No. 46147-1-II

COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON

Respondent,

vs.

DAVID NEWLAND

Appellant.

On Appeal from the Clark County Superior Court
Cause No. 13-1-00090-3
The Honorable David Gregerson, Judge

OPENING BRIEF OF APPELLANT

BEAU D. HARLAN
Attorney for Appellant
WSBA No. 23924

211 E. McLoughlin Blvd.
Vancouver, WA. 98663
Phone (360) 735-8200

TABLE OF CONTENTS

TABLE OF AUTHORITIES

WASHINGTON CASES

UNITED STATES SUPREME COURT CASES

CONSTITUTIONAL PROVISIONS

WASHINGTON STATUTES

REGULATIONS AND COURT RULES

OTHER AUTHORITIES

I. ASSIGNMENTS OF ERROR

1. The trial court denied the defendant his right to a fair trial when the trial court ruled to admit testimony about child sex abuse unrelated to the charged crime of Assault in the Third Degree, thereby and implicating the defendant as being associated with, protecting and/or being a pedophile.

2. The trial court erred by denying defendant's motion to a mistrial after the government's star witness willfully violated a motion in limine excluding testimony excluding testimony of trial rape.

3. The trial court's rulings to admit testimony regarding child sex abuse was harmful and affected the outcome of trial.

4. The State committed prosecutorial misconduct by implying that the defense should have called a witness contrary to a motion in limine.

II. ISSUES PERTAINING ASSIGNEMENTS OF ERROR

1. Whether the trial court properly balanced the unfair prejudice of implicating the defendant with child sex abuse and/or being a defender of a pedophile, and/or being a pedophile, versus the probative value of res gestae in a simple Assault III case?

2. Whether the trial court abused its discretion by failing to grant a motion for a mistrial after the government's star witness, who was present for motions in limine, willfully violated the court's ruling on a motion in limine by testifying in an outburst that he had credible evidence of child rape?

3. Whether the error(s) affected the outcome of trial?

4. Whether the prosecutor commits misconduct by shifting the burden to the defendant when arguing to the jury that the defense failed to call a witness?

III. STAEMENT OF THE CASE

PROCEDURAL HISTORY:

On January 10, 2013, David Newland Sr., was arrested and booked into the Clark County Jail on allegations of Assault in the Third Degree. (CP 114) The State of Washington filed an information alleging Mr. Newland committed the crimes of Assault in the Third Degree and Obstructing a Law Enforcement Officer on January 15, 2013. (CP 1). On January 18, 2013, the matter proceeded to arraignment, where Mr. Newland pled,, 'not guilty'. (CP 114)

On March 22, 2013, Appellant filed a 'Motion for a Bill of Particulars.' (CP 114) In response, the State filed it's 'First Amended Information' alleging Mr. Newland committed the crimes of i) Intimidating a Public Servant, to wit: Brendan McCarthy, ii) Intimidating a Public Servant, to wit: Kim Karu, iii) Assault in the Third Degree, to wit: Brendan McCarthy, and iv) Obstructing a Public Servant. (CP 2-3). A month later, Appellant

filed a motion to dismiss counts I, II and IV, e.g., Intimidating a Public Servant, to wit: Brendan McCarthy, Intimidating a Public Servant to wit: Kim Karu, and Obstructing a Public Servant. (CP 115)

After a motion hearing on June 19, 2013, the trial court granted the defense motion to dismiss counts II, e.g., Intimidating a Public Servant, to wit: Karu, but reserved ruling with respect to count I, e.g. Intimidating a Public Servant, to wit: McCarthy. (CP 115) The State agreed to dismiss the allegation of 'Obstructing a Public Servant' and filed a Second Amended Information on June 19, 2013, alleging two counts: i) Intimidating a Public Servant to wit: McCarthy, and ii) Assault in the Third Degree. (CP 4, 115).

On January10, 2014, defense filed a '*Knapstad* Motion' to dismiss both remain counts. In response, the State filed a Third Amended Information striking the allegation of Intimidating a Public Servant, and stipulated on the record that the allegation of Assault in the Third Degree was premised upon either: i) the apprehension prong or ii) the common law battery prong of the assault instruction. (CP 13).

