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

REPLY BRIEF OF APPELLANT

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

WASHINGTON CASES:

TABLE OF AUTHORITIES – cont'd

Page

FEDERAL CASES :

STATUTES, RULES, AND OTHER AUTHORITY:

A. ARGUMENT IN REPLY

1. RESPONDENT'S "STATEMENT OF THE CASE" IS NOT THE "FAIR STATEMENT OF FACTS AND PROCEDURE RELEVANT TO THE ISSUES PRESENTED FOR REVIEW, WITHOUT ARGUMENT" PROVIDED FOR IN RAP 10.3(a); NOR DOES IT PROVIDE REFERENCE TO THE RECORD "FOR EACH FACTUAL STATEMENT".

The events which led to the second degree rape charges against Mr. Markwell took place in a small jail; the only people in custody during the relevant time were Mr. Markwell; Charlie Hopkins, the alleged victim; Michael (Mikey) Burke; Paul Potts, who did not testify at trial; and Dustin Warren, who was with the others for only three hours. RP 372-373, 418, 423, 519-534. As Charlie Hopkins knew, there were cameras in the day room and the nearby jail staff were able to hear and record what took place in any part of the jail.[1] RP 418-419, 462. Moreover, Hopkins was a jail trustee and was even privileged to go outside the jail to help the officers.[2] RP 417. It is in this context that Respondent's greatly overstated presentation of "facts" about the interactions of these men, confined in the jail with nothing productive to do, should be evaluated.

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[1] Hopkins agreed that he never raised his voice or asked for help, nor did he complain about any of the alleged incidents to the other inmates or jail personnel. RP 420. Further, he did not tell the SSOSA evaluator whom he was seeing at the time about any incidents in the jail. RP 429-430.

[2] "I clean. I do the laundry, and do things for the cops, like help them take garbage out, if needed, make sure that the jail goes right, smooth." RP 417.

First, the record shows that Mr. Markwell did not, as Respondent implies, really spend all of his time talking about fights, violence and how tough he was. See, Brief of Respondent (BOR) at 2. Markwell talked a lot about his kids, RP 474; and, when he talked about prison, he was often describing the ways in which prison is a different world from the outside world. RP 407. When asked, Michael Burke testified that he did not recall *any* specific stories Markwell told about fighting, but agreed on further questioning that every once in a while Markwell told such a story. RP 474. When asked by the prosecutor if he ever witnessed Markwell get mad, Mr. Burke responded "a couple of times"; and, when asked how he could tell Markwell was mad, Burke said, "just the same way you could tell that anyone is mad." RP 475.

Certainly the state's general assertion, BOR 2, that "Markwell was loud and demanding, often times threatening other inmates," is unsupported by *any* citation to the record. Brief of Respondent (BOR) at 2. Dustin Warren testified that he did not see Markwell give orders to anyone during the time he was in jail with him. RP 521. Hopkins, in fact, testified himself on cross-examination that Markwell was not physically violent to him in any way. RP 427.

For a specific example of Respondent's persistent overstatement of the trial testimony, what the state described as Markwell's "throw[ing]

items" (BOR at 2), was described by Hopkins as "he [Markwell] would fling things across the table so he could have a space to draw, write letters and everything." RP 411.

Respondent's claim that "Markwell would also regularly threaten Charlie through use of threats of future harm in order to entice compliance," is supported by citations to the record at RP 400 and 477. At those pages, Mr. Hopkins testified that Markwell insisted that it was his job as trustee to clean and "if I didn't do it, then he would get mad at me and start threatening and just being a total jerk about the whole thing. . . . and [in response to the prosecutor's question "how did he threaten you?], "[I]mplying I would get hurt, I would get beaten up." RP 400. Burke testified that Markwell said, a "few times," "'if you don't quit that,' or 'You don't do this, I will kick your ass,' whatever." RP 477. When expressly asked if he was intimidated by Mr. Markwell, Burke said "Yeah, at times"; but testified that, in general, Mr. Markwell "never was on my case, really, not much – just maybe a few times." RP 475-476, 478. When asked how Markwell treated Mr. Hopkins, Mr. Burke said, "Well, most of the time, he treated him fairly, but a couple of times, you know, he would get mad and get into an argument. Yell." RP 475-476. Hopkins's fear of Markwell at those times was described by Burke as he "just seemed scared, you know? Like your dad yelling at you when you are a little kid." RP 477

