosecuted as a result of the allegation, and Warren was convicted of child molestation.

2. The trial court erred by prohibiting Warren from introducing evidence that he had a heart attack during the charging period.

3. The trial court erred by prohibiting Warren from eliciting testimony that SS said she should not have said anything, which was relevant to prove NS's motive to fabricate.

4. The trial court erred by admitting rap lyrics Warren penned that were not relevant to the charges.

5. The trial court erred by admitting the testimony of two police detective that they were not trying to undercover evidence that Warren sexually abused NS and were surprised by her disclosure.

6. The prosecuting attorney committed misconduct in closing argument by arguing facts not in evidence, vouching for NS's credibility and disparaging Warren's defense counsel.

7. Warren's constitutional right to a fair trial was violated by the cumulative effect of the above errors.

B. ASSIGNMENTS OF ERROR REGARDING CONVICTION FOR ONE COUNT OF CHILD MOLESTATION IN THE FIRST DEGREE (SS)

8. Warren's constitutional right to a jury trial was violated when two government employees vouched for the alleged child victim's credibility.

9. The prosecuting committed misconduct in closing argument by misstating the reasonable doubt standard.

10. The trial court erred in stating the discussion of the reasonable doubt instruction was "playing with words" when sustaining Warren's objection to the prosecutor's misstatement of the reasonable doubt standard in closing argument.

11. The trial court erred by admitting Detective Ryland's opinion that Warren's wife was more protective of him than OF her daughters.

12. The trial court erred by admitting testimony that Warren owned a "penis pump."

13. Warren's constitutional right to a fair trial in his prosecutor for child molestation of SS was violated by the cumulative effect of errors 8-12.

C. ASSIGNMENTS OF ERROR REGARDING JUDGMENT AND SENTENCE FOR ALL FOUR CONVICTIONS

14. The trial court erred by ordering Warren to have no contact with his wife for life.

15. The trial court erred by ordering Warren to have no contact with his wife as a condition of community custody.

D. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR REGARDING THREE CONCTIONS FOR RAPE OF A CHILD IN THE FIRST DEGREE (NS)

1. A criminal defendant's constitutional right to a fair trial may be violated when the trial court improperly admits inflammatory evidence. In Warren's trial on charges that he had sexual intercourse with his stepdaughter NS, the court admitted evidence that (1) her younger sister alleged Warren sexually abused her, (2) Warren was prosecuted as a result of that allegation, and (3) Warren had a conviction for child molestation. Where the molestation of SS was unrelated to the charges involving NS, was Warren's constitutional right to a fair trial violated by the admission of the irrelevant and highly prejudicial information? (Assignment of Error 1)

2. The trial court admitted SS's allegation of sexual abuse by Warren and evidence of his prosecution for that charge to show

the context in which NS disclosed abuse against her. Is the context in which a child alleges sexual abuse so relevant that it overcomes the prejudice of admitting a separate child abuse prosecution?

(Assignment of Error 1).

3. Warren testified he did not have intercourse with NS or touch her inappropriately; he did not make claims about his good character. Did the trial court err in finding Warren's testimony "opened the door" to his prior child molestation conviction?

(Assignment of Error 1).

4. Is there a reasonable probability that the combination of evidence that SS alleged Warren sexually abused her, the charges were investigated, he was prosecuted, and he was convicted of child molestation materially affected the outcome of his trial?

(Assignment of Error 1).

5. A criminal defendant has a constitutional right to present relevant, probative evidence in his own defense and to cross-examine the State's witnesses. The trial court prohibited Warren from introducing evidence that he had a heart attack during the period of time he was charged with having sexual intercourse with NS. Although the trial court held the contest of NS's disclosure was admissible, the court prohibited Warren from eliciting testimony that

immediately before NS reported that Warren sexually abused her, SS regretted making her allegation against Warren. Was Warren's constitutional right to present his defense violated? Where the jury verdict rested upon the jury's credibility determinations, can this Court conclude beyond a reasonable doubt that Warren would have been convicted if the jury had heard his complete defense?

(Assignments of Error 2-3)

6. Warren testified NS had low self-esteem and was concerned about her appearance, and he and her mother would tell NS she was beautiful. After Warren was charged with abusing SS, he wrote a rap song the State alleged included derogatory references to NS. Was the song relevant to impeach Warren's testimony that he and Mrs. Warren tried to boost NS's self-esteem?

(Assignment of Error 4).

7. The prosecutor knew the song described SS's allegations of abuse, but argued the lyrics described NS and showed Warren's attitude towards her. Was the prosecutor's use of the lyrics unduly prejudicial? (Assignment of Error 4)

8. NS disclosed Warren abused her during an interview with the deputy prosecuting attorney. Two detectives testified the prosecutor and the police were not trying to uncover allegations

that Warren had abused NS and they were surprised when she said he did. When the state of mind of the police officers and prosecuting attorney were not probative of any element of the crime, were the police officer's opinions admissible? Where the evidence improperly vouched for the police investigation, did its admission affect the jury verdict? (Assignment of Error 5)

9. The prosecuting attorney's misconduct may violate a defendant's constitutional right to a fair trial. Here the prosecutor (1) argued facts about delayed disclosure of sexual abuse that were not in the record, (2) vouched for NS's credibility by using a "badge of truth" theme to describe her testimony, and (3) disparaged Warren's defense counsel for performing his constitutionally-mandated function. Was the misconduct so flagrant and ill-intentioned that no limiting instruction would have cured the resulting prejudice? (Assignment of Error 6)

10. The trial court held that the parties could not object when opposing counsel misstated the evidence or argued facts not in evidence in closing argument. Given that an objection to the prosecutor's argument that related facts about delayed disclosure that were not in evidence would have been futile, should this Court review the misconduct as if counsel had objected? Is there a

substantial likelihood the prosecutor's comments affected the jury verdict where the jury learned that NS's report of sexual abuse followed her sister's? (Assignment of Error 6)

11. Was Warren's constitutional right to due process violated by the combination of the above errors in his trial on three counts of rape of a child where the jury's determination of NS and Warren's credibility was critical to its verdict? (Assignment of Error 7)

**E. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR REGARDING CONVICTION FOR CHILD MOLESTATION IN SECOND DEGREE (SS)**

12. A defendant's constitutional right to a jury trial is violated if a witness testifies, directly or indirectly, on the credibility of another witness or offers an opinion as to the defendant's guilt. Two respected government employees indirectly vouched for SS's credibility by testifying that she promised to tell the truth in her interviews; one witness added that SS understood the difference between the truth and a lie. Is this a manifest constitutional error that Warren may raise for the first time on appeal? Can the State prove the error was harmless beyond a reasonable doubt when the State's case rested completely upon SS's testimony and her hearsay statements?

(Assignment of Error 8)

13. The prosecutor argued three times in closing that the reasonable doubt standard did not mean the jury should give the defendant the benefit of the doubt. The court first overruled Warren's objection, and then stated, "we are playing with words here in a sense" in sustaining the objection. Was Warren's constitutional right to be convicted only upon facts found by a jury beyond a reasonable doubt violated by the misstatement of the beyond a reasonable doubt standard? Can the State prove beyond a reasonable doubt that Warren would have been convicted absent the combination of the prosecutor's misconduct and the court's statement? (Assignments of Error 9-10)

14. The court admitted a detective's opinion that Mrs. Warren was more protective of her husband than her children. Did the court error in holding the evidence admissible to show Mrs. Warren's outward appearance when her appearance and motivations were not relevant to an issue at trial? Did the evidence unduly prejudice the jury? (Assignment of Error 11)

15. The court admitted evidence that Warren owned a "penis pump" even though SS said he did not show it to her and it was not related to the offense. Was this evidence unduly

prejudicial as the jury could conclude Warren had unusual sexual practices? (Assignment of Error 12)

16. Was Warren's constitutional right to due process violated by the combination of the above errors in his trial on child molestation where the jury's determination of the credibility of SS and Warren was critical to its verdict? (Assignment of Error 13)

F. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR REGARDING JUDGMENT AND SENTENCE FOR ALL FOUR CONVICTIONS

17. The Sentencing Reform Act authorized the court to prohibit a defendant from having contact with a crime victim or witness as condition of the sentence and as a condition of community placement. Did the court exceed its statutory authority by ordering Warren to have no contact with his wife for life when she was not a victim or witness to the crimes in question?  
(Assignments of Error 14-15)

18. The rights to privacy and to freedom of association include the right to marry and have children, and the government may not interfere absent a compelling reason and only after providing due process. Did the court order prohibiting Warren from having any contact with his wife for life violate his right to free association? Because he and his wife have a small child, does the

no contact order essentially terminate his parent-child relationship without due process of law? (Assignments of Error 14-15)

#### G. STATEMENT OF THE CASE

##### 1. OVERVIEW

Richard H. Warren is married to Lisa Warren, and in March, 2002, they resided in Bellevue with her two children, SS (D.O.B. 7-23-93) and NS (D.O.B. 5-7-88). 11/12/03 RP 103-04, 106-07. Mrs. Warren gave birth to Warren's daughter HS, on May 2, 2002. Id. at 104; 11/17/03 RP 103. On March 24, 2002, NS observed a fight between Warren and his wife, and SS learned the details of the incident. 11/12/03 75-77; 11/17/03 RP 102, 104. Warren pled guilty to a domestic violence offense as a result of the incident and was given a jail sentence. 11/17/03 RP 105.

Just before Warren was scheduled to be released from jail, SS told her school counselor she was mad Warren was returning because he hit her mother and did disgusting things. 2/12/02 RP 5-6, 8-9, 18. When the counselor learned the disgusting things included touching SS between her legs, she called Child Protective Services (CPS) and the police. Id. at 15-17. Bellevue detectives took a brief statement from SS. Id. at 100-02, 105-13. They also talked to NS, who said she was not abused by Warren. Id. at 117;

2/18/03 RP 12-13. Both girls were placed with CPS. 2/12/03 RP 114, 117.