The Assault in the Third Degree allegation proceeded to trial on March 31, 2014, before the Honorable David Gregerson. Prior to trial, appellant made 30 motions to limit and/or exclude testimony through motions in limine. (CP 14-20) During trial, the defense filed a 'Motion for a Mistrial' premised upon Detective McCarthy's willful violation of a motion in limine. (CP 48-50). The jury returned a verdict of 'Guilty' and Mr. Newland timely appealed. (CP 88)

STATEMENT OF FACTS:

BACKGROUND

In December of 2012, Clark County Sheriff Deputy Chris Nichollis, received a report of sexual abuse from Ashely Fritz. (CP 22). Ms. Fritz was 21 when she made the report and made the report by phone from her home in Delaware. (CP 22). Ms. Fritz alleged that her step father, David Newland, Jr., not to be confused with the appellant in the instant matter, David Newland, Sr., sexually abused her ten years prior when she was 11 years old. (CP 22-23). Fritz made the report because her half-sister, E.N., resided with David Newland, Jr., and Fritz had concerns for E.N's welfare. After receiving the report, Nichollis referred the matter to

CPS social worker, Kim Karu, and the Clark County Sheriff's Department for further investigation.

MOTIONS IN LIMINE

Prior to trial, Appellant filed a set of 'Motions in Limine.' (CP 14-20). Specific to the instant appeal, Appellant moved to "Exclude Testimony and/or Other Evidence Regarding Allegations of Sexual Abuse by David Newland, Jr." (CP 15-16, RP 20, lns: 13-15) The State opposed the motion stating in part, "I think the State should be able to get into it in its case in chief that there was an investigation going on, to tell the story to prove that he was working in his capacity as a law enforcement officer and, three, to show motive for why the Defendant did what he allegedly did." (RP 22, lns 3-8) Conversely, appellant argued:

> ....Infusing this case into child sex abuse case is extremely prejudicial under 403. Its not relevant for the question of whether or not Mr. Newland Assaulted Mr. McCarthy...The fact that there's underlying sex abuse, child abuse, pedophilia, child rape sort of thing going on here, ..., that's just trying to blanket the whole defense and say, 'We're defending pedophiles. We're on the pedophiles' side.' That's not what this case is about. This case is about an assault. That's all this case is about. And, and it's incredibly prejudicial to infuse this case with...information like that." (RP 22, lns: 11 – 24, RP 23, lns: 1-6)

In denying the Appellant motion, the court noted:

> . . . The issue, I think is an important one. I see this primarily as a 403 issue. I think relevance, if that the objection, and I notice 401 was stated, I think it's fairly relevant for the bases that Mr. Hayes has stated. The real question is whether the probative value of the information is substantially outweighted by the risk of unfair prejudice or confusion or waste of time. The Court engages in a balancing test in order to consider that. On the one hand, we have somewhat unsavory allegations or a, an unpleasant subject matter, which is the subject of the investigation, that could serve to explain the party's motivations, as there may be emotional or personal or legal consequences involved. On the other hand, there is a risk of some prejudice there because, as Mr. Harlan says, it could be construed or inferred that this makes the information or makes the Defendant on the side of possible bad actors (sic), and it also happens to be the, the same name as the Defendant, although it's a senior and a junior. So the Court considers that, and the Court's view on this is that it is appropriate but can be cured to some extent by a limiting instruction. If defense wishes to have some sort of a limiting instruction which clarifies that the evidence is being admitted only for the purposes explaining the totality of the incident and the motivations of the parties that may be involved, but should not be construed as inference of guilt on the charge or of involvement, you know, personally in legal issues involving the son. And let's –We can think about it that and come up with some appropriate language. (CP 23, lns: 20-24 – CP 25, lns: 1-6)

Appellant opposed the suggestion that a limiting instruction was sufficient to cure the prejudice associated with the child sex abuse evidence and in fact that such an instruction would simply

ring the bell louder. (RP 25, lns: 6-15) The court agreed, stating, "...I do appreciate the, the ringing the bell argument. The best description I've ever heard of that was the, the Wizard of Oz approach; which is 'Pay no attention to the man behind the curtain', which I understand are some concerns there, but I think we can craft an instruction that might get us around that." (RP 26, lns: 1-7)

