NO. 31167-8-III

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION THREE

STATE OF WASHINGTON

Respondent,

v.

JOHN HENRY MARKWELL

Appellant.

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

The Honorable William Acey, Judge

OPENING BRIEF OF APPELLANT

JOHN HENRY BROWNE
EMILY M. GAUSE
Attorneys for Appellant

LAW OFFICES OF JOHN HENRY BROWNE, P.S.
200 Delmar Building
108 South Washington Street
Seattle, WA 98104
(206) 388-0777

NO. 31167-8-III

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION THREE

STATE OF WASHINGTON

Respondent,

v.

JOHN HENRY MARKWELL

Appellant.

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

The Honorable William Acey, Judge

OPENING BRIEF OF APPELLANT

JOHN HENRY BROWNE
EMILY M. GAUSE
Attorneys for Appellant

LAW OFFICES OF JOHN HENRY BROWNE, P.S.
200 Delmar Building
108 South Washington Street
Seattle, WA 98104
(206) 388-0777

TABLE OF CONTENTS

Page

TABLE OF CONTENTS – cont'd

Page

TABLE OF AUTHORITIES

Page

WASHINGTON CASES:

TABLE OF AUTHORITIES – cont'd

Page

TABLE OF AUTHORITIES – cont'd

Page

TABLE OF AUTHORITIES – cont'd

Page

FEDERAL CASES :

TABLE OF AUTHORITIES – cont'd

Page

OTHER JURISDICTIONS:

STATUTES, RULES, AND OTHER AUTHORITY:

A. ASSIGNMENTS OF ERROR

1. The trial court erred in entering judgment and sentence for three counts of second degree rape because there was insufficient evidence of the essential element of forcible compulsion for any count.

2. The court erred in admitting the testimony of Robert Jackson and Stephen Lindsley, and the error violated Mr. Markwell's state and federal constitutional rights to a jury determination of the facts of the case.

3. The prosecutor's misconduct throughout the trial denied Mr. Markwell his state and federal rights to a fair trial.

4. The trial court erred in denying the defense motion for mistrial after the surprise testimony by witness Dustin Warren that Mr. Markwell had shot someone at a prior time.

5. The cumulative error in Mr. Markwell's case denied his state and federal constitutional rights to a fair trial.

B. ISSUES PERTAINING TO ASSIGNMENT OF ERROR

1. Was the evidence insufficient to establish the essential forcible compulsion element, under State v. Weisburg, 65 Wn. App. 721, 725-726, 829 P.2d 252 (1992), where there was no express or implied threat to cause bodily injury, but only evidence of the complaining witness's subjective reaction to Mr. Markwell and his conduct?

2. Was it constitutional error to admit the testimony of D.O.C. employee Robert Jackson, where nothing in his testimony was beyond the knowledge of the jurors, it was uncontested that the complaining witness reasonably feared going to prison, and Mr. Jackson's testimony constituted improper profile testimony equating Mr. Markwell with a group of people in prison more likely to commit crimes against people like the complaining witness?

3. Was it constitutional error to admit the testimony of Stephen Lindsley that the complaining witness was vulnerable, credible and a victim because such testimony was improper vouching for the witness and impermissible opinion testimony as to Mr. Markwell's guilt?

4. Did the prosecutor's misconduct in asking leading questions and making speaking objections; in improperly interjecting the rape shield statute into the case; in asking questions which assumed that a rape had been committed; in prompting the complaining witness to testify that force had been used against him; in failing to caution a witness about testimony that had been excluded; in using the expert testimony to support the improper argument that it was the complaining witness's character to be a "victim" and that his failure to disclose was "typical," and otherwise vouching for his credibility; and denigrating Mr. Markwell's character and implying defense

counsel was victimizing the witness deny Mr. Markwell a constitutionally fair trial?

5. Did the surprise testimony by Dustin Warren that Mr. Markwell said he had shot someone in the past and the excluded testimony about alleged drug use deny him a fair trial?

6. Did the cumulative error in this case deny Mr. Markwell a fair trial?

C. STATEMENT OF THE CASE

1. Procedural history

The Garfield County Prosecutor's Office charged John Henry Markwell with three counts of second degree rape, which were alleged to have taken place in the small, 12-inmate-capacity county jail between July 20, 2011, and August 14, 2011. CP 213-215, 218-221; RP 373-375.[1]

A jury convicted Mr. Markwell of all counts after a trial before the Honorable William Acey. CP 115, 156, 157. Judge Acey entered Judgment and Sentence on August 22, 2012, sentencing Mr. Markwell to a term of life without the possibility of parole under the Persistent Offenders Accountability Act. CP 24033. A timely Notice of Appeal followed. CP 4-17.

---

[1] The verbatim report of proceedings is in several volumes, consecutively numbered and cited as RP followed by the page number.

2. Testimony of fact witnesses

With the exception of Dustin Warren, who spent approximately three hours with the other inmates (RP 519, 534), the only persons in the jail during the charging period were Mr. Markwell, Charlie Hopkins and Michael (Mikey) Burke, and Paul Potts.[2] RP 372-373, 418, 423.

Charlie Hopkins testified that in August of 2011, he had unwanted sexual contact with Mr. Markwell on three occasions. RP 383. The state's theory of forcible compulsion to support the second degree rape charges was *not* that Mr. Markwell threatened to harm Mr. Hopkins to force him to engage in sex. RP 418. The state's theory was that Mr. Markwell told Mr. Hopkins, who was going to prison for rape of a child (RP 415), about the things that happen to sex offenders in prison and wrote a letter for Mr. Hopkins to take with him to prison for his protection; and this, together with Mr. Markwell's appearance and demeanor, was an implied threat of bodily injury or death – even though Mr. Hopkins was clear that Mr. Markwell never threatened to take the letter back. RP 389, 394. The only actual threats of violence Mr. Hopkins was able to recall were (1) an incident in which he accidentally put a mop on Mr. Markwell's foot and Mr. Markwell threatened to kick him if he didn't remove the mop, and (2) a threat to harm Mr. Hopkins or his family if Mr. Hopkins ever "snitched."

---

[2] Paul Potts did not testify at trial and there was no substantive testimony about him.

RP 389, 410.