Warren was charged with one count of rape of a child in the first degree and one count of communicating with a minor for immoral purposes; Count II was later amended to charge child molestation in the first degree. CP 1-7.

On the scheduled trial date, August 22, 2002, the parties could not locate Mrs. Warren or the girls. 8/22/02 RP 4-9; 8/26/02 RP 3-4. While pretrial motions were in progress, the police found them in Tacoma and arrested Mrs. Warren as a material witness. 2/12/03 RP 124-25, 178-84; 2/13/03 RP 28. The police and prosecutor then interviewed both girls, and NS revealed that Warren had sexually assaulted her. 9/9/02 RP 2; 11/12/03 RP 10-11.

The court granted defense counsel's motion to recess the trial, but did so on the condition that the State be permitted to amend the information to add charges concerning abuse of NS and the new counts be tried with those regarding SS. 9/10/02 RP 6, 9, 13-15, 17-19, 26-30. The State filed a second amended information adding three counts of rape of a child in the second degree against NS. CP 15-18.

Warren's trial on all five charges began in November 2002, but ended in a mistrial when a witness violated a motion in limine. 11/18/02 RP 82-84; 12/4/02 RP 74, 82. After a second trial in February 2003, Warren was convicted of child molestation in the first degree against SS (Count II). CP 28. The jury was unable to reach a verdict on any other counts. 2/21/03 RP 9-10. The court later dismissed the first degree rape of a child count against SS, Count I. 11/3/03 RP 14-16, 27; CP 29-33.

A third trial addressing only NS's allegations began in November 2003, but ended in a mistrial when the prosecutor committed misconduct in her opening statement. 1/6/03 RP 11-12; 10-20. A fourth trial resulted in guilty verdicts on the three counts of rape of a child in the second degree against NS (Counts III, IV and V). CP 42-44.

Warren received standard range concurrent sentences of 280 months for each of the three counts of rape of a child in the second degree and 198 months for the child molestation in the first degree conviction. CP 65-74. In addition to other conditions, the court ordered Warren to have no contact with his wife for life. CP 68.

2. FACTS CONCERNING SS (February 2003 trial)

a. SS's Testimony. SS testified that Warren touched her private area two times in a way she didn't like.<sup>1</sup> 2/18/03 RP 93. Both times began when SS was in the bathroom checking for an infection in her genital area. SS had suffered from itching and burning in that area of her body for many years.<sup>2</sup> 2/19/03 RP 16. SS or her mother would check her private area to make sure it was clean and apply medicine. Id. at 17. Itching and burning in the vaginal area is not uncommon for young girls and is usually caused by poor hygiene or ill-fitting underwear. 2/12/03 RP 66-67.

SS related she was checking her private parts in the bathroom when Warren walked in. Id. at 93-94. He asked her to put on a short skirt without underwear and sit on a chair in the living room. Id. at 93-95. SS said Warren touched her private area and it hurt a little. She could not remember how he touched her or what he said. Id. at 96-97

SS described another incident that began when she was using the bathroom, was surprised to find she had pubic hair, and

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<sup>1</sup> At the time she testified, SS was 9 years old and in the fourth grade. 2/18/03 RP 83. The court had found her competent to testify. 11/18/02 RP 24.

<sup>2</sup> The condition was not a yeast infection. 2/12/03 RP 64-66.

screamed. 2/18/03 RP 97-98. Warren asked her what was happening and asked to see. Id. at 98. At Warren's direction SS lay down on her parents' bed while he unzipped her clothing, agreed she had pubic hair, and touched her private spot with his hand. Id. at 98-99. She said it hurt. Id. at 98.

SS also said Warren described to her how people have sex using video covers. 2/18/03 RP 98-101, 103-04. Warren never showed her his penis, but did draw a picture of it. Id. at 101-02.

b. Hearsay Statements. In addition to SS's live testimony, the state presented several hearsay statements in which she described the two incidents. 11/18/02 RP 37, 56-61, 69. Psychologist Wendy Cwinar was SS's school counselor, and she talked to SS on June 2, 2002, because SS was worried about her stepfather coming home. 2/12/02 RP 3, 5, 18. Cwinar had SS draw pictures of her family, and SS drew the domestic violence incident. Id. at 6, 10, 19-20. SS said that her stepfather was coming home from jail and he did "disgusting things." Id. at 8.

Cwinar related what SS told her, which included Warren showing her video covers and explaining sexual intercourse, and Warren touching her two times, once when she was told to wear a

short skirt and once she was laying on the bed in her parents;  
bedroom. 2/12/03 RP 9, 13, 15, 26.

After Cwinar contacted CPS and the police, Bellevue Police  
Detectives Jennifer Rylands and Elizabeth Faith came to the school  
to talk to SS. 2/12/03 RP 15, 16-17, 100; 2/13/03 RP 23-24. At  
trial, Rylands related that she first assured herself that SS  
understood what the truth is and had SS promise to tell the truth.  
Id. at 102, 105-06. Rylands then related SS said she was angry  
because Warren was coming home from jail, and he touched her in  
an "icky" place, which she called her "gina." Id. at 106-08. SS then  
described the two incidents when Warren touched her and related  
what he told her about sex and what she saw on the video covers.  
Id. at 108-13. SS added that Warren had a "penis pump" and  
described it. Id. at 112-13.

SS was later interviewed by Nicole Farrell, a forensic child  
interview specialist for the King County Prosecutor's Office.  
2/11/03 RP 3, 8, 10; 2/12/03 RP 122. Farrell prepared a "near  
verbatim report" of the interview, and she read it to the jury.  
2/11/03 RP 15-16. Farrell read SS's description of the two times  
when Warren touched her, both beginning when she was cleaning  
herself in the bathroom. Id. at 20-25, 27-28. When Farrell asked

where Warren touched her, SS pointed to her crotch and said it was her "vagina." Id. at 22. SS also explained her medical condition, and she did not know if Warren was cleaning the area when he touched her. Id. at 22, 26-27, 30. .

Harborview nurse practitioner Joanne Mettler also testified as to SS's hearsay statements. 2/12/03 RP 38-40. SS pointed to her crotch area and said her stepfather touched her there. Id. at 39. SS did not want to talk about it because she had discussed it so many time before, but did say Warren had touched her with his bare hands. Id.

Finally, Rylands related SS's hearsay statements when she was interviewed by Deputy Prosecuting Attorney Cheryl Snow and the detectives at the King County Prosecutor's Office. SS was sad because her mother had just been arrested on the material witness warrant, and she did not want to talk about the sexual abuse allegations. 2/12/03 RP 128, 132, 136-37, 139-40; 2/13/03 RP 3-4. Eventually, Snow went over Farrell's interview with SS, and the jury again heard portions of the interview and learned that SS confirmed they were true. Id. at 142-45, 159-61.

c. Inconclusive Physical Examination. Mettler conducted a complete physical examination, including genital and anal exams.

2/12/03 RP 33, 39-40, 41-42. Mettler reported SS's hymen was very thin and had a U-shaped notch at the 6:00 position. Id. at 48-49. She opined the notch was abnormal and the exam was "concerning" for penetrating trauma, or "probable sexual abuse." Id. at 49, 50; 86, 96. Defense expert Barbara Haner, nurse practitioner and clinical coordinator of the Providence Everett Sexual Assault Center, viewed the colposcope photos Mettler took during her examination of SS and was critical of portions of Mettler's examination and documentation technique. 2/19/03 RP 43-44, 46-47, 49-52, 60. She agreed the photographs alone were "concerning for sexual abuse," but explained they could also show something SS was born with. Id. at 55-56, 63-64.

### 3. FACTS CONCERNING NS (November 2003 trial)

The day the prosecutor and detective interviewed SS at the prosecutor's office, they also discussed the legal process with NS in anticipation of her possible testimony in SS's case. 11/12/03 RP 6-7. NS was worried about swearing on the Bible and whether she would be asked a certain question because she did not want to lie. Id. at 9-10. Specifically, NS did not want anyone to ask her if Warren did anything to her. Id. at 9. When Snow and Rylands left the room, Detective Faith asked that question, and NS admitted

Warren had sexually assaulted her. Id. at 10-11. Both Faith and Rylands testified they and the prosecutor were not trying to uncover abuse of NS and were surprised by NS's allegations. Id. at 7, 14; 11/17/03 RP 12, 19-20.

NS testified that Warren had sexual intercourse with her numerous times when the family resided in Tacoma, Federal Way and Bellevue.<sup>3</sup> 11/12/03 RP 45-53, 66-67, 73-74. She described specific instances of vaginal, anal, and oral intercourse. Id. at 46, 48-50, 61-63. NS said Warren sometimes put a handkerchief over her eyes when they had sex, and she mentioned the use of condoms and lubricant. Id. at 60-63, 67. One time Warren put a wire with a ball on it in her mouth. Id. at 71.

NS also mentioned standing facing a mirror when Warren lifted her shirt, told her to look at herself, and told her she was beautiful like her mother. 11/12/03 RP 42, 44. She added she and Warren would shower together when Warren washed her hair and she was uncomfortable with the way he touched her, even though both were wearing swimming suits. Id. at 42-43.

a. NS's "Recovered Memory" of Alleged Abuse. NS explained that when the detectives came to her school and told her

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<sup>3</sup> At the time NS testified she was 15 years old and in the ninth grade. 11/12/03 RP 36.

of SS's allegations, she did not tell them what had happened to her because she felt confused and panicked. 11/12/03 RP 39-40. At the earlier trial, however, NS said she did not tell the detectives about the abuse when they first interviewed her because she did not remember it. 11/13/03 RP 93; 2/18/03 RP 71.

On cross-examination, NS admitted that she described only vaginal and anal intercourse in her interview with the detective and prosecutor and said nothing else happened. 11/13/03 RP 81-82, 83. She also admitted telling the prosecutor the abuse ended after Warren and her mother married. Those statements were in conflict with her trial testimony. Id. at 80.