Dovetailing appellant's 'Motion in Limine No. 5' was 'Motion in Limine No. 7,' which requested exclusion of "Testimony and/or Other Evidence Pertaining to Ashley Fritz and/or her Report of Sexual Abuse.' (CP 16, RP 27, lns: 11-14) The State again opposed the motion. (RP 27, lns: 13-21). Similar to motion in limine no. 5, the court ruled:

> Again, the Court looks under 403 as to whether the probative value is substantially out-weighted. It's hard for the Court to see a probative value in specifically mentioning Ashley Fritz or her involvement there. I think what is appropriate is for the parties to reference to the jury that the officer and Ms. Karu ***were there to investigate a report of some abuse there, even sexual abuse***, I think that's probably...(emphasis added) (RP 28, lns: 9-17)
>
> . . .

///

///

> . . . I think it's appropriate for the State to elicit factual testimony and reference that the officers were there for purposes of investigating a complaint of ***sexual abuse***. In terms of who reported it and any more specifics, then I think we start getting on the slippery slope of 403. . . (emphasis added) (RP 29, lns: 7-13)
>
> . . .
>
> The balancing I'm doing here is trying to give the jury enough information so that they're not having so many question marks that they're filling that in with incorrect information which ***could be prejudicial to either side***. I think what's appropriate is to mention that the officers were there to do a welfare check, based upon a third party's report of some abuse that occurred a substantial time earlier. (RP 32, lns: 2-10) (emphasis added)

The State proposed, "Just say prior sexual abuse of a minor and we can leave it at that and then if we go into 10..." (RP 32, lns: 17-18) The court responded, "I think that's most appropriate. ***Let's just leave it as vanilla as possible at prior sexual abuse*** of a different minor." (emphasis added) (RP 32, lns 21-24) In response, defense counsel pointed out, "Why does sexual abuse come in at all? I mean, the sexual abuse has zero to do with the assault. (RP 33, lns: 1-2) It has nothing to do with the assault, and it's incredibly prejudicial. I mean; abuse: fine sexual abuse that, that screams pedophile, that screams prejudice under 403. (RP 33, lns: 2-6) In response, the court acknowledged:

> Well, I see your point, but I think it's appropriate and the Court can properly distinguish with the limiting instruction to make sure that your client is not unfairly painted with the information that might pertain to a different person....An alleged perpetrator I, I mean, I agree with you Mr.. Harlan, it's a difficult issue, it's a, it's a tightrope there. And I could be wrong on it, and if the Court of Appeals tells me I'm wrong . . . then. . . I'll have to respect that. (RP 33, lns 7 -20)

The court went on to state:

> . . . I think the appropriate information, if we can boil it down to a streamlined version is to say that, that the law enforcement was there to investigate welfare, based upon a report of a third party of alleged sexual abuse from a substantial time earlier. (RP 33, ln: 24, - RP 34, lns: 1-4)

Defendant's motion in limine number 12 moved for 'exclusion of evidence that [David] Newland Jr., was the suspect of an active child rape investigation.' (CP 16, RP 41, lns: 16-19) The State agreed with the motion, stating, ". . . I'm fine just leaving it as sexual abuse allegations and not going into a rape...rape investigation." (RP 41, ln: 24, RP 42, lns: 1-2) The court agreed stating, "Yeah, the phrase, you know, an active child rape investigation is probably improper, but I think there's some general latitude to explain that they were responding to a call and a welfare check. .. and that specific phrase will be granted in limine" (RP 42, lns: 3-7)

Detective McCarthy violated the court's ruling on the instant motions in limine. On cross-examination, McCarthy testified:

> . . . I felt stupid because in trying to be accommodating to Mr. Newland, I let him into the house, I took off my shoes, okay, and I allowed that situation to be there, and I felt stupid because - - when he came up to me it became clear why he was there, which was to interfere with the investigation, to prevent us from talking to the 11-year-old when ***I had substantial criminal – or credible evidence that his son raped –his granddaughter***. (emphasis added) (RP 315, lns: 21-24; RP 316, lns: 1-6; RP 404, lns: 4-14)