Although the state asserts that "Burke felt he could not stand up for himself, nor could he stand up for Charlie who he thought was the smallest person in the jail" (citing RP 477-78), BOR 4, Burke actually denied that Markwell was "on his case" and simply denied that he ever told Markwell to leave Hopkins alone, not that he couldn't have.[3] RP 478.

In support of its claim that "Markwell controlled the other inmates," Respondent asserts that he "forced Michael Burke to move out of his own cell." BOR at 3. Burke testified that he changed cells because he was asked to; and when asked if he had a choice, Burke responded, "No, I just agreed to it and moved." RP 480. Moreover, with regard to moving into Markwell's cell, Hopkins testified that he moved his stuff into a cell with Markwell because he didn't "want to start a big commotion." RP 401.

Most importantly, the support for the state's assertions that Markwell likely wrote the letter for Hopkins to "victimize him while in prison," is a citation to the opinion of a Department of Corrections Officer who had no first-hand knowledge of Hopkins or Markwell, or of their relationship to one another.[4] BOR at 6 (citing RP 251). And the assertion

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[3] Respondent states that Hopkins "was the smallest person in the jail." BOR 4. There were, however, only four people in jail.

[4] The Department witness testified that "snitches" and homosexuals *are* victimized in prison and often must seek protective custody. RP 253. Mr.

"[t]hrough the use of implied threats, express threats and physical force, Markwell forced Charlie to have sexual intercourse with him on three separate occasions," again, is not supported by any citation to the record.

Of course this assertion was essentially argument to support the state's theory that Markwell's telling Hopkins, who was going to prison for rape of a child (RP 415), about the things that happen to sex offenders in prison and Hopkins's fear that Mr. Markwell might take back the protection letter he wrote; together with Markwell's appearance and demeanor, constituted the implied threat of bodily injury or death necessary to support the convictions for second degree rape. *See* RP 578-579. Hopkins, however, was clear that Mr. Markwell never threatened to take the letter back. RP 389, 394. The only actual threats of violence Hopkins was able to recall were (1) an incident in which he accidentally put a mop on Markwell's foot and Markwell threatened to kick him if he didn't remove the mop, and (2) a threat to harm Hopkins or his family if Hopkins ever "snitched." RP 389, 410.

As set out in the Opening Brief of Appellant, Markwell's theory was that there was only one act and that was an act of consensual oral sex.

Markwell's reported references to telling Mr. Burke that if he were in prison with Mr. Hopkins, he should "jump on him and hurt him" was consistent with describing the need to avoid being associated with a sex offender. RP 481.

AOB at 5-6. His theory was supported by the testimony of Michael Burke that Hopkins agreed to oral sex, and was smiling when he returned to the day room afterwards. RP 495, 498-499. Moreover, according to Burke, Hopkins told him about giving Markwell oral sex and never once said that he was forced to do so. RP 497-498. When asked if Markwell threatened him before the oral sex, Mr. Hopkins himself described only the incident with the mop, RP 389, which he agreed on cross-examination had nothing to do with sex. RP 418.

Hopkins said that he thought "okay, if I do this, he will protect me inside the prison system," RP 404-405, and that he was afraid that Markwell would take the letter back; he was clear, however, that Markwell never threatened to do that. RP 404-405. Hopkins agreed further that Markwell never said that he would write a letter in exchange for sex. RP 449.