NS revealed that when she was returned to her mother's home, her mother asked her leading questions about the abuse for several minutes every couple of days. Id. at 83-84. As a result of the interrogation by her mother, NS remembered more things. Id. at 85-86. NS said her mother mentioned a little pink ball with a wire, and she did not know what her mother was talking about. But after she went to the bathroom and returned, her mother asked her

about it again, and the way her mother asked her “stirred something inside my head.”<sup>4</sup> 11/12/03 RP 85-86.

At the earlier trial, NS had testified her memory returned “in bits and pieces,” sometimes spontaneously and sometimes in a dream. 11/12/03 RP 93-94; 2/18/03 RP 71. When asked to describe how her memory of the incidents returned to her, in the first trial NS explained:

A: The first time it will be blurry and be sort of like seeing through glass or something, scrambled. I can see what’s going on but it was blurry. I can’t explain it.

Q: And then what happened?

A: And then it would just shut off. I would think about it, and then sometimes it would come back, and the more often it would come back the more clear it would become.

2/18/03 RP 76-77.

Elizabeth Loftus, research psychologist and expert in human memory, testified for Warren. 11/14/03 RP 10-14. Dr. Loftus explained that memory does not work like a videotape recorder; new information after an event can contaminate or distort a memory or even create a completely new memory. *Id.* at 15. Dr. Loftus described various studies on memory and expressed her concerns

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<sup>4</sup> In the February trial, NS had testified that her mother’s questions helped her remember the oral intercourse. She said she had forgotten about it, but her mother talked to her, she went to the bathroom, and then she “just remembered.” 2/18/03 RP 75-76; 11/17/03 RP 68-69.

about "recovered memory" of repressed brutalization. *Id.* at 16-26, 27-34. Loftus was suspicious of someone who claimed they had no memory of repeated abuse for a period of time and then said the memory suddenly returned. *Id.* at 34-36.

b. Inconclusive Physical Examination. Mettler conducted a physical exam of NS. 11/13/03 RP 16-17. At the February 2003 trial, Mettler had opined NS's vaginal and anal examinations were normal. 2/12/03 RP 57. At the November trial, however, she reported a notch visible in the colposcope photographs taken during the vaginal examination that could be normal or could be the result of some form of penetration. 11/13/03 RP 32-37.

Naomi Sugar, medical director of the Harborview Center for Sexual Assault and Traumatic Stress and Mettler's supervisor, reviewed the colposcope photographs from NS's exam and found "deep notches" in the 3:00 and 8:00-to-9:00 positions. 11/13/03 RP 83-84, 95, 103. Adolescents normally develop notches at the 3:00 and 9:00 positions. *Id.* at 88, 94. Dr. Sugar felt the placement of NS's notch at between 8:00 and 9:00 was unusual, but she the notch could really be at the 9:00 position because the photographs did not reveal NS's position. *Id.* at 102-05. She therefore

concluded the notches could be developmentally normal or could be a sign of sexual penetration. Id. at 88, 105.

Warren testified in his own behalf, and the prosecutor was permitted to impeach his testimony with the fact that he had been convicted of child molestation and with a rap lyric he had written while he was in jail. 11/17/03 RP 137-49.

H. ARGUMENT CONCERNING CONVICTIONS FOR RAPE OF A CHILD IN SECOND DEGREE (NS)

1. THE ADMISSION OF WARREN'S CHILD MOLESTATION CONVICTION AND SS'S ALLEGATIONS OF ABUSE VIOLATED HIS RIGHT TO A FAIR TRIAL.

At Warren's trial for sexually assaulting NS, the State was permitted to introduce evidence that SS alleged Warren sexually abused her and that Warren was prosecuted for that crime. 11/12/03 RP 3-6, 109-12; 11/17/03 RP 3-7. The court also permitted the State to impeach Warren with his prior conviction for child molestation 11/17/03 RP 149. The combination of this evidence violated Warren's constitutional right to a fair trial.

a. The admission of other misconduct may violate due process. The improper admission of inflammatory evidence may violate an accused's constitutional right to due process. U.S. Const. amend. 14; Estell v. McGuire, 502 U.S. 62, 75, 112 S.Ct.

475, 116 L.Ed.2d 385 (1991). The Supreme Court has strongly suggested that the defendant may not have fair trial when prejudicial character evidence is admitted. Sims v. Stinson, 101 F.Supp.2d 187, 196 (S.D.N.Y. 2000), citing Michelson v. United States, 335 U.S. 469, 475, 69 S.Ct. 213, 93 L.Ed.2d 168 (1948); Dowling v. United States, 493 U.S. 342, 110 S.Ct. 668, 107 L.Ed.2d 708 (1990); Brinegar v. United States, 338 U.S. 160, 174, 69 S.Ct. 1302, 93 L.Ed.2d 1879 (1949). The improper use of misconduct evidence is contrary to “firmly established principles of Anglo-American jurisprudence.” McKinney v. Rees, 993 F.2d 1378, 1380 (9<sup>th</sup> Cir.), cert. denied, 510 U.S. 1020 (1993). When evidence of a defendant’s prior misconduct is improperly admitted and there is no proper influence the jury can draw from the evidence, it renders the trial unfair, violating the defendant’s constitutional right to due process of law. Sims, 101 F.Supp.2d at 194-95.

b. Evidence of other misconduct is inadmissible unless relevant to show an essential ingredient of the charged offense.

Washington’s evidence rules prohibit the introduction of evidence of a defendant’s character or character traits, and a defendant’s other misconduct is not admissible to prove the defendant’s character or show that he acted in conformity with that character. ER 404; State

v. Everybodytalksabout, 145 Wn.2d 456, 464, 39 P.3d 294 (2002);  
State v. Smith, 106 Wn.2d 772, 775, 725 P.2d 951 (1986).

Evidence of prior misconduct may not be used to demonstrate the defendant is a dangerous person or the type of person who would commit the charged offense. Everybodytalksabout, 145 Wn.2d at 466. The rule, however, permits evidence of other misconduct when relevant to prove an ingredient of the offense charged. The rule reads:

Evidence of other crimes, wrongs, or acts is not admissible to prove the character of the person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

ER 404(b).

In determining if evidence of prior misconduct is admissible under ER 404(b), the trial court must

(1) find by a preponderance of the evidence that the misconduct occurred, (2) identify the purposes for which the evidence is sought to be introduced, (3) determine whether the evidence is relevant to prove an element of the crime charged, (4) weigh the probative value against the prejudicial effect.

State v. Thang, 145 Wn.2d 630, 642, 41 P.3d 1159 (2002), citing

State v. Lough, 125 Wn.2d 847, 853, 889 P.2d 487 (1995). In

doubtful cases, the evidence should be excluded. Id., citing Smith,

106 Wn.2d at 776. This Court reviews admission of evidence under ER 404(b) for an abuse of discretion. Thang, 145 Wn.2d at 642.

c. Evidence that SS alleged Warren sexually abused her and was prosecuted as a result of her allegations was not admissible. Warren moved to exclude all evidence of his conviction for molesting SS from his trial on the charges involving NS. 11/4/03 RP 17, 54. The trial court rejected the State's argument that molestation of SS was admissible as evidence of a common scheme or plan. 11/7/03RP 46-47, 53. But the court found that the evidence was relevant to the timing and motivation of NS's first disclosure of sexual abuse. Id. at 53-54. The court concluded that the State could elicit evidence that "there were claims being made [by SS] and in the context of those claims that she [NS] was talking to the police and she made her disclosure." Id. at 54.

During the course of the trial, the jury learned from various witnesses that SS disclosed sexual abuse in June and the prosecutor charged Warren as a result. 11/12/03 RP 3, 6; 11/17/03 RP 3. The jury also learned the detectives placed both girls into protective custody, that their mother refused to cooperate with the investigation and was arrested, and the girls were again placed in

protective custody. 11/12/03 RP 3-6, 109-12; 11/17/03 RP 3-7.

The detectives further testified that NS revealed Warren abused her as the prosecutor was preparing SS's case for trial. 11/12/03RP 6-7, 9-10.

*i. SS's allegations against Warren and the resulting prosecution were not admissible to counter Warren's defense.* The trial court admitted SS's claim that Warren had sexually assaulted her after finding "the way that NS disclosed the information, how it was disclosed, why it was not disclosed, and how it came out later" would all be hotly contested issues at trial. 11/4/03RP 39. The trial court was correct that NS's changing memory and her claim to have remembered some of the abuse in a dream would be important to Warren's defense, as would NS's fear of Warren returning home.

But whether Warren sexually assaulted SS was unrelated to whether he assaulted NS. It did not matter which girl reported first. Nor were SS allegations necessary to counter Warren's defense of attacking NS's questionable story that her memory of the events suddenly returned or returned in dreams.

*ii. Sexual molestation of SS was not part of the res gestae of the offenses against NS.* The court ruled that SS's

molestation was admissible because it “sets the context” for NS’s report that Warren abused her and showed her possible motivation. 11/4/03 RP 58, 60. This is akin to finding the allegations were part of the res gestae of NS’s disclosure.

Under the res gestae exception to ER 404(b), evidence of another crime may be admitted where it is “a ‘link in the chain’ of an unbroken sequence of events surrounding the charged offense . . . ‘in order that a complete picture be depicted for the jury.’” (Emphasis added). State v. Brown, 132 Wn.2d 529, 571, 940 P.2d 546 (1997), cert. denied, 523 U.S. 1007 (1998), quoting State v. Tharp, 96 Wn.2d 591, 594, 637 P.2d 961 (1981). The evidence must still be relevant to a material issue and its probative value must outweigh its prejudicial effect. Id.

Thus, in Brown, evidence of the defendant’s assault on one woman was admissible in his trial for raping and killing a different woman because the defendant used the murder victim to finance his trip to join the other woman; the crimes themselves were “linked in significant ways.” Brown, 132 Wn.2d at 572-76. The res gestae evidence demonstrated the “immediate context within which [the] charged crime took place,” not the context in which it was discovered and investigated. Id. at 576. Similarly, in

State v. Elmore, the defendant's prior molestation of the murder victim was admissible at a death penalty proceeding only because the defendant killed the victim to keep her from disclosing the abuse. 139 Wn.2d 250, 285-87, 985 P.2d 289 (1999), cert. denied, 531 U.S. 837 (2000).