In response to the violation, the court instructed the jury to disregard the last word of the statement. (RP 316, ln: 12). The court went on to instruct the jury to disregard that last remark from the witness. (RP 316, lns: 15-16). Defense counsel timely objected to the statement and moved from a mistrial. (RP 316, lns: 17-18; RP 331, lns: 10-20) On the second day of trial, defense filed a written motion for mistrial based upon McCarthy's willful violation of the motion in limine. (CP 48) In response, the State summed up the crux of the issue before the court well. More specifically the prosecutor stated:

> . . . Basically a motion for a mistrial would only be granted if there's literally no way to remedy the prejudice that's happened. And first off, case law says juries are presumed to follow the Court's instructions. The testimony in question, the Court did ask the jury to disregard it. ***We were already at a point where they were already aware that there were child sexual abuse allegations against Newland, Jr. Here the detective just said information that Newland, Jr., had raped his stepdaughter. It's not really that much more afar of what we where we were already going in the case***, the Court asked the jury to disregard it, and it pertains to a third-party, not the defendant, I think that's a pretty key distinction here, so when they jump up and down about prejudice, it's not even against their client, it's against someone else, and like I said, ***it was already in the area that we were already into***, so it's not so prejudicial that he just cannot receive a fair trial and that no instruction could possibly remedy it, which is what the Court will really have to find in order to grant a mistrial. (emphasis added) (RP 402, lns: 16-24; RP 403, lns: 1-16)

The court candidly agreed that McCarthy 'crossed the line' and violated the motion in limine. (RP 404, ln: 24, RP 405, ln: 1-2) Prior to the court's ruling on the defense 'Motion for Mistrial' the prosecutor acknowledged the significance of the error, stating:

> . . . So the fact that – And the Court's order was, was violated, and I'm not saying, I'm not trying to minimize that, that was bad, but the extent to which it was - - we went over the line didn't put this into an area where he [Newland Sr.] can't get a fair trial. (RP 480, lns: 2-7)

OPENING STATEMENT

At the outset of the trial, the Deputy Prosecutor beat the child sexual abuse drum in opening statement. More specifically, the prosecutor began his opening statement stated:

> When police officers get up in the morning and go to work, they're facing the unknown, except that they know that they're going to be in potentially dangerous situations. The case you are about to hear more of is a dangerous situation created by the defendant. ***The Defendant wanted to hinder a child sexual abuse investigation involving his son***. The defendant got right up into Detective McCarthy's face, tried to tell Detective McCarthy what he could and couldn't do in his attempts to try to hinder the investigation...(emphasis added) (RP 214, lns: 9-20)
>
> . . .
>
> As part of the investigation, the detective, in the days, weeks leading up to January 10th, 2013, had interviewed a person who had ***made sexual abuse allegations*** against Newland Jr., and on January 10th, 2013, the detective, along with a CPS social worker named Kim Karu, went to the house of David Newland, Jr., to contact his wife, Melani, and their daughter, E.N., just as part of normal protocol, to contact and make sure other kids associated in this situation are safe to be where they are, determine if perhaps they need to be removed from the home for safety of the kid, and that's what happened on this day January 10th, 2013. (emphasis added) (RP 215, lns: 6-19)

TESTIMONY:

Child abuse was referenced throughout the trial. At the outset of Brendan McCarthy's testimony, McCarthy testified, "As a patrol officer, officer safety is one of those things that's kind of at the forefront of everything that you do." (RP 230, lns: 14-15) "As an investigator, when we're interviewing children who are potentially victims bluntly, officer safety is not one of those things that's the forefront of your, of your head when your doing that." (RP 230, lns: 14-20) He testified that when he went to the Newland home on January 10, 2013, he was investigating allegations of child sexual abuse. (RP 233, lns: 5-8) Furthermore, McCarthy testified:

> the victim in this case had actually made a 911 call to, to the 911 operator here in Clark County. That was then routed to a deputy who wrote a report. That deputy then contacted the state and where the victim was currently living and arranged for the victim to be interviewed by a detective in that state. (RP 233, lns: 13-19)

. . .