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

Respondent asserts that the forcible compulsion element of second degree rape was established in the first alleged incident because Hopkins testified that, after he "went down" to perform the oral sex, Markwell "took his hand and put it on the back of my head" and "kept it on the back of my head so that I couldn't take it off him." BOR 8-9; RP 388.

"Forcible compulsion," however, requires (1) that the force be directed at overcoming the victim's resistance, and also (2) that it be more than 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). In this case that standard is not met.

Hopkins, by his own testimony, voluntarily left the day room area which had cameras where he could be seen and heard by the jail guards and went to his cell, where there was no camera, knowing that Markwell wanted to have sex with him. RP 419. He described beginning oral sex without any action by Markwell to compel him. RP 388. Under these circumstances, as in Wright, the physical act of simply putting a hand on the back of Hopkins's head and leaving it there, was no more force than required to maintain the penetration and intercourse.

This is distinguishable from State v. McKnight, 54 Wn. App. 521, 774 P.2d 532 (1989), the case cited by Respondent; and McKnight, in fact, supports Markwell's sufficiency argument. The court in McKnight held that force must be considered in light of the totality of the circumstances. Id. at 526. In McKnight, the court considered the isolation, weakness and lack of sophistication of the 14-year-old victim, who clearly asked her assailant to stop as he pushed her down on the couch, removed her clothing and continued intercourse when she said he was hurting her –

circumstances missing in Markwell's case. Id. at 526-527. Even at that, the dissenting opinion was concerned that the majority had removed entirely the distinction between second and third degree rape. Id. at 530-531.

This case is also not like the other case cited by Respondent, State v. Bright, 129 Wn.2d 257, 263-264, 916 P.2d 922 (1996), which involved a forced act of oral sex and vaginal intercourse performed by an armed police officer in the car and in an isolated area.

In contrast to McKnight and Bright, Mr. Hopkins was not in an isolated situation, and certainly was not threatened by a weapon. In fact, he had to take care to avoid being seen or overheard by the jail staff, who certainly would have come to his assistance. He walked out of their sight and voluntarily began the act of oral sex. Under the totality of the circumstances, putting a hand on his head does not constitute forcible compulsion. Putting a hand on his head does not compare to the painfully tight grip of the officer in Bright, nor the struggle against the grip in that case.

Similarly, the act of pulling Mr. Hopkins's pants down ("They were pulled down"), RP 409, and his resistance ("By trying to pull them back up, but I wasn't able to get that done)", RP 410, does not constitute forcible compulsion. Again, in contrast to McKnight, when Mr. Hopkins

complained of pain, Mr. Markwell stopped. RP 403. Any audible request for help would have sufficed to end any sexual contact. There was simply no physical forcible compulsion under the totality of the circumstances.

On the issue of whether there was "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), the state argues on appeal, as it did at trial, that Markwell "creat[ed] an atmosphere where threats and demands were regular, stories of past violent acts were told, and the victim's actions were controlled and/or directed." BOR 11. As set out in the reply to the Respondent's "Statement of the Case," this claim not is supported by the record.

In addition to the overstatements and misstatements of the facts identified in the "Statement of the Case," Respondent states in support of its sufficiency argument:

> In order to further control the victim in this case, the defendant attempted to isolate Charlie. Charlie testified that he reluctantly told the defendant why he was incarcerated and that he was headed to D.O.C. RP 406. The defendant told the other inmates that Charlie was a sex offender, arguably to reduce any support the victim may gain from other inmates.

BOR at 12-13. In fact, Hopkins testified:

Q. Who in jail knew why you were in jail?

A. Mikey Burke knew why I was in there.

. . . .

Q. Did you talk to anybody about prison?

A. I did.

Q. Who did you talk to?

A. I talked to a lot of people. I talked to a guy by the name of Paul Potts about it, and I talked to Mikey about it.

RP 406.