> What is the implied threat? Well, we have heard that there were stories of violence, stories including smashing heads, snitches being beat, that you are going to be hurt in prison without my protection.
>
> You heard previous threats of kicking Charlie's head in because of the mop incident, a threat to break Mikey's [another inmate in the jail] neck. A threat that your family won't be safe [if you are a snitch]. And forced actions like moving into the same cell, or the house mouse that was cleaning the cell.[3]
>
> We have the defendant's appearance. . . .

RP 578-579.

Mr. Markwell's theory was that there was one act of consensual oral sex. His theory was supported by the testimony of Michael Burke that, although Mr. Markwell told stories of fights and life in prison and yelled at Mr. Hopkins on occasion, he heard Mr. Hopkins agree to oral sex. RP 474-477, 481, 492-495, 5012. Mr. Burke described the time this occurred. The three of them were sitting in the day room and Mr.

---

[3] With regard to moving into Mr. Markwell's cell, Mr. Hopkins testified that he moved his stuff into a cell with Mr. Markwell because he didn't "want to start a big commotion." RP 401.

With regard to making him clean, Mr. Hopkins testified that Mr. Markwell "made me clean his cell all the time, and made me clean up after him, clean the table off, and told me that it was my job, since I was the trustee inside the jail." RP 399. If things weren't clean, Mr. Markwell "would start hollering at me." RP 400.

Earlier Mr. Hopkins described the "mop" incident as the one occasion he could recall in which Mr. Markwell had threatened him. RP 389.

Markwell started joking about Mr. Hopkins giving them oral sex; Mr. Hopkins was smiling and seemed to enjoy the attention. RP 494-495. Eventually Mr. Hopkins said, "let's do it" and walked into the cell with Mr. Markwell. RP 495. After the two went into a cell together and returned to the day room, he saw Mr. Hopkins smiling and heard him say that his friend Nick's penis was bigger than Mr. Markwell's. RP 498-499. Mr. Hopkins told him about giving Mr. Markwell oral sex and never once said that he was forced to do so. RP 497-498. Mr. Burke testified that Mr. Hopkins did not seem afraid of Mr. Markwell. RP 499.

Mr. Hopkins' account of this first alleged incident of oral sex was that it occurred in the first of the two cells in what was called the bullpen area of the jail. RP 383-387. According to Mr. Hopkins, when they were in the day room together, Mr. Markwell said he had to "give him oral sex." RP 386. Mr. Hopkins said he said "no," but then he went to his cell and Mr. Markwell followed him and had him give him oral sex there. RP 385. They went into the cell because there were cameras in the day room and the jail staff were able to hear them everywhere in the jail. RP 418-419. Mr. Hopkins testified that after he began the oral sex, Mr. Markwell kept his hand on the back of his head. RP 388.

When asked if Mr. Markwell threatened him before the oral sex, Mr. Hopkins described one incident in the past in which he accidentally

put his mop on Mr. Markwell's foot and Mr. Markwell told him to get the mop off of him or he would kick his head in. RP 389. Mr. Hopkins could not remember how long before the sexual encounter this incident took place, but denied that there were any other threats before the oral sex. RP 389. On cross examination, Mr. Hopkins agreed that the mop incident had nothing to do with sex. RP 418.

Mr. Hopkins testified that he was afraid of prison and that Mr. Markwell had written him what was called "a letter from home" that would protect him. RP 390-391, 429. The letter was written before the sex. RP 424. The letter said that he, Charlie Hopkins, was an "awesome homosexual" and that he deserved "a fair chance." RP 391. The letter also said (untruthfully) that Mr. Hopkins's mother was his "woman" and so Hopkins was part of his family. The letter concluded "Handle with care. Handle fair" and that he "deserves to be safe and spoiled." RP 391. It was signed with Mr. Markwell's prison name. RP 391.

Mr. Hopkins testified that Mr. Markwell told him he should make the letter true. RP 393. He admitted, however, that Mr. Markwell never threatened to take the letter away. RP 394. He said that Mr. Markwell also made him clean his room and said that, because Mr. Hopkins was a jail trustee, it was his job to keep the cell clean. RP 399. Mr. Markwell, he said, implied he would get hurt if he didn't do those chores. RP 400.

The second incident allegedly happened in what had been Mr. Burke's cell. RP 400. Mr. Hopkins said he gave in to Mr. Markwell's requests for him to move to this cell because he did not was to "start any big commotion or anything like that." RP 401. In the second cell for the second alleged incident, Mr. Markwell began having anal sex, but stopped when Mr. Hopkins complained that it hurt. RP 403-403. Mr. Hopkins said they switched to oral sex at that point. RP 403. He said that he tried to pull his pants back up but wasn't able to. RP 409.

Mr. Hopkins described what he claimed was the third incident inside the bullpen where Mr. Markwell ordered him to perform oral sex. RP 403. Mr. Hopkins said that Mr. Markwell would ask him for sex and ask him again and then he would think about the letter Mr. Markwell wrote and that "okay, if I do this, he will protect me inside the prison system." RP 404-405. Although Mr. Hopkins testified that he was afraid that Mr. Markwell would take the letter back, he was clear that Mr. Markwell never threatened to do that. RP 404-405.

On cross examination, Mr. Hopkins agreed that he had a boyfriend outside of prison named Nick. RP 442. He agreed that Mr. Burke was present before and shortly after the first incident and there was a discussion about who had a bigger penis, Mr. Markwell or Nick. RP 449. He agreed that he said that there was no way Mr. Markwell's was bigger.

RP 449. Mr. Hopkins agreed that Mr. Markwell never said that he would write a letter in exchange for sex. RP 449.

3. Testimony admitted over defense objection

Over defense objection, the state was permitted to present the evidence of three witnesses. First, the defense objected to the relevance of the testimony about prison culture by Robert Jackson, a Department of Corrections investigator of criminal activity in prison. RP 39, 167, 233. The defense objected that his testimony was not helpful to the jury, and invited the jurors to infer Mr. Markwell was a gang member and fit a profile of prisoners who assaulted other prisoners. RP 39-40. The defense argued that Mr. Jackson's testimony would be overly impressive to the jurors (RP 38), and not relevant because there would not be testimony of threats in prison. RP 228. The testimony was admitted as a "vocabulary lesson" and as relevant to whether "potentially implied threats" were "objectively reasonable." RP 226-227.