///

///

///

...by January 10th, I had spoken to the victim on the phone but I had not done a formal interview, she had already been formally interviewed in the state where she was currently a resident. I had spoken to that detective who had done the interview to assess his feelings about her, about the allegations that she was making, and as he has been working child sexual abuse cases for 20 year... (RP 233, lns: 21-24; RP 234, lns: 1-6)

I am a detective assigned to the Children's Justice Center, which is a joint unit between the Vancouver Police Department and the Clark County Sheriff's Office. We investigate felony level crimes against kids. Most of those are child sexual abuse. (RP 235, lns: 20-24, RP 236, ln: 1)

CPS kind of has two roles with us. One, they generate referrals when people call Child Protective Services and they generate a referral that then says there's an allegation of abuse, it's then forwarded to my supervisor, who then determines then whether or not this is criminal level that needs to be investigated. That[s] one role. (RP, 236, lns: 5-12)

The second role is if there's an allegation that comes through law enforcement, someone calling 911, someone reporting it, and some – school calling 911, when we have a valid allegation of abuse, we will then reach out to CPS and report it ourselves so that they, then, have a referral to go along with our law enforcement case, and so then they work the case from the Child Protective Services side and we work the case from the law enforcement side. (RP 236, lns: 13-21)

////

////

////

> The safety aspect of the kids goes hand-in-hand between law enforcement and Child Protective Services because if we deem that –if, it it's deemed that the children in the home are not safe, CPS can't take the kids without law enforcement signing over custody unless they go get a writ from a judge. (CP 237, lns: 1-7)

McCarthy went on to testify that he went to the Newland household on January 10th 2013 as part of his official duties with the Clark County Sheriff's Department to do a welfare check on a child's safety and as part of his own child abuse investigation associated with the child sexual abuse allegations. (RP 237, lns: 19-24; 238, lns: 1-3)

McCarthy and CPS social worker Kim Karu arrived at the Newland home a little later than 12:30 on January 10th, 2013. (RP 239, lns: 10-11, lns: 21-22, RP 353, lns: 7-15) Karu and McCarthy drove to the home together and McCarthy was in plain clothes wearing a tie, jacket, pants, button up shirt, badge and gun. (RP 240, lns: 2-17) The purpose of going to the Newland home was to make contact with E.N. a female minor living in the home. (RP 241, lns: 3-4)

As McCarthy and Karu arrived at the home, another car, driven by an elderly 73 year old gentleman with a heart condition,

David Newland, Sr., arrived at the same time. (RP 241, lns: 9-15, RP 268, lns: 5-9 RP 353, lns:17-21; RP) Karu and McCarthy exited their vehicle, David Newland, Sr. exited his and David Newland Sr introduced himself. (RP 353, lns: 22-24, RP 354, lns: 1-5) David Newland, Sr., was friendly, pleasant, cordial, said "come on in," and escorted Karu and McCarthy to the front door. (RP 281, lns: 13-15; RP 242, lns: 4-24; RP 336, lns: 14-16; RP 354, lns: 10-21) David Newland, Sr. walked McCarthy and Karu to the door and knocked or rang the door bell. (RP 243, lns: 1-2, RP 244, lns: 2-4; RP 337, lns: 7) Melani Newland, David Newland Sr's daughter-in-law, answered the door and the three entered the home. (RP 244, lns: 3-5; RP 355, lns: 3-5) Melani Newland was the wife of David Newland, Jr. and mother of E.N.. (RP 244, lns: 6-13; RP 337, lns: 7-8) After entering the home, Melani walked toward the dining room table, located at the end of the entryway; McCarthy and Karu took their shoes off in the entryway. (RP 244, lns: 15-23) Karu explained to Melani that she was going to talk to E.N. alone. (RP 337, ln:14) Melani Newland called to E.N. (RP 337, lns: 14-18) McCarthy and Karu walked toward the dining room table, E.N., came into the room from the kitchen and Karu introduced herself to E.N. (RP 245, lns: 5-11) Karu told E.N. she