Most importantly, what the record shows is that Markwell at most said that Hopkins "should make it true," that he was a good homosexual, as he had written in the letter. This is not a threat to take the protection letter back (BOR 13)—a threat which Hopkins expressly denied that Markwell made. RP 389-394. Nothing in the record, in fact, shows either that Markwell wrote the letter to entice Hopkins to have sex with him or threatened to take it back if he didn't. Hopkins may have feared this, but this fear was not based on any threat or action by Markwell.

What the evidence established, again at most, is Hopkins' subjective belief that he was better off having sex with Markwell. As set out in the Opening Brief of Appellant (AOB) at 19-22, his subjective belief alone cannot establish forcible compulsion. State v. Weisberg, 65 Wn. App. 721, 725, 829 P.2d 252 (1992). Nor in this case did Hopkins'

subjective belief – even if true – establish forcible compulsion. The State of Washington, not Mr. Markwell, was responsible for Hopkins' realistic fear of what might happen to him in prison because the state Department of Corrections is in charge of what happens to inmates in the state's prisons. Markwell may have described the realities of prison, but he had neither the power to change those realities, nor the authority to prevent Hopkins from entering the system. Whether the letter of protection would serve Mr. Hopkins well or not, Mr. Markwell never threatened to take it back.

Given that there was insufficient evidence to establish the forcible compulsion element of second degree rape, Mr. Markwell's conviction should be reversed and dismissed. 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).

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

Respondent asserts here on appeal that the testimony of state's expert witnesses Robert Jackson and Stephen Lindsley was relevant and admissible: (1) "to explain to the jury why comments made by the defendant and perceived by the victim, were actual threats," BOR 21;

(2) to "provide evidence of a subjective belief" by Mr. Hopkins that he was threatened, BOR at 23; (3) to provide evidence of "the victim's . . . vulnerability to exploitation," BOR 22; and (4) to "aid the jurors in interpreting the victim's actions and testimony in court." BOR 22. This testimony was not properly admissible at trial.[5] These determinations were for the jury and not for expert testimony.

It may always be helpful to the prosecution to have expert witnesses telling the jury what to decide – here that threats were actually made and that the alleged victim was vulnerable to exploitation and had a subjective belief he was being threatened. As set out in the Opening Brief of Appellant, however, 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

[5] At trial the testimony was admitted as a "vocabulary lesson" and as relevant as to whether "potentially implied threats" were "objectively reasonable." RP 49, 226-227.

752 (2005); Sutherby, 144 Wn.2d at 617.

Interestingly, respondent cites State v. Lubers, 81 Wn. App. 614, 915 P.2d 1157 (1996), for the proposition that "it was the jury's place to determine whether the victim's belief that she was being threatened was credible." BOR at 22 n.3. This is precisely the point: the determination of credibility is for the jurors, not expert witnesses.

Further, the expert testimony of these two witnesses was simply not helpful to the jury or admissible on any grounds. Respondent has not provided examples of comments made by Markwell, or any other witness, which was technical or in need of explication; nor was the accuracy of his descriptions of prison at issue. What the evidence about mean things that can happen in prison did was signal to the jury that because he had been to prison and talked about prison conditions to his fellow inmates in jail, Markwell was associated with prison rape, gangs, and drug use.[6] Jackson and the prosecution equated Jackson's knowledge and experience with Markwell's language and actions. As such, the testimony was improper "profile evidence." State v. Braham, 67 Wn. App. 930, 936-37, 841 P.2d 785 (1992).

The sole purpose of evaluator Lindsley's testimony was to give the

[6] The prosecutor did not offer a witness knowledgeable about the sex offender treatment program at Twin Rivers, or other institution, where Hopkins was perhaps more likely to be going.

jurors his expert opinion that Hopkins was vulnerable, credible and a victim; and, by inference, that Markwell was guilty of victimizing him. This was a constitutionally impermissible grounds for admitting his testimony. See AOB at 26-28.

Mr. Markwell's convictions should be reversed and remanded for retrial with the testimony of Jackson and Lindsley excluded.