Mr. Jackson testified that he investigated crimes like assault, drug introduction and attempted murder, and had in the past worked with a special focus on security threats from groups and gangs. RP 233. He described "the tunnel" at the receiving units in Shelton Corrections Center, which used to be a dangerous place for new prisoners (RP 237), and defined terms like "bitch," "punk, " "house mouse," "girlfriend," "wife,"

and "shank." RP 243-244, 247. He testified about one inmate feeling another inmate was his property, and about letters of protection. RP 246-248. He testified that inmates suffered assaults, rapes, beatings and being "shanked" in the DOC. RP 251-252. He defined "protective custody." RP 252. He testified that sex offenders "have difficulty walking mainline, staying out in general population. Their safety is at risk." [4] RP 254-255.

Again, over defense objection, the state was permitted to introduce the testimony of Steven Lindsley, mental health provider who performed a presentence psychosexual evaluation of Mr. Hopkins. RP 36, 270-271. Defense counsel objected that this testimony was speculative, improper opinion evidence as to guilt and unfairly prejudicial; counsel noted that Mr. Lindsley was not an expert in predicting future harm. RP 36-38.

Mr. Lindsley testified that Mr. Hopkins "appears to be functioning somewhere in the borderline range of intelligence," RP 271, and functioning emotionally at a level "much lower" than a typical 21-year-old. RP 274. He was permitted to give his opinion that Mr. Hopkins had not had "a lot of control over what happened to him." RP 274. He described Mr. Hopkins as seeing himself as a victim and would be "vulnerable" because he would see the world as dangerous, and would

---

[4] Mr. Hopkins testified that Mr. Markwell told him about protective custody, that he might get shanked and beaten and have his commissary purchases taken in prison because he was a sex offender; and talked about the tunnel at Shelton, where all new prisoners go initially. RP 406-407.

look for ways to alleviate his fear, and would not be able to challenge a dominant person. RP 275-277. Mr. Lindsley was permitted to testify that these deficiencies would "be very obvious" to a person sharing a living space with him. RP 278. Mr. Lindsley was permitted to testify that Mr. Hopkins would be vulnerable to manipulation through fear and a perception of a threat or danger. RP 276-277.

On cross-examination, Mr. Lindsley agreed that Mr. Hopkins was impulsive and tended to dramatize situations. RP 284. Mr. Hopkins did not report any sexual assaults to him or sexual encounters with men, even though the evaluation took place after the dates of the alleged crimes. RP 286, 296-297. Mr. Lindsley was also permitted to testify that victims don't always disclose right away, particularly male victims. RP 301.

Third, the defense objected to the testimony of Dustin Warren who was in the jail for a weekend and "near" Mr. Markwell for three hours. RP 312. The defense objected on hearsay grounds and on grounds that Mr. Warren's testimony would also be impermissible character evidence, cumulative and more prejudicial than probative. RP 312-315. Mr. Warren's testimony was admitted subject to the limitation that he would not be permitted to testify about what Mr. Hopkins or Mr. Burke said. RP 313-314.

Prior to trial the court ruled that Mr. Hopkins could testify about

threats he heard Mr. Markwell make against him or anyone else, but that "[a]s 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 322-325. The court found that such evidence "is highly prejudicial, and outweighs its probative value." RP 326.

Dustin Warren testified that he was in jail briefly in August of 2011 with Mr. Markwell and Mr. Hopkins. RP 519. He was permitted to testify that his impression of Mr. Markwell was that he was "kind of big and intimidating." RP 520. According to Mr. Warren, Mr. Markwell talked a lot of the time and Mr. Hopkins "kind of sat back and was quiet," but that he did not see Mr. Markwell giving orders to anyone. RP 520. When asked what Mr. Markwell talked about, Mr. Warren responded "stories of previous drug use." RP 521-522. A defense objection was sustained and the jury instructed to disregard the testimony. RP 522. The court asked the prosecutor, at that point, to take the witnesses out to the hallway and enlighten him or refresh his memory about the court's prior ruling. RP 522. Immediately when the direct examination resumed, the prosecutor delved again into specifics acts of violence:

Q. Defendant told a number of stories, correct?

A. Yes.

Q. And what was included in those stories?

A. Violence.

Q. What do you mean?

A. Talking about one story where he shot a guy in the foot.

RP 522-523. The defense objection was again sustained and the answer stricken and the jury told to disregard the answer. RP 523, 528. The jury was excused and defense counsel moved for a mistrial, and noted counsel's belief that the prosecutor was intentionally trying to provoke a mistrial. RP 524-526. Defense counsel noted that under ER 404(b), the state was obligated to give notice of prior bad acts and that this testimony was totally unexpected. RP 526-527. The court denied the motion for mistrial, but noted that the state should have warned the witness about the drug use because it had been mentioned in the report of the police officer. RP 528-529. The court admonished Mr. Warren that "other bad acts that the defendant might have bragged about, those are off-limits." RP 529.

4. Speaking objections and leading questions

Defense counsel objected on relevance grounds to testimony from DOC investigator Jackson, the first witness at trial, about the tunnel at Shelton, and the court asked for an offer of proof. RP 237. The prosecutor said in response that the state expected there to be testimony about the tunnel and Mr. Jackson would put that in context. RP 237. Defense counsel then objected to talking objections. RP 237.

Nevertheless, when counsel cross-examined Mr. Lindsley about why he did not recommend a SOSA for Mr. Hopkins, the prosecutor made a long speaking objection:

> We have a lot of hearsay here. The State's questioning of Mr. Lindsley was very specific to intellectual functioning and emotional development. I think we have gone beyond the scope greatly and ultimately, even if you do deem the door is open, I think if you even deem it relevant, is completely prejudicial to the victim in this case. . . and unduly inflammatory."

RP 282.

As cross-examination of Mr. Lindsley continued, the prosecutor made another speaking objection, "I think if nothing else, under the rape shield law. I mean it does not matter whether or not the victim had had previous . . ." RP 286. Counsel objected. RP 286.

Further, after being admonished to refer to an "alleged rape" instead of rape, the prosecutor continued immediately to ask the same question about interviewing a witness about the rape. RP 378-379.

Defense counsel also objected to the prosecutor's leading questions and the court repeatedly sustained these objections. For example, the prosecutor asked Mr. Jackson if he was stating that usually there is a dominant individual and a submissive individual in prison homosexual relationships – which clearly suggested an answer. RP 245.