was going to talk to E.N. alone. (RP 337, lns: 17-18) Karu told E.N., "This is my friend Brendan. We're going to talk. Is there a place we can talk?" (RP 245, lns: 7-12) They were directed toward E.N.'s bedroom. (RP 245, lns: 13-14) E.N. walked toward her room, Karu followed. (RP 246, ln: 21) At the same time, David Newland Sr. asked McCarthy, "Hey, are you a cop?" in a non-aggressive, non-threatening, non-assertive way, while Newland, Sr., was approximately 10 feet away. (RP 247, ln: 3; RP 283, lns: 3-16, RP 348, lns: 20-22) McCarthy turned around and said, "Yes, I'm a cop." (RP 247, ln: 10) Newland, Sr. responded, "You can't talk to her" or "You're not going to talk to anyone; I've got a lawyer." (RP 247, ln: 13; RP 340, lns: 14-15) McCarthy responded, "I can talk to her and that's why I'm here and this is my purpose of being here is to assess whether or not she is safe." (RP 247, lns: 15-18) David Newland Sr. closed the distance between he and McCarthy, they were face to face, e.g., 6 inches to a foot apart, and Newland, Sr. told McCarthy to "sit down." (RP 248, lns: 4-9; RP 284, lns: 7-11; lns: 15-19) Newland, Sr. never physically obstructed McCarthy's progress down the hall toward E.N.'s room where the interview was to be conducted. (RP 284, lns: 17-23; RP 290, lns: 1-2) McCarthy perceived Newland, Sr.'s

order to 'sit down' as a threat. (RP 286, lns: 15-24) McCarthy felt threatened and stupid. (RP 248, ln: 11) McCarthy felt threatened by Newland, Sr.'s demeanor; he was angry and yelling at McCarthy. (RP 249, lns: 3-5) McCarthy's voice was raised and used profanity. (RP 249, lns: 9-15; RP 379, lns: 18-22) McCarthy never ordered Newland, Sr. to "stop" "calm down" or propose "let's talk about this" because he didn't have a chance to (RP 287, lns: 2-17; RP 288, lns: 12-15) McCarthy testified that he felt Newland, Sr.'s intent was to obstruct his actions and interfere with an investigation. (RP 250, lns: 7-9; RP 326, lns: 22-24) Newland made no verbal threats toward McCarthy. (RP 380, lns: 9-14) McCarthy pushed Newland, Sr.'s right shoulder away with his left hand as they stood chest to chest. (RP. 250, lns: 11-15; RP 251, lns: 9-11; RP 289, ln: 4) It is undisputed that McCarthy initiated the physical contact by pushing Newland, Sr.. (RP 329, lns: 8-12) McCarthy didn't use a great deal of force, but attempted to push Newland, Sr. away from him and away from Karu who was down the hall. (RP, 250, lns: 22-25) McCarthy pushed Newland, Sr., in an attempt to create distance between Newland, Sr. and McCarthy. (RP 319, lns: 11-13) When McCarthy attempted to 'redirect' or move Newland, Sr., Newland Sr. threw his right arm and elbow

back toward McCarthy's face. (RP 251, lns: 9-18, RP 252, lns: 1-7; RP 313, lns: 10-13, RP 314, lns: 5-12) Prior to McCarthy pushing Newland Sr., Newland had made no physical contact with McCarthy. (RP 277, lns: 8-12) In response, McCarthy took Newland, Sr. to the ground. (RP 253, ln: 2-22) Newland, Sr. threw his elbow and missed, and then McCarthy pushed Newland, Sr. forward and drove him toward a space between the dining room table and the living room where he went down in a heap between the dining room table and living room. (RP 255, lns: 13-18) McCarthy used physical force and momentum to driver Newland Sr. to the ground. (RP 291, lns: 15-18) It was a fast fluid quick event. (RP 291, lns: 19-21) Newland Sr. never landed any blow to McCarthy and McCarthy believes he may have blocked Newland. Sr.'s arm with his right arm. (RP 254, lns: 22-23, RP 255, lns: 1-3) Mr. Newland Sr.'s elbow never hit McCarthy. (RP 291, ln: 10-11) Once on the ground, McCarthy was in the upper position and Newland struggled and fought. (RP, 256, lns: 9-12, RP 291, lns: 22-24, RP 291, ln: 1) McCarthy was in the top position trying to grab Newland's arm and restrain Newland and telling Newland to stop resisting. (RP 256, lns: 19-21, 257, lns: 1-3) Newland Sr. was face down on the carpet. (RP 291, lns: 7-12)