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

Markwell's claim of misconduct arises from the pervasive efforts of the prosecutor in this case to direct and comment on the evidence rather than present it to the jury from the witnesses who had the information relevant to the charges, and from the continuing effort of the prosecutor to elicit ER 404(b) evidence. Respondent denies or minimizes the misconduct, and argues that Mr. Markwell was not prejudiced by it.[7]

The one example of a leading question the Respondent addressed, BOR 28, is the question to Hopkins, "What did Markwell say to you prior to the blowjob?" RP 404. Respondent argues that this is not leading because "it is difficult to predict the answer being sought by the prosecutor in this

[7] Respondent claims that "[i]n review of the trial proceedings, the conduct of the prosecutor in asking questions was not improper. When the defendant felt it was necessary to object to a question, he did so, and the court in turn made the appropriate rulings erring heavily on the side of caution for the defendant and his right to a fair trial." BOR 29.

question." BOR 28. Defense counsel noted at the time that the proper question was "Did he say anything?" RP 404, which unlike the question asked by the prosecutor does not suggest the answer that something was said.

The questioning by the prosecutor continued:

Q. Did Mr. Markwell say anything to you prior to the blowjob?

A. Not that I remember.

Q. How did you know he wanted a blowjob?

A. Because he kept asking about it and kept asking.

Q. How did he ask?

A. He asked – He asked to give him a blowjob, and I would say no, and then he would ask again. . . .

RP 405. This series of questions demonstrates that the prosecutor was trying to get the witness to testify that Markwell said something to him, and said it in a threatening manner. The prosecutor had, in fact, already asked Hopkins, "Did Mr. Markwell threaten you prior to the oral sex?" RP 389. At that time, when the prosecutor did not get the answer he wanted, 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 Hopkins to say that Markwell directed him to do whatever he told him to do.

A. (response to whether Markwell had threatened him prior to the oral sex) He did at one point in time.

Q. And what did he threaten?

A. One incident I can recall that I was mopping the cell: I accidentally got the mop over across his foot, and he said that, "Get that mop away from me," or he was going to kick my head in.

Q. Did he yell that?

A. No, he just came out and said that.

. . .

Q. How far in time, prior to the oral sex, did Mr. Markwell make the threat about the mop?

A. I don't remember.

Q. Was it right before?

MR. BROWNE: Objection. That is leading.

THE COURT: Sustained.

Q. Did he make any other threats to you prior to this oral sex?

A. No.

Q. Did you feel you could say no?

(continues with questions about prison the letter)

RP 389-390.

Later the prosecutor asked still further leading questions to try to tie the letter to the sex.

Q. You stated the letter to home was given to you ahead of time before the sex, and that you felt he was offering to help you?

Did you feel you had to do anything in return?

A. Yes, I did.

Q. What did you have to do?

A. I felt like, since he wrote that, I felt like, okay . . .

Q. Did the defendant tell you that you had to do everything he told you?

MR. BROWNE: Objection, leading.

THE COURT: Sustained

RP 467-469.

Another example, cited in the Opening Brief of Appellant:

Q. You said earlier that he forced oral sex; how did he force oral sex?

MR. BROWNE: Your honor, I object to the form of that question.

. . . .

THE COURT: Yes, your objection is sustained. Just ask the question without repeating testimony.

. . . .

Q. How did Mr. Markwell force you to give him a blowjob?

RP 388-389. Here although the court sustained the objection, in doing so the court endorsed the prosecutor's incorrect characterization of the "prior" testimony. Second, the prosecutor's revised question is equally leading. The prosecutor did not honor the court's ruling.

Respondent defends his speaking objection as well as his leading questions:

> The defendant's first objection to a 'speaking objection' was in response to the State's listing of a number of reasons for its own objection to a question, including hearsay, beyond the scope of the question, relevance and unduly inflammatory. RP 283. After the defense objection, the court allowed the defendant to argue its objection, at which time the defendant chose not to argue its objection and ended questioning of the witness. RP 283.