When examining Mr. Hopkins, the prosecutor asked and was

denied the right to ask leading questions – such as "You said earlier that he forced oral sex; how did he force oral sex?" RP 388. Even though the objection was sustained to that question, the prosecutor followed up, "How did Mr. Markwell force you to give him a blowjob?" RP 388-389. This leading question elicited the testimony that after he began the oral sex, Mr. Markwell put his hand on the back of his head. RP 388.

An objection was sustained to the prosecutor's asking how far before the oral sex did Mr. Markwell "make the threat about the mop?" RP 238. An objection was sustained when the prosecutor asked "Did you guys talk about this [the letter] just prior to the first oral sex incident?" RP 392-394.

While the jury was out, the court instructed the prosecutor to "stick to who, what, when, why or how. That will almost always avoid a leading question objection." RP 397. Nevertheless, the prosecution drew objections, which were sustained, with questions like, "What did Mr. Markwell say to you prior to the blowjob?" RP 404. "Did the defendant tell you that you had to do everything he told you?" RP 468-469.

5. The prosecutor's closing argument

The prosecutor asked the jury to consider whether defense counsel used the term "child rapist" to get them to say "who cares" or "it does not matter what happened to Charlie because he is a child molester." RP 583.

> How many times did you hear terms used by [defense] counsel and/or questions about the victim being a child rapist? Why was that paraded around so much. Was it to point you into the direction of the jury instruction that says, "You get to consider evidence that a witness has been convicted of a crime, only in deciding what weight or credibility to give that witness? . . . Or was it to elicit emotion from you? Was it to get you to say, "Who cares? He is a child rapist? Was it to get you to say, "It should not matter what happened to Charlie because he is a child molester?"

RP 583.

The prosecutor referred to Mr. Lindsley's testimony as establishing "that this person [Charlie] would try to absent himself from threats" and "if he were locked in a cage, he would give in and get it over with." RP 585.

The prosecutor then continued his attack on defense counsel and continued building his argument that Mr. Hopkins was vulnerable because Mr. Lindsley said he was. He argued that counsel was "dominant appearing" and an "aggressive type."

> When Charlie was questioned by a dominant appearing, maybe aggressive type defense attorney, didn't it seem like every answer was yes?

RP 585. He continued:

> Mr. Lindsley also went on to talk about Charlie not disclosing sex with another man. . . . male victims typically don't disclose rape right away, and because it is threatening to a man to have to admit that he has been sexually abused.

RP 585.

Additionally, defense counsel objected to the prosecutor's argument that reasonable doubt does not mean 100% certainty or beyond all doubt, which implied that a defendant is not entitled to the benefit of the doubt." RP 587. The court sustained the objection and instructed the prosecutor to remove the last bullet point on his PowerPoint presentation slide, which stated, "If you believe in your gut that the defendant committed the crime, you are satisfied beyond a reasonable doubt. RP 587-588; CP 114-146 (Appendix to Motion for Arrest of Judgment).

The prosecutor's PowerPoint presentation also included six slides of an American flag. In the first slide there were only a few stripes and more of the flag was added in each slide until the entire flag appeared. CP 114-146.

6. The jury questions

During deliberations, the jury sent out two questions. First, the jurors asked: "What is the difference between 1st and 2nd degree rape." RP 616; CP 159. The court responded, "The defendant is not charged with first degree rape, only second degree rape. Please refer to the court's instructions on the law." RP 621; CP 159. Second, the jurors asked

> Instruction number 10
>
> Last sentence: There also must be a "threat" - a communication of an intent to cause bodily injury.

Is there a timetable of the "threat" happening the same time as the forcible compulsion?

RP 622; CP 160. The court indicated it could not answer the questions and referred the jurors back to the instructions. RP 622; CP 160.

7. Post-trial motions

The trial court denied Mr. Markwell's motions for arrest of judgment and new trial. RP 640; CP 34, 35.

D. ARGUMENT

1. THERE WAS INSUFFICIENT EVIDENCE TO ESTABLISH THE ESSENTIAL ELEMENT OF FORCIBLE COMPULSION.

Mr. Markwell's three convictions for second degree rape should be reversed and dismissed because there was insufficient evidence to prove the essential element of forcible compulsion.

As a matter of long-standing state and federal constitutional law, a conviction cannot be affirmed unless a rational trier of fact taking the evidence in the light most favorable to the state could find, beyond a reasonable doubt, the facts needed to support the enhancement. Jackson v. Virginia, 443 U.S. 307, 61 L. Ed. 2d 560, 99 S. Ct. 2781 (1979); State v. Green, 94 Wn.2d 216, 220-221, 616 P.2d 628 (1980).

Mr. Markwell was accused of committing second degree rape by "forcible compulsion." RCW 9A.44.050(1)(a). "Forcible compulsion,"

where physical force is alleged, requires that the force exerted be (1) directed at overcoming the victim's resistance, and (2) more than that which is normally required to achieve penetration. State v. Wright, 152 Wn. App. 64, 214 P.3d 968 (2009), review denied, 168 Wn.2d 1017 (2009).

"Forcible compulsion" is defined by statute as meaning such "physical force which overcomes resistance," or "a threat, express or implied, that places a person in fear of death or physical injury to herself or himself or another person, or in fear that she or he or another person will be kidnapped." RCW 9A.44.0101(6). In Mr. Markwell's case there was clearly no evidence or allegations of kidnapping and no express threat; the issue was whether there was an implied threat of force.

A finding of forcible compulsion by implied threat of physical injury cannot be based solely on the victim's subjective reaction to a particular conduct. State v. Weisberg, 65 Wn. App. 721, 725, 829 P.2d 252 (1992). There must also be a threat, a communication of intention to cause bodily injury. Id.

In Weisburg, the Court reversed a conviction for second degree rape in which Mr. Weisberg, a clothing manufacturer's representative, invited a neighbor, P.C., over to try on clothing that he offered to her for a birthday present. After she took off her clothing, Weisberg suggested she

remove her underwear. When she did not, he removed them. P.C. testified that she did not try to stop Weisberg because she was afraid that he might try to hurt her. When she said she did not want to lie down on the bed, Weisberg insisted that she "go ahead and lay on the bed anyway." Id. at 723. When told to stop the ensuing intercourse, Weisberg did stop. The issue on appeal was whether this conduct constituted an implied threat, and the Court of Appeals held that it did not.