McCarthy applied two hard knee strikes to Newland's ribs. (RP 258, lns: 17-21; RP 259, ln: 2-3, 9) In response, Newland, Sr., stopped resisting. (RP 259, ln: 11)

Melani Newland was sitting at the dining room table when McCarthy took Newland, Sr. to the ground. (RP 256, ln: 1) Melani Newland called 911 after McCarthy took Newland Sr. to the ground. (RP 257, ln: 11; RP 322, lns: 11-17) Melani Newland was on the phone to 911 while McCarthy had Newland, Sr. on the ground and applying knee strikes. (RP 260, ln: 5-9, RP 293, lns: 16-21) On January 10th, 2013 at 13:24 hours, Melani Newland called 911 and told the 911 operator:

> . . . my father-in-law is being attacked by a police officer in my home....
>
> ....
>
> . . . 9013 Northeast Sunset Way...
>
> ....
>
> He's attacking my father-in-law. He has him on the ground...
>
> ....
>
> . . . Oh, God, what are you doing to him? He is 73 years old...
>
> ....

> He didn't touch you. You attacked him. I saw the whole thing. I'm on the phone with 911 real quick...
>
> . . .
>
> . . . He has my father-in-law down on the ground. . .
>
> . . . .

Melani Newland had an unobstructed view of the contact between McCarthy and Newland, Sr. (RP 364, lns: 4-7) Melani was an eye witness to the entire event. (RP 378, lns: 4-5)

While McCarthy had Newland, Sr., on the ground, Karu came to McCarthy's aid and asked McCarthy, "How can I help." (RP 259, Ln: 21; RP 293, lns: 1-3) McCarthy responded, "Run out and get my cuffs out from the car." (RP 293, lns: 4-7) McCarthy gave Karu his keys and asked Karu to retrieve his police utility belt containing handcuffs from the trunk of the vehicle. (RP 259, lns: 21-23) Melani Newland was on the phone with 911 when Karu exited the home to retrieve the hand cuffs. (RP 359, lns: 11-15) McCarthy applied one knee strike before giving Karu the keys and one knee strike after. (RP 293, lns: 10-13)

Kim Karu testified that she was employed as a social worker for the Department of Social and Health Services and CPS.

(RP 330, lns: 5-9) Her duties include investigation of abuse and neglect in the parental home and assessment of safety and risk to children. (RP 330, lns: 11-13) Karu received training in how to interview children and that when she receives a referral pertaining to abuse and/or neglect she will go out and speak to the alleged victim and interview them, then she will talk to the parents and others that may be able to provide information. (RP 330, lns: 16-22, RP 334, lns: 8-9)

In this case, Karu went to the Newland home to conduct a safety evaluation for E.N. (RP 351, lns: 15-19) In violation of a motion in limine on the topic, Karu testified that E.N. was homeschooled. (CP 17, RP 351, ln: 21-22) The court instructed the jury to disregard the comment. (RP 352, lns: 3-4) Karu went further to testify that her concern was for the safety of the children and that her concern stemmed from child sexual abuse allegations that had been made against David Newland, Jr. (RP 352, lns: 7-11)

At the end of the first day of trial, the State's prosecutor moved in limine for admission of additional sex offense evidence

in the event Melani Newland testified at trial. More specifically, the prosecutor stated:

> . . . [I]f Melani Newland is called by the defense, which I am pretty sure she will be, I think it's going to be fair game for the State to cross-examine her regarding the fact that Detective McCarthy was involved in a case that has now resulted in her husband currently sitting downstairs in jail looking at 131 to 171 months to life based on the sexual abuse allegations, and I think that's bias in regards to her being able to say that Detective McCarthy was out of line and try to either get back at him or find some way to discredit the reason that her husband is downstairs in jail. (RP 395, lns: 20-24, RP 396, lns: 8)

The court acknowledged, "Mr. Hayes is putting you on notice that he intends to go that direction..." (RP 397, lns: 1-2) At the outset of the second day of trial, defense counsel responded to the State's motion:

> We were handed, number one, a statement of the Defendant on plea of guilty involving David J. Newland Jr., and the State has threatened to use that if we were to call Melani Newland in this case and impeach her with that, thus painting the whole case in the context of a child abuse case as opposed to a simple assault case. Now, because of that Judge, I feel – and the possibility of that information coming in over the State's basic threat, we won't be calling Melani Newland. ...(RP 401, lns: 11-23)