But Warren's crime against SS was part of the chain of events that led NS to report the crime against her, it was not part of the offense itself. The jury did not need to learn the facts surrounding NS's report of child abuse to understand the facts of the charged crime. The offense against SS was unrelated to the alleged assaults against NS and thus was inadmissible as res gestae.

d. The trial court improperly admitted Warren's prior conviction for child molestation. Prior to trial, the court ruled that the State could not introduce evidence that Warren was convicted of child molestation in the first degree against SS and the court did not want the jury to speculate on the outcome of the investigation in SS's case. 11/4/03 RP 41, 58. The court later ruled, however, that the conviction was admissible to impeach Warren's testimony on direct examination. 11/12/03 RP 115, 125. The court was incorrect

because Warren did not bring his good character into evidence and thus could not be impeached by an instance of bad character.

When Warren testified, he countered NS's testimony. NS had testified that Warren lifted her shirt while she was standing in front of a mirror and told her she was beautiful. 11/12/03 RP 42, 44. Warren testified that while he had applied lotion to NS's back and arms for a skin condition, he had not applied it to certain areas "being like she is a girl." 11/17/03 RP 82-83. He also said both he and Mrs. Warren told NS she was beautiful to counter her low self-esteem. Id. at 83-85.

NS also testified she was uncomfortable when Warren washed her hair in the shower because of the way he touched her. 11/12/03 RP 42-43. Warren is a licensed cosmetologist, and he cared for the family members' hair. Id. at 81, 87. He used several products on NS's hair and rinsed them out in the shower because NS's hair was long and the products could hurt her eyes. Id. at 87-89. Warren explained he would stand outside the shower in shorts and NS would stand inside the shower in her bathing suit; he would only touch her scalp. Id. at 90.

According to the trial court, this testimony was an attempt by Warren to prove his own good character and opened the door to his

child molestation conviction. 11/12/03 RP 115-16. "He is saying I am the type of person who would not do that. When, in fact, at least at this point he has been convicted of doing that very thing with the sister." Id. at 116.

A criminal defendant may bring his character into issue by making "sweeping assertions as to his own good character." State v. Pogue, 104 Wn.App. 981, 17 P.3d 1272 (2001); Karl B. Tegland, 5 Wash. Pract. Evidence § 103.14 (1999). See State v. Ciskie, 110 Wn.2d 263, 281, 751 P.2d 1165 (1988) (State permitted to rebut defendant's broad assertions that rape victim "never appeared fearful of him at any time" with a third party who heard the defendant threaten to kill victim, using language nearly identical what victim had described); State v. Fisher, \_\_\_ Wn.App. \_\_\_, 2005 WL 647359 at 8-9 (No. 28282-8-II, March 22, 2005) (when defendant charged with assaulting child presented character witnesses who testified he was gentle with children, proper for State to cross-examine character witnesses about whether defendant spanked the victim).

But Warren did not make broad statements about his good character. Warren's testimony that he was outside the shower washing NS's hair did not comment on his character. Similarly,

Warren's explanation that he sometimes applied lotion to NS and told her she was attractive to increase her self-esteem was not the sweeping evidence of good character that opened the door to otherwise inadmissible misconduct.

e. Warren's right to a fair trial was compromised by the introduction of evidence that SS alleged Warren had sexually abused her and that he had a prior conviction for child molestation. Because of the court's erroneous rulings, the jury learned both that Warren was prosecuted for sexual abuse of NS's younger sister and that Warren had been convicted of child molestation. Any reasonable juror could have reached one of two conclusions from this evidence. First, the jury could conclude that Warren had been convicted of sexually assaulting SS. Or, the jury could conclude that Warren had been convicted of sexually molesting a child before he was accused of molesting SS and NS and thus might have abused three separate girls.

The evidence of SS's allegation, especially when tied to the admission of Warren's child molestation conviction, was more prejudicial than probative. The jury did not need to know the context of NS's first complaint of sexual abuse in order to evaluate

the case, and a reasonable juror would use this evidence to evaluate Warren's character.

When a defendant's constitutional rights, such as the right to a fair trial, are violated, the conviction must be reversed unless the reviewing court is convinced beyond a reasonable doubt that the error did not contribute to the jury verdict. Chapman v. California, 386 U.S. 18, 24, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967). In the absence of physical evidence, the jury's decision depended on its evaluation of the relative credibility of NS and Warren. This Court cannot conclude beyond a reasonable doubt that evidence Warren molested SS did not contribute to that determination.

In the alternative, the erroneous admission of ER 404(b) evidence requires reversal if there is a reasonably probability that the error materially affected the trial. Pogue, 104 Wn.App. at 988. The evidence of SS's allegations and the child molestation conviction clearly told the jury that Warren was the kind of person who would sexually assault a young girl, and the court gave no limiting instruction telling the jury otherwise. Warren's convictions for second degree rape of a child should be reversed and remanded for a new trial.

## 2. THE TRIAL COURT'S IMPROPER EVIDENTIARY RULINGS PREVENTED WARREN FROM PRESENTING HIS DEFENSE

The constitutional rights to due process and confrontation guarantee criminal defendants the meaningful opportunity to present a complete defense. U.S. Const. amends. 6, 14; Wash. Const. art. I, §§ 3, 22; Crane v. Kentucky, 476 U.S. 683, 690, 106 S.Ct. 2142, 90 L.Ed.2d 636 (1986); Chambers v. Mississippi, 410 U.S. 284, 93 S.Ct. 1038, 35 L.Ed.2d 297 (1973); Washington v. Texas, 388 U.S. 14, 19, 87 S.Ct. 1920, 18 L.Ed.2d 1019 (1967). Thus, a defendant may both introduce relevant, probative evidence and cross-examine the State's witnesses in a meaningful fashion. Id.; State v. Maupin, 128 Wn.2d 918, 924-25, 824, 813 P.2d 808 (1996), citing State v. Hudlow, 99 Wn.2d 1, 15, 459 P.2d 514 (1983).

a. The trial court improperly excluded evidence that Warren had a heart attack during the charging period. The State charged Warren with three counts of rape of a child, each occurring sometime between May 7, 2000 and May 7, 2002. CP 15-18; 55-57. Warren had a heart attack on October 30, 2001, and was bedridden for several weeks. 11/12/03 RP 23-24; 11/12/03(opening) RP 17. The trial court, however, ruled such

evidence was inadmissible as it was an attack on SS's veracity and would thus open the door to Warren's conviction for child molestation of SS. 11/12/03 RP 23.

The court's ruling is logically incorrect.<sup>5</sup> Warren was convicted of touching SS on her vagina – an act that requires little or no physical stamina. The evidence of Warren's heart attack did nothing to sully SS's credibility. Nor was SS's credibility even at issue in a trial where she was not a victim or witness.

But Warren's heart attack offered a partial defense to the charge that he had sexual intercourse with NS. NS alleged Warren had various forms of sexual intercourse and ejaculated. 11/12/03 RP 45, 46, 48-50, 66-67, 73. NS said this occurred when the family lived both in Federal Way and Bellevue, which includes the time Warren was recovering from the heart attack.<sup>6</sup> *Id.* at 73-74. The evidence of Warren's heart attack was admissible to rebut the claim he engaged in strenuous sexual activity, and the court's ruling violated Warren's constitutional right to present a defense.

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<sup>5</sup> The court was correct that the heart attack occurred during the charging period for the child molestation conviction, July 23, 2001, to June 11, 2002. CP 15-15; SuppCP \_\_\_\_ (Court's Instructions to Jury, February 19, 2003, sub.no. 102A) (Instruction11). The jury made no finding as to when in the charging period the offense occurred.

<sup>6</sup> The family leased apartments in Federal Way from March 2, 2001, to February 5, 2002, and in Bellevue from January 26, 2002, to July 31, 2002. 11/17/03RP 10-11. See 11/12/03RP 105-07.

b. The trial court improperly excluded evidence that SS said she should not have said anything, which was relevant to NS's motive to fabricate. The trial court admitted evidence that SS alleged Warren sexually abused her, that Warren was charged with that crime, and that Mrs. Warren was not cooperating with the investigation or prosecution of Warren for a period of time. 11/12/03 RP 3-6; 11/17/03 RP 3, 5-7. The jury additionally learned the court issued a warrant for Mrs. Warren and that when the police found the family in Tacoma, they placed Mrs. Warren under arrest and transported SS and NS to Child Protective Services' custody. 11/17/03 RP 7. After the court denied Warren's motion to exclude evidence of SS's charges, he asked permission to elicit testimony that, on the ride to her interview with the prosecutor the next day, SS said she should not have said anything and NS told her to be quiet. See 12/2/02 RP 86-87 (evidence admitted by State at first trial). The court held this evidence was inadmissible. 11/12/03 RP 15-20.

The trial court had ruled that the entire context of NS's initial disclosure of abuse was admissible, yet it held SS's statement that she should not have said anything was not relevant. The statement, however, was made only one day before NS told the

prosecutor Warren had abused her. It was thus admissible to show a possible motive for NS to make the allegation -- she was afraid SS would recant and Warren would return to her home. Warren should have been permitted to cross-examine NS about this statement.

c. Warren's convictions should be reversed. A constitutional error is harmless if the appellate court is convinced beyond a reasonable doubt that any reasonable jury would have reached the same result in absence of the error. Chapman, 386 U.S. at 24; Maupin, 128 Wn.2d at 928-29.

NS's report of sexual abuse changed over time and was questionable in light of her mother's leading questions and her claim of recovered memories. SS's statement showed a possible motive for NS to fabricate -- a fear that SS was recanting and Warren would be returning home. And Warren's heart attack would have demonstrated he could not have committed the offenses during a portion of the charging period. The evidence in this case is not so strong that this Court should be convinced beyond a reasonable doubt that the jury verdict would have been the same if Warren had been permitted to present this evidence. His convictions should be reversed.