The Weisberg court held that "a finding of forcible compulsion cannot be based solely on the victim's subjective reaction to particular conduct." Id. at 725. There must also be a threat – "a communication of an intention to cause bodily injury." Id. Further, "the implied threat must cause the victim's fear." Id. at 726. In reversing the conviction, the court focused on the fact that Weisberg ceased physical contact when P.C. complained that intercourse hurt her, that they were not in an isolated location without an avenue to escape or others in the vicinity, and that there was no conduct suggesting that Weisberg would injure P.C. if she did not comply with his requests. Id. at 727.

In Mr. Markwell's case, as in Weisberg, there was no evidence of physical force sufficient to constitute forcible compulsion. In the first alleged incident, Mr. Hopkins said in court that he left the day room area which had cameras where he could be seen and heard by the jail guards

and voluntarily went to his cell, where there was no camera, knowing that Mr. Markwell wanted to have sex with him. RP 419. He did not describe any kind of physical force being applied to force him to begin the oral sex. RP 385-589. There was no evidence that he made any type of verbal protest, which would have been heard by the guards. At most, Mr. Hopkins testified—in response to a leading question by the prosecutor – that Mr. Markwell put his hand on the back of his head. RP 388. As in Wright, such minimal pressure under the circumstances where it would have been easy to call on the protection of guards and others and where the oral intercourse was begun without any force, could not be said to be more than that which is normally required to achieve and maintain penetration.

Similarly, in the second alleged incident, the fact that Mr. Hopkins tried unsuccessfully to pull his pants back up was not sufficient physical force under Wright and Weisberg. RP 409. There was no evidence that more force was used than that which is normally required for penetration, and Mr. Markwell stopped the anal intercourse when Mr. Hopkins complained. RP 403. Again, Mr. Hopkins made no effort to call a guard. He admitted, in fact, that he moved to the second cell in the bullpen in response to Mr. Markwell's requests that he do so because he didn't want "to start a big commotion." RP 401. There was no evidence that force

would have been used if Mr. Hopkins had refused.

With regard to the third alleged incident, there was clearly no evidence of any kind of physical force. RP 403-405.

Further, there was no evidence of a threat, implied or express, of physical injury or death to Mr. Hopkins to force him to engage in sexual intercourse. Mr. Markwell did not threaten to hurt Mr. Hopkins in prison or threaten to have anyone else hurt him in prison. Mr. Markwell merely described the shameful fact, confirmed by Mr. Jackson of the Department of Corrections, that Mr. Hopkins might be preyed upon in prison because of his physical stature and his conviction for rape of a child – particularly if he were sent to the penitentiary at Walla Walla, Washington. RP 237, 243-244, 247-248. Mr. Hopkins explicitly testified that Mr. Markwell never threatened to take the letter of protection back. RP 404-405. At most, the evidence established that Mr. Markwell told stories to frighten Mr. Hopkins and gave him the "letter from home" to gain his gratitude; this was not a threat. And, as in Weisberg, Mr. Hopkins's subjective belief that Mr. Markwell might take back the letter was insufficient to establish forcible compulsion.

Further, the threat over the mop had nothing to do with forcible compulsion for the second degree rape charges. This threat established, as much as anything, that Mr. Markwell was perfectly capable of making a

threat if he meant to. Although the prosecutor worked hard to conjure up a picture of Mr. Markwell as a threatening person, the fact remains that he never said he would beat up Mr. Hopkins, or harm his family or have anyone in prison harm him if he did not have sexual intercourse with him.

The prosecutor argued to the jury that the implied threat which constituted forcible compulsion was made up of the stories of being hurt in prison without Mr. Markwell's protection; the mop incident; Mr. Markwell's demanding that Mr. Hopkins clean the cell and table, and the threat of harm if Mr. Hopkins became a snitch. None of these constituted a threat to harm Mr. Hopkins if he did not engage in sexual activity. Mr. Hopkins was in danger, if Mr. Jackson can be believed, of being assaulted in prison for reasons having nothing to do with Mr. Markwell. Even if Mr. Hopkins believed that Mr. Markwell might take back the "letter from home" if he did not have sex with him, that was only his subjective belief; Mr. Markwell never threatened to do so. None of the other interactions such as the "mop" incident had anything to do with forcing Mr. Hopkins to have sex. Under these circumstances, there was simply insufficient evidence, even in the light most favorable to the state, to support the convictions. Mr. Markwell may have tried to give Mr. Hopkins a reason

to be grateful to him, but this is not forcible compulsion.[5] Mr. Markwell's convictions should be reversed and dismissed.

2. THE TESTIMONY OF MR. JACKSON AND MR. LINDSLEY WAS CONSTIUTIONAL ERROR--AN IMPROPER COMMENT ON THE CREDIBILITY OF ANOTHER WITNESS AND MR. MARKWELL'S GUILT.

Over defense objection, the state was permitted to introduce the testimony of Robert Jackson and Stephen Lindsley. This constituted an abuse of discretion and an error of constitutional dimensions.

The state's rationale, adopted by the court in admitting the evidence, was that Robert Jackson's testimony was admissible as a "vocabulary lesson" and as relevant to whether "potentially implied threats" were "objectively reasonable."[6] RP 49, 226-227. Clearly neither of these reasons justified admission of his testimony. First of all, nothing that Mr. Jackson testified about was beyond the understanding and knowledge of the jurors, nor was it disputed that Mr. Hopkins had a legitimate fear of going to prison or that his being a convicted sex offender would potentially make matters worse for him in prison. The vocabulary,

---

[5] The jury inquiry about the timing of the threat suggests that the jurors believed the threat in the "mop" incident could have constituted the implied threat for the rape charge. CP 160. The prosecutor invited this conclusion. RP 578-579. The mop incident, however, was entirely separate from any alleged sexual conduct and was relevant, if at all, only to Mr. Hopkins's subjective beliefs. It simply did not involve a threat to cause injury for compel sexual intercourse.

[6] This ruling was made by a visiting judge. RP 49.

even if new in some particular, was not obscure in context. Moreover, Mr. Markwell did not threaten to send Mr. Hopkins to prison or to hurt him or have him hurt in prison if he did not have sex with him. Most importantly, it was unknown whether Mr. Hopkins would be assigned to the state penitentiary at Walla Walla, or some other less hostile institution such as Twin Rivers Correctional Center.