BOR 30. The objection followed a question by defense counsel asking whether Lindsley recommended a SOSA after evaluating Hopkins and why not:[8]

> MR. NEWBERG: Judge, I am objecting. We have got a lot of hearsay here. The State's questioning of Mr. Lindsley was very specific to intellectual function 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 deem it relevant, it completely prejudicial to the victim in this case –
>
> MR. BROWNE: Your Honor, this is a speaking objection.
>
> MR. NEWBERG: I am getting all of my objections in. And unduly inflammatory. I just don't know how this is within the scope of direct examination.

RP 280-281. Thus, clearly the prosecutor did not merely object on hearsay, relevance or beyond the scope grounds; he communicated to jury his opinion that the defense was being unfair to the Hopkins and trying to inflame their passions. The prejudice of this speaking objection was in

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[8] Lindsley testified that he specialized "in the area of sexual abuse," and "psychosexual evaluations"

implying the defense was being unfair and inflammatory.

Similarly, the state defends its telling the jury that Hopkins was protected by the Rape Shield Statute and that his prior sexual history was not relevant at trial, by saying that it did "begin to argue the objection prematurely," but that the objection was not improper. BOR 30. The prosecutor again misunderstands that it is the communicating of his opinion to the jury that is improper and objectionable, not making a good-faith objection to testimony. Moreover, as the trial court ruled "[T]he door was opened calling this witness to talk about this SOSA report, and you can't pick and choose parts of the report that are going to be heard" and allowed the defense to impeach the credibility of Hopkins who was not candid with the evaluator about his prior homosexual experiences. RP 288-291.

Respondent, again, refused to acknowledge that the trial court explicitly excluded evidence of prior bad acts, except threats to or overheard by Hopkins. BOR 31-32. This is, however, just what the court did:

> THE COURT: Well, getting back to my original ruling, then, or my most recently stated ruling, *if Hopkins testifies that he heard the defendant communicate a threat, either to himself or to somebody else in his presence, I am letting it in. . . . . As to utilizing Burke, or anybody other than Mr. Hopkins, to get in evidence of other bad acts, no, I am not allowing it.*
>
> . . . . .

> It is Mr. Hopkins' state of mind that is of utmost critical in this case – that – I mean clearly, if Hopkins didn't observe it, if he is getting it secondhand from Burke, that is once removed from the original source.
>
> I follow your logic that well, he is creating an atmosphere of intimidation and fear inside the jail, therefore everything ought to come in.
>
> I can't get there from here under 404(b). I do find it is highly prejudicial, and outweighs its probative value.
>
> But again, anything [threat] observed or heard by Mr. Hopkins can come in.

RP 324-325 (emphasis added). This ruling is clear and excludes prior bad acts other than threats against Hopkins or others if Hopkins heard the threat.

With regard to improper closing argument, respondent denies that its argument on reasonable doubt was improper. The prosecutor argued:

> Well, what does that [reasonable doubt] mean? It means if you have a real doubt as to whether or not these things occurred, then the defendant is not guilty – but it does not mean that you have to be persuaded beyond all doubt. It does not mean 100 percent certainty; as the jury instruction says, very few things are done with 100 percent certainty.

RP 587. The constitutional infirmity here is akin to the fill-in-the-blank errors in State v. Walker, 164 Wn. App. 724, 231, 265 P.3d 191 (2011), and State v. Emery, 174 Wn.2d 741, 759-760, 278 P.3d 651 (2012) – implying that you have to have a "real" reason that can be articulated in order to acquit. Second, this argument implies erroneously that the jury instruction tells the jury that "very few things are done with 100 percent certainty"

which it does not. RP 587.

Although perhaps less overt, this is not unlike the improper argument linking the jury's decision on guilty or innocence to everyday decisions. This "minimizes and trivializes the gravity of the standard and the jury's role." State v. Lindsay, 171 Wn. App. 808, 288 P.3d 641, 652 (2012).