### 3. THE TRIAL COURT ADMITTED PREJUDICIAL EVIDENCE THAT LACKED PROBATIVE VALUE

Only relevant evidence is admissible in Washington. ER 402; State v. Harris, 97 Wn.App. 865, 868, 989 P.2d 553 (1999), rev. denied, 140 Wn.2d 1017 (2000). Evidence is relevant if it tends to “make the existence of any fact that is of consequence to the determination of the action more or less probable than it would be without the evidence.” ER 401. Even relevant evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice. ER 403. This Court reviews the admission of irrelevant evidence for abuse of discretion. Harris, 97 Wn.App. at 869. Here, the trial court improperly admitted a rap lyric and evidence that the detectives were surprised by NS’s disclosures that were not relevant and were unduly prejudicial.

a. Warren’s rap lyrics were not relevant. At the trial where Warren was convicted of molesting only SS, the State offered rap lyrics penned by Warren after his arrest, arguing the rap described the offense against SS and showed Warren’s lustful disposition. 2/13/03 RP 73-76, 80-87; 2/20/03 RP 26-27, 93-94. The State agreed not to admit those lyrics at the November trial. 11/10/03 RP 10. The State later argued, however, the rap lyrics were admissible

to counter Warren's testimony that he tried to boost NS's self-esteem because they were derogatory towards NS. 11/17/03 RP 108. The court permitted the State to cross-examine Warren with the lyrics. Id. at 124, 136-49..

The court apparently reasoned Warren "opened the door" to the lyrics because he had portrayed himself as a good parent who tried to build NS's self-esteem. 11/17/02 RP 111-12, 124. See Id. at 84-85. But the rap was penned long after the time period in question. Warren did not write the rap while he was living with NS and SS but later when he was in jail facing the charges involving SS. 11/19/02 RP 4, 22-23 11/17/03 RP 137. In fact, the State believed the rap was a message to Mrs. Warren not to cooperate with the prosecution, and thus logically it must have been written after the charges were filed. 11/19/02 RP 6, 13-14, 33. The rap lyrics do not show that Warren used derogatory names to refer to NS during the period of time at issue, and the trial court abused its discretion by admitting the rap on that basis.

The rap lyrics were quite prejudicial, as they included a description that mirrored SS's statements about Warren noticing her when she was checking her genital area in the bathroom. 11/17/03 RP 142-45. The State had earlier argued the lyric

described Warren's abuse of SS. 11/19/92 RP 8. The jury, however, had only heard that SS disclosed Warren abused her; they had not learned SS's description of the crime. This permitted the prosecutor to both imply in cross-examination of Warren and argue in closing that the lyrics were Warren's description of NS.<sup>7</sup> Id; 11/18/03 RP 33-36 (quoting from rap even though not admitted as evidence). Thus, not only was the evidence irrelevant, it was misleading.

b. The detectives' testimony that they were surprised by NS's disclosures was not relevant. The trial court permitted Detective Faith and Detective Rylands to testify that when they and the prosecutor were interviewing NS about SS's allegations, they were not trying to uncover allegations that Warren abused NS and were surprised when NS stated Warren had also abused her. 11/12/03 RP 7, 13-14; 11/17/03 RP 12, 19-20. While the record does not reflect the reason for the court's ruling, in the earlier trial the court had admitted this evidence to show the detectives' "state of mind." 2/13/03 RP 29-30. Since the state of mind of the police

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<sup>7</sup> Through its cross-examination questions, for example, the prosecutor implied Warren was referring to NS when he used the term "demon seed," when, in fact, the term referred to SS. 11/17/03 RP 136; 2/13/03 RP 76, 85.

detectives and prosecuting attorney was not an element of the charges here, the court's admission of this evidence was in error.

A police officer's state of mind is rarely relevant in a criminal case. State v. Johnson, 61 Wn.App. 539, 545, 811 P.2d 687 (1991) (confidential informant's statement to police lieutenant not admissible to show lieutenant's state of mind in executing search warrant); State v. Aaron, 57 Wn.App. 277, 280, 787 P.2d 949 (1990) (police dispatcher's hearsay statements not admissible to show state of mind of officer acting on statements). Whether Detective Faith, Detective Rylands, or Senior Deputy Prosecuting Attorney Cheryl Snow were "surprised" by NS's statements is irrelevant as was their purpose in interviewing NS. The trial court abused its discretion in admitting the evidence because it was irrelevant, and the evidence was prejudicial because it bolstered the police investigation and NS's credibility.

c. The admission of the prejudicial and irrelevant evidence requires reversal of Warren's convictions. The detectives' reaction to NS's claim that Warren abused her and the rap lyrics penned while Warren was in jail were not relevant in this case. Further, any possible probative value of the evidence was outweighed by its great potential to prejudice the jury. ER 403.

When an evidentiary error is not of constitutional magnitude, this Court will reverse if, within a reasonable possibility, the error materially affected the outcome of the case. State v. Acosta, 123 Wn.App. 424, 438, 98 P.3d 503 (2004), quoting State v. Stenson, 132 Wn.2d 668, 709, 940 P.2d 1239 (1997). The rap lyric permitted the prosecutor to create the false impression that Warren was describing NS in the bathroom and to cross-examine Warren in a manner that implied a lustful disposition towards her. Given the lack of physical evidence in this case, there is a reasonable possibility the rap lyric and evidence bolstering the police investigation affected the jury verdict, and Warren's convictions should be reversed.

#### 4. PROSECUTORIAL MISCONDUCT DURING CLOSING ARGUMENT DENIED WARREN A FAIR TRIAL

A criminal defendant's right to due process of law ensures the right to a fair trial. U.S. Const. amend. 14; Wash. Const., art. I, § § 3, 22. A prosecutor, as a quasi-judicial officer, has a duty to act impartially and to seek a verdict free from prejudice and based on reason. State v. Echevarria, 71 Wn.App. 595, 598, 860 P.2d 420 (1993), citing State v. Kroll, 87 Wn.2d 829, 835, 558 P.2d 173 (1976); State v. Huson, 73 Wn.2d 660, 663, 440 P.2d 192 (1968),

cert. denied, 393 U.S. 1096 (1969). When a prosecutor commits misconduct, a defendant may be denied his right to a fair trial and due process of law. State v. Charlton, 90 Wn.2d 657, 664-65, 585 P.2d 142 (1978).

The deputy prosecuting attorney committed misconduct in closing argument by arguing facts not in evidence, improperly vouching for NS's credibility, and disparaging Warren's defense counsel. Although Warren's attorney did not object to the improper argument, he may raise this issue because his constitutional right to a fair trial was violated by the deputy prosecuting attorney's misconduct.

To determine whether prosecutorial comments constitute misconduct, the reviewing court must decide first whether such comments were improper; and, if so, whether a "substantial likelihood" exists that the comments affected the jury. State v. Dhaliwal, 150 Wn.2d 559, 578, 79 P.2d 432 (2003); State v. Belgarde, 110 Wn.2d 504, 508, 755 P.2d 174 (1988). Where the defendant does not object to the misconduct, the reviewing court may still reverse the conviction if the misconduct is so flagrant and ill-intentioned that the resulting prejudice could not have been cured by a limiting instruction. Id.

a. The prosecutor argued facts not in evidence. In closing argument, the prosecuting attorney told the jury that delayed disclosure of sexual abuse is not uncommon and that children carefully decide to whom they reveal sexual abuse. 11/18/03 RP 9.

What we know in these cases is children carefully assess who they will disclose to and when they will do it. They are constantly assessing people and determining whether they think those people are worthy of their trust, worthy of telling them.

And, as we discussed in jury selection, what we know is the phenomenon of delayed disclosure is not uncommon, that many people go through life not telling or denying sexual abused, and confiding to people. Because that's what it is when you have that experience. The child is choosing to trust you and confide in you what happened.

Id. In fact, neither of these "facts" or theories were in evidence.<sup>8</sup>

While the attorneys have latitude in closing argument to argue reasonable inferences from the evidence presented at trial, counsel may not mislead the jury by misstating the evidence or arguing facts not in the record. Dhaliwal, 150 Wn.2d at 577; State v. Rose, 62 Wn.2d 309, 312, 382 P.2d 513 (1963); RPC 3.4(e).

When the prosecutor argues facts outside the record, she becomes an unsworn witness against the defendant. Belgarde, 110 Wn.2d

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<sup>8</sup> Scientific testimony is only admissible the court finds it is generally accepted in the relevant scientific community, the witness qualifies as an expert in that field, and the information will be helpful to the jury. State v. Riker, 123 Wn.2d 351, 359-65, 869 P.2d 43 (1994), citing Frye v. United States, 293 F. 1013 (D.C. Cir. 1923); ER 702.

at 507 (conviction reversed because prosecutor essentially “testified” during argument regarding terrorist organization where no evidence to support argument).

A similar argument was found to be prejudicial misconduct in State v. Case, 49 W.2d 66, 298 P.2d 500 (1956). Among other objectionable arguments, the prosecuting attorney explained that it was not uncommon for incest victims to belatedly report the abuse and that perpetrators of this crime can come from any segment of society. Id. at 69. There was no evidence to support this argument, which was based upon the prosecutor’s personal experience. Id. The prosecutor’s argument here mirrored the argument in Case, and she basically testified as an expert witness concerning children’s delay reporting of sexual abuse. This was misconduct.