Under ER 702, Mr. Jackson's specialized knowledge was not necessary to assist the jurors in understanding or determining a fact in issue; there was nothing in Charlie Hopkins' or Michael Burke's testimony beyond the understanding of the jurors, nor was the question of whether Mr. Hopkins reasonably feared going to prison at issue.

Moreover, Mr. Jackson's testimony should have been excluded under ER 403 because any probative value of his testimony was greatly outweighed by its unfairly prejudicial impact. His testimony tended to equate Mr. Markwell, who had been in prison in the past, with security threats and those prisoners guilty of assaults, introduction of drugs and even murder – matters which Mr. Jackson testified were the matters in which he had expertise and experience. 1RP 24-25. As such, the testimony was improper "profile evidence," which identified a group of people more likely to commit a crime; it was inadmissible because it was used to imply that Mr. Markwell committed the charged crime because he

shared the characteristics of known offenders. State v. Braham, 67 Wn. App. 930. 936-37, 841 P.2d 785 (1992).

Further, Mr. Jackson's testimony tended to substantiate the state's groundless and illogical argument that telling stories of prison violence constituted a threat to do bodily harm to Mr. Hopkins.

Mr. Lindsley's testimony was not only more unfairly prejudicial than probative under ER 403, it was excludable as improper vouching and impermissible opinion testimony as to guilt. The sole purpose of his testimony was to give the jurors Mr. Lindsley's expert opinion that Mr. Hopkins was vulnerable, credible and a victim; and, by inference, that Mr. Markwell was guilty of victimizing him.

It is well-settled law that a witness may not express an opinion on another witness's credibility nor give an opinion as to the guilt or innocence of the accused. ER 608(a); State v. Sanders, 66 Wn. App. 380, 387, 832 P.2d 1326 (1992), State v. Black, 109 Wn.2d 336, 348, 745 P.2d 12 (1987); State v. Sutherby, 144 Wn.2d 755, 759, 30 P.3d 1278 (2001); State v. Jones, 117 Wn.2d 89, 91, 68 P.3d 1153 (2003), State v. O'Neal, 126 Wn. App. 395, 409, 109 P.3d 429 (2005), aff'd, 159 Wn.2d 505 (2007). Such testimony invades the province of the jury and denies the accused his or her right to a jury trial. State v. Thach, 126 Wn. App. 297, 312, 106 P.3d 752 (2005); Sutherby. 144 Wn.2d at 617. This can

constitute a manifest constitutional error which can be raised for the first time on appeal even if not, as here, objected to at trial. Thach, at 312.

Further, Mr. Lindsley's testimony that many victims delay disclosure, particularly a male victim of a sexual attack, was not shown to be based on any reasonable scientific theory. It was akin to the testimony in State v. Black, supra, and cases cited in Black, which was held to be reversible error. In Black, the error was in admitting testimony about rape trauma syndrome. In State v. Maule, 35 Wn. App. 287, 295-96, 667 P.2d 96 (1983), the error was in admitting testimony about the characteristics of sexually abused children; and in State v. Stewart, 34 Wn. App. 221, 222-224, 660 P.2d 278 (1983), the error was in admitting testimony about the propensity of babysitting boyfriends to inflict child abuse.

The testimony of Mr. Jackson and Mr. Lindsley should have been excluded. There was no proper purpose for which it was admissible. It was overwhelmingly and unfairly prejudicial. Mr. Lindsley painted a picture of Charlie Hopkins, even though he had apparently victimized his younger sister over some period of time, as a passive person who was vulnerable and a victim. Mr. Jackson's testimony tended to suggest that Mr. Hopkins could be expected to be victimized by persons like Mr. Markwell.

Their testimony not only constituted improper testimony about the

credibility of another witness, it impermissibly implied that Mr. Markwell was guilty as charged. As constitutional error, the error in admitting the testimony is not harmless unless shown by the state to be harmless beyond a reasonable doubt. Chapman v. California, 386 U.S. 18, 21-24, 87 S. Ct, 824, 17 L. Ed. 2d 705 (1967); and State v. Caldwell, 94 Wn.2d 614, 618, 618 P.2d 508 (1980). These witnesses constituted almost half of the state's case and gave weight to Mr. Hopkins's testimony, which otherwise would have stood alone against the first-hand account by Mr. Burke which contradicted it.

For these reasons, Mr. Markwell's convictions should be reversed and remanded for retrial with this testimony excluded.

3. THE PROSECUTOR'S MISCONDUCT DENIED MR. MARKWELL A FAIR TRIAL.

The prosecutor in this case, in an effort to buttress an insufficient case, went too far in trying to model and comment on the evidence rather than present it to the jury from the witnesses who had the information relevant to the charges. This was contrary to the prosecutor's duty as not to seek "'conviction through the aid of passion, sympathy or resentment.'" State v. Case, 49 Wn.2d 66, 298 P.2d 500 (1956) (quoting People v. Fielding, 158 N.Y. 542, 547, 53 N.E. 497 (1899)); see also, State v. Reed, 102 Wn.2d 140, 146-47, 684 P.2d 699 (1984).

When he or she fails to act in the interest of justice, a prosecutor commits misconduct. This denies the accused a fair trial. State v. Davenport, 100 Wn.2d 757, 762, 675 P.2d 1213 (1984); Berger v. United States, 295 U.S. 78, 88, 79 L. Ed. 2d 1314, 55 S. Ct. 629 (1935) (the remarks of the prosecutor are reversible error if they impermissibly prejudice the defendant).

Where there is a "substantial likelihood" that a prosecutor's misconduct affected the jury's verdict, the defendant is deprived of the fair trial he is guaranteed by the Fourteenth Amendment. See State v. Belgarde, 110 Wn.2d 504, 508, 755 P.2d 174 (1988). Moreover, multiple incidents of a prosecutor's misconduct that, when combined, materially affect the verdict, deny the accused a fair trial and require a new trial. Case, supra, at 73-74; State v. Henderson, 100 Wn. App. 794, 805, 998 P.2d 907 (2000).