The court in Lindsay also held that denigrating the integrity of defense counsel is misconduct. Id. at 651 (citing Bruno v. Rushen, 721 F.2d 1193, 1195 (9th Cir. 1983)). This is what the prosecutor did by describing defense counsel as "dominant" and "aggressive," linking counsel to the prosecutor's descriptions of Markwell and implying that defense counsel was also victimizing Hopkins.[9] RP 585.

The prosecutor's reliance, in closing argument, on the testimony of 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,[10] RP 585, conclusively demonstrates that Mr. Lindsley's testimony was improperly admitted. The only use of his testimony was to

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[9] The fact that defense counsel tried to counter the prejudice of that accusation by the prosecutor by addressing it directly does not excuse the misconduct. BOR at 39.

[10] 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 Markwell was guilty of some lesser degree of rape.

improperly comment on Mr. Hopkins's credibility, given that Hopkins delayed any disclosure of his allegations against Markwell and didn't disclose to Lindsley that he had voluntary sexual encounters with men or that Markwell had allegedly compelled him to have sex:

> Mr. Lindsley also went on to talk about Charlie not disclosing sex with another man, but he also said that he would likely not consider being sexually assaulted, the same as a consensual encounter.
>
> Again, he went on to say that 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.

Respondent denies that using an American flag in its PowerPoint presentation in closing argument was "waving the flag, " and states that it was "simply a tie-in to the prosecutor's questioning in voir dire, wherein the flag was an illustrative subject for questioning the jurors on observation, investigation, and common sense." BOR 40. This underestimates the power and symbolism of the flag.

5. 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.

Respondent fails to acknowledge the trial court's ruling excluding prior bad acts evidence, the state's responsibility in failing to instruct Mr. Warren adequately about the court's ruling and its responsibility for eliciting

the excluded testimony. The Court was clear in asking the prosecutor to "[p]lease, take the witness out in the hallway and refresh his memory, or enlightened [sic] him about my prior ruling." RP 522.

It is not clear what the prosecutor told the witness, but he clearly asked questions designed to elicit evidence of a prior bad act:

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 523. Respondent calls this last answer "unexpected," but from the court's ruling and the prosecutor's questions it is hard to imagine what proper answer could have been expected.

Given the prosecutor's actions and the unfair prejudice to Mr. Markwell, a mistrial should have been granted. The prosecutor was clearly trying to elicit from Warren a specific act of violence that Markwell related with the specific goal of having the jury hear that Markwell claimed to have committed a prior act of violence. Since a mistrial wasn't granted by the trial court, a new trial should be granted by this Court.

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

For all of the reasons set forth here in the reply brief and in his opening brief, appellant asks that this Court reverse his conviction because the errors individually and certainly cumulatively require a new trial.

Even assuming without admitting the truth of Hopkins's testimony, it established at most that he decided to accept Mr. Markwell's requests for sex (1) because Markwell kept asking him and (2) because he was afraid that, even though Markwell had never threatened to do so, Markwell would take back the letter of protection he had written. The prosecutor kept telling the jurors something different -- among other things, that they had to have a specific "real" reason to acquit; that few things in life are certain so they didn't have to be 100 percent certain to convict; that Mr. Markwell and his "aggressive" attorney threatened Mr. Hopkins, who was a victim by nature; that the "mop incident" was the threat for the second degree rape charges; that Mr. Markwell was associated with prison gangs and rapes and drug users and did little else besides tell stories of his past violence ; and that the patriotic thing to do was convict. Certainly collectively these errors denied Mr. Markwell a fair trial.

E. CONCLUSION

Appellant respectfully submits that his convictions should be reversed and dismissed or reversed and remanded for retrial.

DATED this 28th day of May, 2013.

Respectfully submitted,

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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 "Reply Brief of Appellant" upon the following counsel of record:

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DATED at Seattle, Washington, this 29th day of May, 2013.

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