Warren’s failure to object to this portion of the prosecutor’s argument may be excused, as the record shows an objection would have been futile. Judge Hayden took the position in the earlier trial that the lawyers could not object to the other attorney mischaracterizing the evidence or arguing facts not in evidence. 2/20/03 RP 7-8, 94-95. The court continued to overrule objections on that basis in the November trial, stating “an objection to

mischaracterizing the evidence during closing argument is not a well founded objection.” 11/18/03 RP 44. See 12/12/03(opening) RP 15. Thus, counsel may be excused from failing to object when the prosecutor argued social science theories not in evidence. See State v. Moen, 129 Wn.2d 535, 547-48, 919 P.2d 69 (1996) (timeliness of restitution hearing may be addressed for first time on appeal where hearing already untimely and objection could not cure problem).

b. The deputy prosecutor improperly vouched for the primary witness. The State's duty to ensure a fair trial precludes the prosecutor from personally vouching for the government or endorsing the credibility of prosecution witnesses. State v. Reed, 102 Wn.2d 140, 684 P.2d 699 (1984). State v. Sargent, 40 Wn.App. 340, 344, 698 P.2d 598 (1985). Moreover, it is improper for a prosecutor to express his personal opinion about the credibility of a witness and the guilt or innocence of the accused. RPC 3.4(f)

Here, the deputy prosecutor devoted a substantial portion of her closing argument to demonstrating that NS's testimony had the “badge of truth.” 11/18/03 RP 12.

... there are certain details and certain facts that a child may tell you that I may refer to, and what I'm going to refer to here as a badge of truth. The reality is they hit you in the

gut. You listened to the testimony, you hear these details and they are things that just have the ring of truth. . . .

(Emphasis added). Id. The prosecutor then went over the portions of NS's testimony that "rang out clearly with the truth." Id. at 13-15. Although Snow never directly said that she believed NS was telling the truth, her emphasis on how NS's testimony had the ring of truth was improper vouching. State v. Beaulieu, 82 Conn.App. 856, 848 A.2d 500, 510 (2004) (prosecutor improperly vouched for complaining witness's credibility by stating she was there "to tell the truth.")

c. The prosecutor's argument disparaged Warren's defense attorney. When the State argues in a manner that disparages defense counsel, it is misconduct because it impacts the defendant's constitutional right to counsel. Reed, 102 Wn.2d at 146-47; State v. Neslund, 50 Wn.App. 531, 561-62, 749 P.2d 725, rev. denied, 110 Wn.2d 1025 (1988); Bruno v. Rushen, 721 F.2d 1193 (9<sup>th</sup> Cir. 1983), cert. denied, 469 U.S. 920 (1984). The prosecutor may not disparage defense counsel's legitimate function. Reed, 102 Wn.2d at 143, Case, 49 Wn.2d at 70. Similarly, the prosecutor should not complain to the jury of "favorite"

defense tactics. United States v. Boldt, 929 F.2d 35, 40 (1<sup>st</sup> Cir. 1991).

Here, the deputy prosecuting attorney began her rebuttal closing argument by stating she made notes of the “number of mischaracterizations” in defense counsel’s argument “as an example of what people go through in a criminal justice system when they deal with defense attorneys.” 11/18/03 RP 62. Later she complained that defense counsel’s argument was “a classic example of taking these facts and completely twisting them to their own benefit, and hoping that you are not smart enough to figure out what in fact they are doing.” Id. at 63. And the prosecutor culminated this argument by suggesting that the defense kept changing its position as the trial progressed. Id. at 65-66.

The attorneys for the State and the defense serve an essential function in our adversarial system, and counsel is therefore entitled to respect. See Gideon v. Wainwright, 372 U.S. 335, 344, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963). It was improper for the prosecutor to complain about how hard it is to deal with defense attorneys. And it was improper of her to discredit Warren’s counsel by arguing he was trying to deceive the jury when he was performing his constitutionally-mandated function.

d. The prosecutorial misconduct requires reversal. The deputy prosecutor engaged in misconduct by (1) arguing social science facts not in evidence, (2) indirectly vouching for the critical witness's testimony, and (3) disparaging defense counsel. Defense counsel's failure to object to the social science facts may be excused as any objection would not have been sustained. The other misconduct was so flagrant and ill-intentioned that no curative instruction would have cured it. Thus, this Court must reverse unless it is convinced there is a substantial likelihood the improper argument did not affect the jury verdict. State v. Rivers, 96 Wn.App. 672, 675, 981 P.2d 16 (1999).

This rape of a child case essentially came down to whether the jury believed NS or Warren. The prosecutor's argument here filled in gaps in the State's case by adding a social science explanation for NS's delay reporting, claiming NS's testimony had the "badge of truth," and then disparaging defense counsel for doing his job. This Court cannot be convinced that Warren had a fair trial. Reversal is required. State v. Reed, 102 Wn.2d at 146-47.

5. THE CUMULATIVE ERRECT OF THE ABOVE ERRORS  
DENIED WARREN A FAIR TRIAL

The due process clauses of the federal and state constitutions provide that a criminal defendant receive a fair trial. U.S. Const. amend. 14; Wash. Const. art. 1, § 3, 22. Reversal may be required due to the cumulative effects of trial court errors, even if each error examined on its own would otherwise be considered harmless. State v. Coe, 101 Wn.2d 772, 789, 684 P.2d 668 (1984). Thus, in State v. Alexander, this Court ordered a new trial because (1) a counselor impermissibly suggested the victim's story was consistent and truthful, (2) the prosecutor impermissibly elicited the defendant's identity from the victim's mother, and (3) the prosecutor repeatedly attempted to introduce inadmissible testimony at trial and in closing. State v. Alexander, 64 Wn.App. 147, 158, 822 P.2d 1250 (1992). And in Coe, the court reversed four rape convictions based upon numerous evidentiary errors and a violation of discovery rules by the prosecutor. 101 Wn.2d at 774-86, 788-89.

If this Court concludes none of the above errors alone require reversal of Warren's convictions for rape of a child, the combination of the errors do require a new trial. Cumulatively, the

above errors cannot be deemed harmless since they fatally undermine the State's evidence that Warren committed the crimes. His conviction must be reversed and remanded for a new trial.

I. ARGUMENT CONCERNING CONVICTION FOR CHILD MOLSTATION IN FIRST DEGREE (SS)

1. WARREN'S CONSTITUTIONAL RIGHT TO A JURY TRIAL WAS VIOLATED WHEN TWO STATE'S WITNESSES IMPROPERLY VOUCHERED FOR SS'S CREDIBILITY

A witness may not offer an opinion as to the credibility of another witness. State v. Dolan, 118 Wn.App. 323, 329, 73 P.3d 1011 (2003). In addition, no witness may offer an opinion, either by direct statement or inference, on the guilt of the defendant. State v. Demery, 144 Wn.2d 753, 759, 30 P.3d 1278 (2001); State v. Black, 109 Wn.2d 336, 348, 745 P.2d 12 (1987). Testimonial opinions as to guilt are unfairly prejudicial and inadmissible because they invade the province of the jury and thus violate a defendant's right to a fair trial. Id. It is thus improper for a witness to vouch, even indirectly, for the credibility of another witness State v. Kirkman, \_\_\_ Wn.App. \_\_\_, 107 P.3d 133, 137 (2005). This is especially true when the vouching witness is a government official, such as a police officer. Demery, 144 Wn.2d at 759; Dolan, 118 Wn.App. at 329; Kirkman, 107 P.3d at 137.

a. A forensic interviewer employed by the prosecutor and a police detective both vouched for SS's credibility. Two witnesses commented on SS's credibility, asserting indirectly that she was telling the truth. The witnesses testified that SS understood the difference between the truth and a lie and agreed to tell the truth before making detailed statements that were admitted under the child hearsay statute.

The state introduced SS's detailed hearsay statement to Farrell, a "forensic" child interview specialist employed by the King County Prosecutor's Office to obtain statements from young children in cases involving suspected child abuse. 2/11/03 RP 3-4, 20-33. Farrell twice told the jury she began interviews by talking to the child about the importance of telling the truth. 2/11/03 RP 7, 12-13. Farrell also said she began her interview with SS by eliciting SS's agreement to tell the truth. Id. at 19. Farrell said, "As we do our talking today it is important to only talk about the truth. Can you promise to only talk about the truth today?" Id. SS responded by nodding her head affirmatively. Id. at 19-20. Farrell also ended the interview with SS's assurance that everything she said was true. Id. at 32-33.

On cross-examination, Farrell said her job was not to determine if the child is telling the truth but rather to find out what happened. 2/12/03 RP 58-59. When defense counsel attempted to explore this dichotomy, Farrell reiterated that her job is to “set up a context in which the child has demonstrated a knowledge of the difference between telling the truth and fabricating, and to get an agreement from the child that they will in fact tell the truth.” Id. at 59.

The State also offered SS’s hearsay statements through Detective Rylands. Rylands’ testimony covered both SS’s agreement to tell the truth during these interviews and her ability to do so. Rylands said her normal interview with a child includes an explanation that the child must tell the detective if she does not understand a question and must always tell the truth 2/12/03 RP 105. Rylands described her discussion with SS of the difference between the truth and a lie. Id. at 105-06. SS related that “the truth is better, even when it hurts someone.” Id. at 106. Finally Rylands related that SS promised to tell the truth. Id.

Rylands again testified that SS successfully explained the difference between the truth and a lie when the deputy prosecuting attorney questioned her at a later interview. 2/12/03 RP 128-29,

134. DPA Snow told SS there was only one rule in talking to her and that was to tell the truth. Id. at 142. In response to Snow's questions, SS said she sometimes went to church and nodded affirmatively when asked if it was important to tell the truth. Id. When the prosecutor asked SS if what she told the counselor and other people was true, SS responded, "I told everybody the truth." Id. at 135.

b. The two witnesses improperly vouched for SS's credibility. Although Farrell and Rylands did not directly say that SS was telling the truth on the witness stand, their testimony was a comment on SS's credibility. Testimony remarkably similar to Rylands' and Farrell's was found to be an improper comment on a child witness's credibility in Kirkman, supra. Kirkman was convicted of first degree rape of an eight-year-old child. 107 P.3d at 134. The police detective who investigated the case described his procedure for interviewing children who were suspected abuse victims and also testified about specifics of his interview with the child in Kirkman's case, AD. Id. at 136. The detective stated that he asked AD to give an example of a lie and of the truth, that she was able to tell the difference between the two, and that she promised to tell him the truth. Id.