Here, the prosecutor's misconduct was pervasive and nowhere more evident than in the persistent refusal to comply with the rulings of the trial court. Continuing to ask the same question after an objection is sustained is misconduct. State v. Alexander, 64 Wn. App. 147, 154, 822 P.2d 1250 (1992). In this case, in spite of objections from defense counsel and direction from the court, the prosecutor continued to ask leading questions and make speaking objections. The prosecutor used speaking objections to convey his opinion that defense counsel's cross examination of Mr. Lindsley

was prejudicial to the "victim in this case . . . . and unduly inflammatory." RP 282. He interjected the rape shield statute into the case, and continued to ask questions which assumed that a rape had been proven, rather than a rape merely alleged. RP 286, 378-379. As set forth in 5 Karl B. Tegland. Washington Practice Manual, Evidence Law and Practice, 2012 update, at § 103.8, speaking objections may be used to intimidate or influence a witness's answer and "most trial judges believe speaking objections should be used sparingly, if at all." Speaking objections, while not subject to a specific rule of evidence, are within each trial judge's discretion to determine the propriety of. Id. Here, in spite of defense counsel's early statement objecting to speaking objections and the court's willingness to hear argument outside the presence of the jury rather than in front of the jury, the prosecutor continued to make speaking objections. RP 237-238, 282, 286.

When the court admonished the prosecutor to use "alleged rape," the prosecutor immediately ignored the admonishment. RP 378-379.

The prosecutor also used leading questions, even after being directed not to, to prompt Mr. Hopkins to testify that force was used against him. RP 387-388. He used leading questions to convey to the jury a connection between the "threat about the mop" and oral sex and the letter and oral sex, as well as to lead Mr. Hopkins to say that Mr. Markwell directed him to do whatever he told him to do. RP 389-390, 467. As these questions

demonstrate, a leading question is one that suggests the desired answer. State v. Swan, 114 Wn.2d 613, 790 P.2d 610 (1990) (as clarified on denial of reconsideration (June 22, 1990)). ER 611(c) restricts the use of such leading questions in ordinary circumstance.

Similarly, the prosecutor ignored the court's rulings on motions in limine and failed to caution Mr. Warren not to testify about drug use or other bad acts. RP 324-325. ("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.") Even after being specifically directed to talk to Mr. Warren in the hall about limits on his testimony, the prosecutor led him Mr. Warren to testify that Mr. Markwell talked about violence and shooting someone. RP 522-523.

Then, in closing argument, the prosecutor relied on the testimony of Mr. Lindsley to support the improper argument that it was Mr. Hopkins's character to be a victim and that it was "typical" that he would not disclose abuse right away.[7] RP 585. This furthered the prosecutor's improper vouching for Mr. Hopkins's credibility and denigrating Mr. Markwell's. State v. Reed, 102 Wn.2d 140, 145, 684 P.2d 699 (1984) (improper for a prosecutor to vouch for the credibility of a prosecution witness); RPC 3.4(f).

---

[7] The jury inquiries reflect the jurors' confusion from the prosecutor's closing that the threat arising from the "mop" incident could constitute "forcible compulsion." RP 578-579 (arguing that this incident was an implied threat); CP 159-160. The jury inquiries also possibly reflected the jurors' belief that Mr. Markwell was guilty of some lesser degree of rape.

By depicting defense counsel as being "dominant" and "aggressive," the prosecutor linked counsel to Mr. Markwell and implied that defense counsel was also victimizing Mr. Hopkins. RP 585. This not only implied the prosecutor's opinion that Mr. Markwell was guilty, it asked the jury to infer guilt from Mr. Markwell's exercise of his right to counsel.

A prosecutor may not launch unfounded attacks impugning the character of defense counsel and imply that the defense case is improper. United States v. Sanchez, 176 F.3d 1214, 12241225 (9th Cir. 1999). To do so violates the defendant's Sixth and Fourteenth Amendment rights to the effective assistance of counsel. See Bruno v. Rushen, 721 F.2d 1193, 1195 (9th Cir. 1983). A prosecutor's unfounded attempts to undermine the defendant's case by denigrating defense counsel insidiously interferes with counsel's duty to provide effective assistance of counsel, and to investigate and interview witnesses, and denies the defendant his Sixth Amendment right to counsel and his due process right to a fair trial. State v. Jury, 19 Wn. App. 256, 263-266, 576 P.2d 1302, rev. denied 90 Wn.2d 1006 (1978).

Moreover, asking the jury to infer guilt from Mr. Markwell's exercise of his state and federal constitutional rights to effective counsel and confrontation of witnesses is constitutional error because it invites the jury to draw an inference of guilt from the exercise of a constitutional right. See e.g., State v. Rupe, 101 Wn.2d 664, 795, 683 P.2d 571 (1984) (right to bear

arms); Griffin v. California, 380 U.S. 609, 614, 85 S. Ct. 1229, 14 L. Ed.2d 106 (1965) (failure to testify); State v. Belgarde, supra. (right to remain silent); State v. Charlton, 90 Wn.2d 657, 660, 585 P.2d 142 (1978) (marital privilege); State v. Nelson, 72 Wn.2d 269, 285, 432 P.2d 857 (1969) (privilege against self-incrimination).

The prosecutor also misstated the law on reasonable doubt and burden of proof in closing argument by stating that the defendant in a criminal case is not entitled to the benefit of the doubt. 3RP 23-24. As the Washington Supreme Court held in State v. Warren, 165 Wn.2d 17, 24-25, 195 P.3d 940 (2008), cert. denied, 129 S. Ct. 2007 (2009), it is "clearly improper" to argue that reasonable doubt does not mean that jurors have to give the defendant the benefit of the doubt.

> It is an unassailable principle that the burden is on the State to prove every element and that the defendant is entitled to the benefit of any reasonable doubt. It is error for the State to suggest otherwise.

Id. The Warren court held that this improper statement of the law "undermined the presumption of innocence." Id. (citing State v. Bennett, 161 Wn.2d 303, 315-316, 165 P.3d 1241 (2007); In re Winship, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970). Given the weakness of the state's case and the prosecutor's reliance on improper expert testimony and denigration of defense counsel, this misstatement of the law was so

unfairly prejudicial that even the judge's instruction could not cure the error.

Finally, the prosecutor's waving of the flag in its PowerPoint presentation improperly invited an emotional verdict based on "passion, sympathy," and "resentment." State v. Case, supra. It improperly conveyed the message to the jurors that voting for the prosecution was their patriotic duty.