The Court of Appeals held the detective told the jury that AD was telling the truth when she spoke to him even though he did not offer a direct opinion on her credibility.

Detective Kerr did not offer his direct opinion of A.D.'s credibility, but he told the jury that he tested A.D.'s competency and her truthfulness. In essence, he told the jury that A.D. told the truth when she related the incriminating events to him. This is significant because a police officer's testimony may particularly affect a jury because of its "special aura of reliability." And it is significant because a witness may not give an opinion on another witness's credibility.

(Citations omitted). 107 P.3d at 137.

In determining if a witness's statement is an improper opinion, this Court looks at the totality of the circumstances, including "(1) 'the type of witness involved,' (2) 'the specific nature of the testimony,' (3) 'the nature of the charges,' (4) 'the type of defense, and' (5) 'the other evidence before the trier of fact.'" Kirkman, 107 P.3d at 137, quoting Demery, 144 Wn.2d at 759.

Here, the child witness was 8 years old. Two respected government employees, a police detective and a forensic interview specialist for the prosecutor's office, vouched for her credibility and assured the jury that SS's three critical hearsay statements were truthful. Warren was charged with both child molestation and rape of a child in the first degree, and the only physical evidence was a

an inconclusive physical exam that was “concerning” for probable sexual abuse. While Warren did not testify at this trial, he had a viable defense that he was examining SS to monitor her vaginal-area irritation, not for his sexual gratification. RCW 9A.44.010 (1), (2); RCW 9A.44.073(1); RCW 9A.44.083(1). Under these circumstances, the opinion testimony from both Detective Ryland and interviewer Ferrell was improper.

c. This manifest constitutional error warrants reversal of Warren’s conviction. Warren’s attorney did not object when Ferrell and Rylands bolstered SS’s credibility. Improper opinion evidence, however, invades the fact-finding function of the jury and thus violates a criminal defendant’s constitutional right to a jury trial. Kirkman, 107 P.3d at 137-38; Dolan, 118 Wn.App. at 330. This Court may review an issue affecting a manifest constitutional issue for the first time on appeal. RAP 2.5(a).

Washington courts employs a two-part test to determine if a constitutional issue such as improper vouching for a witness’s credibility will be addressed for the first time on appeal. State v. Scott, 110 Wn.2d 682, 688, 757 P.2d 492 (1988).

The proper way to approach claims of constitutional error asserted for the first time on appeal is as follows. First, the appellate court should satisfy itself that the error is truly of

constitutional magnitude – that is what is meant by “manifest.” If the asserted error is not a constitutional error, the court may refuse review on that ground. If the claim is constitutional, then the court should examine the effect the error had on the defendant’s trial according to the harmless error standard set forth in Chapman v. California.

Id., citing Chapman, *supra*.

It is the function of the jury to assess the credibility of a witness and the reasonableness of the witness’s responses. Demery, 144 Wn.2d at 762, citing State v. Welchel, 115 Wn.2d 708, 724, 801 P.2d 948 (1990). Thus, improper opinion testimony violates the defendant’s constitutional right to a jury trial, and the alleged error in Warren’s case is a constitutional one. Kirkman, 107 P.3d at 137-38; Dolan, 118 Wn.App. at 330.

The error had a practical effect on Warren’s trial. Two separate government employees vouched for the credibility of eight-year-old SS and her hearsay statements by explaining that SS agreed to tell the truth and assured them she had told the truth. One of the witnesses, Detective Ryland, also testified that SS knew what it meant to tell the truth. The other witness, forensic interviewer Ferrell, described SS as bright and articulate for her age. 2/11/03 RP 14. The entire case rested upon SS’s testimony

and hearsay statements describing her abuse.<sup>9</sup> Hearing government witnesses, including a police detective, indirectly vouch for SS's credibility no doubt influenced the jury.

In order to uphold Warren's conviction, the State must demonstrate constitutional error is harmless beyond a reasonable doubt. Chapman, 386 U.S. at 24; State v. Easter, 130 Wn.2d 228, 234-42, 922 P.2d 1285 (1996). In Alexander, 64 Wn.App. at 154, the defendant was charged with two counts of rape of a nine-year-old child, and the child's counselor testified the child did not give any indication she was lying about the abuse. This Court found the constitutional error was not harmless where the credibility of the child was a crucial issue and conflicted directly with the defendant's testimony. Id.

In Kirkman, supra, this Court reversed a child rape conviction where (1) the detective vouched for the child witness's credibility in the same manner as Rylands and Farrell did here, (2) a physician testified the child's physical examination did not reveal sexual abuse but described her demeanor and recitation of the facts as appropriate, clear and consistent and (3) the witness's aunt

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<sup>9</sup> While Merrell did opine SS's exam revealed "probable" penetrating trauma, the jury did not base its verdict upon that evidence as it did not convict Warren of rape of a child.

testified she believed the child. The error was not harmless because the only corroboration of abuse was the child's recitation of the same story to her aunt, the policeman, and the physician. 107 P.3d at 138.

Here, too, the only evidence that SS was molested was her testimony and her statements to various parties. In the absence of overwhelming, untainted evidence of Warren's guilt, Warren's conviction should be reversed.

## 2. THE PROSECUTOR COMMITTED PREJUDICIAL MISCONDUCT BY MISSTATING THE BURDEN OF PROOF IN CLOSING ARGUMENT

As argued in Section E(4) above, a defendant's constitutional right to due process may be violated when a prosecutor commits misconduct. When the misconduct that impacts a specific constitutional right, the error is subject to the constitutional harmless error standard. In that case, the State must prove beyond a reasonable doubt that the misconduct was harmless. State v. Easter, 130 Wn.2d at 242 (prosecutor's comment on defendant's right to remain silent); State v. French, 101 Wn.App. 380, 386, 4 P.3d 857 (2002) (prosecutor's comment on fact defendant did not testify), rev. denied, 142 Wn.2d 1022 (2001).

A criminal defendant has a constitutional right to be convicted only upon proof beyond a reasonable doubt of every element of the crime. Apprendi v. New Jersey, 530 U.S. 466, 476-77, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000); In re Winship, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970); U.S. Const. amends. 6, 14; Wash. Const. art. I, §§ 3, 22. A conviction cannot stand if the jury has been instruction in a manner that relieves the State of this burden of proof. Sullivan v. Louisiana, 508 U.S. 275, 113 S.Ct. 2078, 124 L.Ed.2d 182 (1993) (constitutionally deficient reasonable doubt instruction); State v. Jackson, 137 Wn.2d 712, 727, 976 P.2d 1229 (1999) (incorrect instruction on elements of crime). Thus, the prosecutor may not argue to the jury in a manner that improperly states the burden of proof. See State v. Davenport, 100 Wn.2d 757, 760, 675 P.2d 1213 (1984) (misconduct for prosecutor to argue defendant could be convicted as accomplice in absence of accomplice liability instruction; prosecutor may not argue law not in instructions); State v. Fleming, 83 Wn.App. 209, 213, 921 P.2d 1076 (1996) (misconduct for prosecutor argue jury could only acquit if found complainant was lying), rev. denied, 131 Wn.2d 1018 (1997).

An integral piece of proof beyond a reasonable doubt is that the accused receive the benefit of the doubt. Victor v. Nebraska, 511 U.S. 1, 8, 114 S.Ct. 1239, 127 L.Ed.2d 53 (1994), quoting Commonwealth v. Webster, 59 Mass. 225, 230 (1850). Yet the deputy prosecuting attorney told the jury the reasonable doubt standard did not mean the jury should give the defendant the benefit of the doubt, and the court's instructions to the jury in sustaining defense counsel's objection compounded the error rather than curing it.

The deputy prosecuting attorney misstated the burden of proof beyond a reasonable doubt three times. 2/20/03 RP 98-99. First, the prosecutor said, "And for them [defense] to ask you to infer everything to the benefit of the defendant is not reasonable." Id. at 98. After Warren objected and the court ruled off the record, the prosecutor continued, "Reasonable doubt does not mean that you give the defendant the benefit of the doubt, and that is clear when you read the definition." Id. at 99. Later, the prosecutor returned to this theme and again stated the jury was not to give the defendant the benefit of the doubt:

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. That is the standard to be applied to the defendant's case, the same as any other case. 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.

Id. at 103-04.

Warren again objected, and the trial court instructed the jury that reasonable doubt was defined in the court's instructions and read part of the instruction defining the term. Id. 104-05. See SuppCP \_\_\_\_ (Court's Instructions to Jury, sub. no. 102A, Instruction 3). The court explained that if, after reviewing all the evidence, the jury had a doubt, the benefit of that doubt would go to the defendant. Id. at 105. Unfortunately, the court concluded with the dismissive statement, "So we are playing with words here in a sense." Id.

Thus the trial court immediately undermined its effort to correct the State's improper argument concerning the burden of proof beyond a reasonable doubt. A reasonable juror could conclude from the court's remark that the reasonable doubt instruction was verbiage and the exact wording made little sense or was irrelevant. This violated Warren's constitutional right to a fair

trial and to be convicted only upon proof beyond a reasonable doubt.

The prosecutor improperly diminished of the burden of proof in her closing argument, and the court's attempt to correct the misstatement was ineffectual. This Court cannot be convinced beyond a reasonable doubt that the jury understood what "beyond a reasonable doubt" means or that it was to take the standard of proof seriously. Warren's conviction for child molestation must be reversed.

### 3. THE COURT ADMITTED IRRELEVANT, PREJUDICIAL EVIDENCE

As explained in Section H(3) above, only relevant evidence is admissible, and even relevant evidence may be excluded if its probative value is outweighed by the danger of unfair prejudice. In Warren's February trial, the court permitted a detective to opine that Mrs. Warren was more protective of her husband than SS and NS, and also admitted evidence Warren owned a "penis pump" that was not connected to the offenses.

a. The detective's opinion that Mrs. Warren was more protective of her husband than her children was not admissible.

The trial court ruled in limine that the detectives could not express

their opinions, but could describe another person's emotional state. 11/18/02 RP 87-88; CP 78. Detective Rylands testified that Mrs. Warren seemed more protective of Warren than her daughters, and defense counsel's objection was overruled. 2/12/03 RP 120-21. Later, the court explained the detective's theory was a relevant opinion concerning Mrs. Warren's "outward demeanor." *Id.* at 155, 158-59. In fact, the detective's testimony did not describe Mrs. Warren's outward demeanor, but was an opinion as to Mrs. Warren's inward thoughts and motivations.

Also, whether Mrs. Warren was protective of her children, her husband, or both was not at issue in the prosecution of Warren for child molestation. Thus, the opinion was not admissible under ER 701 because it was not "helpful to a clear understanding of the witness' testimony or the determination of a fact in issue." ER 701. Detective Ryland's subjective opinion was improper and should have been excluded.

b. The "penis pump" was not relevant. Prior to trial, the court prohibited the State from introducing a "penis pump" seized from Warren's home but refused to suppress testimony concerning the item. 8/26/02 RP 67; 11/18/02 RP 69-71, 75; 11/19/02 RP 56; CP 77. The court reasoned that information about the "penis

pump” was relevant to show Warren’s state of mind and rebut any defense that Warren was checking SS for medical reasons.

11/18/02 RP 75-77.

At trial, SS testified that she saw a “penis pump” in one of Warren’s briefcases in her parent’s bedroom, but that he did not show it to her. 2/19/03 RP 21-22, 29-30, 32. She might have learned how it worked from an Austin Powers movie. Id. at 20-21. The jury also learned SS discussed the item at an interview with Detective Rylands and at another interview with the prosecuting attorney. 2/12/03 RP 112-13, 140; 2/13/03 RP 16-17.

SS knew that Warren owned a “penis pump” because she saw it in his briefcase. Warren did not show the “penis pump” to SS or use it to teach her about sexual activity. Warren’s ownership of the item did not help the jury evaluate whether Warren molested SS. It simply was not relevant to a fact at issue in this case.

c. The irrelevant evidence was unduly prejudicial. The evidence of the “penis pump” was highly prejudicial because the jury could have concluded Warren was unduly concerned about his sexual prowess or had unusual sexual habits. Thus, the evidence tended to show bad character, in violation of ER 404(b). Coupled with Detective Rylands’ opinion that Mrs. Warren was not properly

protecting her children, the errors prejudiced Warren and this Court cannot be convinced he would have been convicted without them.

4. THE CUMULATIVE EFFECT OF THE ABOVE ERRORS DENIED WARREN A FAIR TRIAL

The combination of several errors may deny a criminal defendant the fair trial guaranteed by the due process clauses of the federal and state constitutions. See Section H(5) above. Two government employees vouched for the credibility of the complaining child witness. In addition, the prosecutor misstated the burden of proof beyond a reasonable doubt in her closing argument and the court admitted irrelevant, prejudicial evidence. If this Court concludes none of these errors require reversal standing alone, this Court should hold that the combination of the errors is not harmless beyond a reasonable doubt.

J. ARGUMENT CONCERNING SENTENCE

THE SENTENCING COURT EXCEEDED ITS STATUTORY AUTHORITY IN IMPOSING AN ORDER PROHIBITING WARREN FROM HAVING CONTACT WITH HIS WIFE FOR LIFE

The sentencing court ordered Warren to have no contact with SS, NS and his wife, Lisa Warren, for life. CP 68, 73. The no contact order for Lisa Warren must be vacated because it exceeds

the court's statutory authority and violates Warren's constitutional privacy rights.

1. RCW 9.94A.505(8) authorizes the sentencing court to impose crime-related prohibitions. The Sentencing Reform Act (SRA) allows the sentencing court to impose "crime-related prohibitions and affirmative conditions as provided in this chapter." RCW 9.94A.505(8).<sup>10</sup> Thus, an order prohibiting contact must be directly related to the facts of the adjudicated offense. Id. Interpreting similar language in a section of the SRA governing community supervision, former RCW 9.94A.120(9)(c)(ii), the Supreme Court pointed out that there must be a reasonable relationship between the crime and a no-contact order. State v. Riles, 135 Wn.2d 326, 349-50, 957 P.2d 655 (1998). The Riles Court struck a sentence provision prohibiting contact with all minors because the order was not reasonably connected to the defendant's crime, rape of a nineteen-year-old woman. Id.

Similarly, Warren's wife was not a victim or witness to the crimes. There is no indication that Mrs. Warren was present or involved in the assaults in any fashion. Thus, there is no basis for a no-contact order with respect to Mrs. Warren, and the court

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<sup>10</sup> The relevant SRA provisions have been re-codified since Warren's offenses. The current nomenclature is used here for simplicity.

exceeded its statutory authority in imposing the life-time no-contact order.

2. RCW 9.94A.400 does not authorize the no-contact order as a condition of community placement. The court also ordered Warren to have no contact with his wife as a condition of community placement after his release from custody. CP 73. The order refers to RCW 9.94A.700(4), (5). RCW 9.94A.700(5)(b), however, only authorizes the court to order no contact with crime victim, not a crime victim's parent..

As part of any terms of community placement imposed under this section the court may also order one or more of the following special conditions: . . .

(b) The offender shall not have direct or indirect contact with the victim of the crime or a specified class of individuals.

RCW 9.94A.700(5)(b). Thus, the court had the power to order Warren to have no contact with SS and NS, or even no contact with young children, but it lacked authority to order no contact with Warren's wife.

3. Sentencing conditions and conditions of community custody may not interfere with a person's constitutional right of association. A court order prohibiting contact with another person or class of persons must bear some relationship to the adjudicated

offense in order not to offend an individual's right to freedom of association guaranteed by the First Amendment and art. I, sec. 4, of the Washington Constitution. Riles, 135 Wn.2d at 350. The Riles Court held, "the defendant's freedom of association may be restricted only to the extent it is reasonably necessary to accomplish the essential needs of the state and the public order." Riles, 135 Wn.2d at 350, citing State v. Ross, 129 Wn.2d 279, 287, 916 P.2d 405 (1996); State v. Riley, 121 Wn.2d 22, 37-38, 846 P.2d 1365 (1993). In Riley, the Supreme Court held "[I]n limitations upon fundamental rights are permissible, provided they are imposed sensitively." 121 Wn.2d at 37. The Legislature has provided more appropriate forums than the criminal sentencing process such as family court to best address family matters. State v. Ancira, 107 Wn.App. 650, 655, 27 P.3d 1246 (2001)..

The freedom to enter into and maintain certain intimate or private relationships is a fundamental element of liberty protected by the First Amendment. Board of Dirs. Of Rotary Int'l v. Rotary Club of Duarte, 481 U.S. 537, 545, 107 S.Ct. 1940, 95 L.Ed.2d 474 (1987). The United States Supreme Court has called marriage "one of the vital personal rights essential to the orderly pursuit of happiness by free men." Loving v. Virginia, 388 U.S. 1, 12, 87

S.Ct. 1817, 18 L.Ed.2d 1010 (1967). Moreover, the Court has noted, "Marriage and procreation are fundamental to the very existence and survival of the race." Skinner v. Oklahoma, 316 U.S. 535, 541, 62 S.Ct. 1110, 86 L.Ed. 1655 (1942). In the case at bar, however, Judge Hayden's no-contact order effectively dissolved the Warrens' marriage without a hearing as the court denied Warren any contact with his wife for life.

In addition, the Warrens have a young child, HW, born on May 2, 2002. 11/12/03 RP 103-04. A parent has the fundamental liberty and privacy interest in the care, custody and enjoyment of his child. Troxel v. Granville, 530 U.S. 57, 64-67, 120 S.Ct. 2054, 2060, 147 L.Ed.2d 49 (2000); Dependency of J.B.S., 123 Wn.2d 1, 12, 863 P.2d 1344 (1993); Ancira, 107 Wn.App. at 653-54. The United States Supreme Court recognized a parent's interest in his child is "perhaps the oldest of the fundamental liberty interests recognized by this Court. Troxel, 530 U.S. at 65. The Washington Supreme Court refers to the bond between a parent and child as "more precious than . . . life itself." In re Myricks, 85 Wn.2d 252, 254, 533 P.2d 841 (1985).

Because HW was less than two years old and in the custody of her mother at the time of Warren's sentencing, the no contact

order with Mrs. Warren essentially prevents Warren from having a relationship with his daughter. The courts, however, may not sever the relationship between a parent and child without providing due process and proving the parent is unfit. Santosky v. Kramer, 455 U.S. 745, 102 S.Ct. 1388, 71 L.Ed.2d 599 (1982).

When an individual has committed a crime, his constitutional rights may be limited as authorized by the SRA. Riles, 135 Wn.2d at 347; Ross, 129 Wn.2d at 286-87. But any infringement upon a defendant's constitutional rights must be necessary to accomplish the goals of punishment and protection of the public. Riles, 135 Wn.2d at 350; Ross, 129 Wn.2d at 287. Here, Warren's liberty interests in his marriage and parenting his child are severely impaired by the no-contact order, yet the order is not authorized by the SRA and are unnecessary to protect the public order.

4. The appropriate remedy is to strike the no-contact order.

Where a term included in a sentencing order is found improper, "[t]he simple remedy is to delete the questionable provision from the order." Riles, 135 Wn.2d at 350. Mrs. Warren was not a victim or witness in this case. Thus, the portion of the order prohibiting contact with Mrs. Warren must be stricken.

K. CONCLUSION

For the reasons stated above, Richard Warren requests this Court reverse his convictions and remand his case for a new trial. In the alternative, this Court should vacate the no contact order with his wife.

DATED this 29<sup>th</sup> day of March, 2005.

Respectfully submitted,



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