In sum, the prosecutor's misconduct pervaded the entire trial and, taken together, should require the reversal of Mr. Markwell's convictions and a new trial.

4. THE SURPRISE TESTIMONY BY DUSTIN WARREN REQUIRES A NEW TRIAL BECAUSE NOTHING SHORT OF A NEW TRIAL CAN CURE THE UNFAIR PREJUDICE OF THE TESTIMONY.

In this case, the trial court ruled prior to trial that prior bad acts would not be admissible through witnesses other than Mr. Hopkins because such evidence "is highly prejudicial and outweighs its probative value."[8] RP 325-326. Nevertheless, the prosecutor failed to adequately warn Mr. Warren either before he testified or during his testimony. As a result, the jurors heard that Mr. Markwell was involved in drugs and had shot someone. RP 522-523. As a result, defense counsel moved for a mistrial, noting the

[8] In spite of this clear ruling, the prosecutor argued that "my understanding of the Court's pretrial rulings were that stories of violence and stories that these individuals heard in the jail cell were admitted to show the common scheme or plan of intimidation – to show the – basically, we went through this whole 404(b) thing." 2RP 193. The record does not show any rulings based on "common scheme or plan of intimidation."

complete surprise at the testimony and the failure of the state to give notice of the introduction of prior bad acts, as required by ER 404(b).

RP 522-529. The court erred in denying this motion.

Whether an error is prejudicial enough to warrant a mistrial depends on the seriousness of the irregularity, whether it involved cumulative evidence and whether the trial court took steps to avoid prejudice. State v. Greiff, 141 Wn.2d 910, 921, 10 P.3d 390 (2000).

Here, the irregularity was serious. In fact, failure to comply with a discovery rule can constitute a violation of an accused person's right to due process. State v. Bartholomew, 98 Wn.2d 173, 205, 654 P.2d 1170 (1982), rev'd on other grounds, 463 U.S. 1203, 103 S. Ct. 3530, 77 L. Ed. 2d 1383 (1983). And the jury's hearing that a person accused of a violent crime had committed a prior act of violence is the kind of irregularity that has been deemed too prejudicial to be cured by an instruction by the court. State v. Escalona, 49 Wn. App. 251, 255, 74 P.2d 190 (19870) (surprise testimony that the defendant had stabbed someone on a prior occasion); State v. Hopson, 113 Wn.2d 273, 284, 778 P.3d 1014 (1989); State v. Mack, 80 Wn.2d 19, 490 P.2d 1303 (1971); State v. Miles, 73 Wn.2d 67, 71, 436 P.2d 198 (1968). A curative instruction is insufficient when irregular evidence is inherently prejudicial and likely to impress itself on the minds of the jurors. Escalona, 49 Wn. App. at 255.

Thus, even though the court gave a curative instruction, as in Escalona, the evidence was too inherently prejudicial and likely to impress itself on the minds of the jurors to be cured by an instruction. This is particularly true where, as here, the evidence was not cumulative of other evidence. Although the jurors knew that Mr. Markwell had been in prison, many people are in prison for property and non-violent crimes, and there was no other evidence either of drug use or shooting someone. Given the seriousness of the error and the fact that the surprise evidence was not cumulative and could not be cured by instruction, the mistrial should have been granted. Since the mistrial should have been granted and was not, a new trial should be granted.

5. THE CUMULATIVE ERROR IN THIS CASE REQUIRES A NEW TRIAL.

In this case, the errors individually and cumulatively require a new trial. The combined errors unfairly prejudiced Mr. Markwell by having expert testimony improperly equate Mr. Markwell with criminal and predatory conduct in prison and tell jurors that Mr. Hopkins was a victim and explained his failure to report the alleged conduct; by having the jury exposed to alleged other prior bad acts by Mr. Markwell; and by having the prosecutor misstate the law on burden of proof and reasonable doubt, as well as denigrate defense counsel. These errors combined substantially

undermined the fairness of the trial, particularly in light of the weakness of the state's case.

Such combined effects of error may require a new trial, even when those errors individually might not require reversal. State v. Coe, 101 Wn.2d 772, 789, 684 P.2d 668 (1984); United States v. Preciado-Cordobas, 981 F.2d 1206, 1215 n.8 (11th Cir. 1993). Reversal is required where the cumulative effect of several errors is so prejudicial as to deny the defendant a fair trial. Mak v. Blodgett, 970 F.2d 614 (9th Cir. 1992); United States v. Pearson, 746 F. 2d 789, 796 (11th Cir. 1984).

Here the state's case was insufficient to establish the crime; and, at the least, extremely weak. Under these circumstances, it is clear that the combined effect of the pervasive errors should require a new trial.

E. CONCLUSION

Appellant respectfully submits that his convictions should be reversed and dismissed for insufficiency of the evidence of forcible compulsion. At the least, his convictions should be reversed and remanded for retrial.

DATED this 7th day of February, 2013.

Respectfully submitted,

LAW OFFICES OF JOHN HENRY BROWNE, P.S.

JOHN HENRY BROWNE, WSBA #4677
Attorney for John Henry Markwell, Appellant

EMILY M. GAUSE, WSBA # 44446
Attorney for John Henry Markwell, Appellant

IN THE COURT OF APPEALS FOR THE STATE OF WASHINGTON
DIVISION III

STATE OF WASHINGTON Respondent, v. JOHN HENRY MARKWELL Appellant.	No. 31167-8-III DECLARATION OF SERVICE

I certify under penalty of perjury under the laws of the State of Washington that caused to be served by U.S. Regular Mail, postage prepaid, a copy of the attached "Opening Brief" upon the following counsel of record:

Matt Newburg
Garfield County Prosecuting Attorney
809 Columbia Street
PO Box 820
Pomeroy, WA 99347-0820

and to appellant:

John Henry Markwell, DOC 979014
Washington State Penitentiary
1313 North 13th Avenue
Walla Walla, WA 99362

DATED at Seattle, Washington, this 8th day of February, 2013.

Lorie J. Hutt
Law Offices of John Henry Browne, P.S.
200 Delmar Building
108 South Washington Street
Seattle, WA 98104
Telephone: 206-388-0777
Facsimile: 206-388-0780