CLOSING ARGUMENT

Prior to closing argument, defense moved to preclude the State from shifting the burden of evidence by suggesting Melani Newland should have been called as a witness. (RP 473, lns: 9-12)

The state agreed with the motion, stating, "I will not be making any argument as to where is Melani Newland, I agree that would be improper." (CP 473, lns: 16-18). Then on rebuttal argument, the prosecutor violated the motion implying the Defense should have called Melani Newland, when he stated:

> . . . a lot has been put into this 911 tape just now. Let's just keep *in mind* Instruction number 1, it says, "your decision as jurors must be made solely upon the evidence presented during these proceedings." We don't know what she [Melani Newland] saw. (RP 521, lns: 10-15)
>
> Objection by defense counsel. (RP 521, ln: 16)
>
> Counsel says this is the source; we should put a lot of stock in this 911, but we don't' know what she saw. . . (RP 521, ln: 23, RP 522, ln: 1)
>
> Counsel says this is the source [referring Melani Newland's 911 call] but we don't have really any information at all from that source. (RP 523, lns: 1-2)

Defense counsel timely objected a second time. (RP 523, ln: 3)

At the outset of his closing argument, the prosecutor cloaked the entire case against the backdrop of child sexual abuse,

stating, "The defendant created this whole situation involving the confrontation. He knew exactly why the police were there that day. His son was being investigated for some very serious charges, allegations," e.g. child sexual abuse, child rape. (RP 494, lns: 16-20)

In the context of "performance of his official duties" element of Assault Third Degree, the prosecutor again incorporated the child sexual abuse theme stating that McCarthy was there investigating one of the most serious allegations that's out there, e.g. child sexual abuse, child rape. (RP 501, lns: 14-18) He was doing his part of his job to make sure this child was safe. (RP 501, lns: 18-19) He even suggested E.N. could have been taken from the home, stating:

> ...Officer's in unknown area (sic) surrounded by people who are not exactly big fans of him and of CPS, who might be taking their child, he has to take control of the situation. (RP 503, lns: 20-24)

////

////

IV. ARGUMENT AND AUTHORITIES

A. TRIAL COURT ERRED BY ADMITTING EVIDENCE OF CHILD SEX ABUSE THAT HAD LITTLE PROBATIVE VALUE, PREJUDECED THE DEFENDNAT, AND DEPRIVED HIM OF A FAIR TRIAL.

1. The Court Failed to Exclude Evidence that was Unfairly Prejudicial.

The relevant elements required to prove an Assault III are that the defendant "assaulted a law enforcement officer who was performing his official duties at the time of the assault". WPIC 35.20. In this case, the defense attempted to stipulate prior to trial that Det. McCarthy was acting in his official duty on the date in question. However, the defense asked the court to admit testimony relating to the fact that the detective and a CPS worker were at the home to investigate potential sexual abuse of the defendant's minor granddaughter by her father, the defendant's son. The reasoning behind the prosecutor's position was that the jury needed to understand the whole story and that his theory of the case was that the defendant was trying to obstruct the investigation of his son for sexual assault of a child. (RP 21, lns:6-24) The response of the defense was that such evidence is not relevant to the officer's scope of employment, such information is more prejudicial than

probative, it would paint the defendant as protecting a pedophile, infuse the case with child sex abuse, that there was no proof that anyone in the home was abused, and that this is not a RCW 9A 44 case. (RP 22, lns:10-24, RP 23, lns:14-17, RP 25, lns:7-15, RP 31, lns:7-8, RP 34, lns:21-24) In taking argument from both sides the court provided these conclusions from its ER 403 analysis:

> The balancing I'm doing here is trying to give the jury enough information so that they're not having so many question marks that they're filling that in with incorrect information which could be prejudicial to either side. I think what's appropriate is to mention that the officers were there to do a welfare check, based upon a third party's report of some abuse that occurred a substantial time earlier. (RP 32, lns: 2-10)
>
> I think that's most appropriate. Let's just leave it as vanilla as possible at prior sexual abuse of a different minor. (RP 32, lns:21-24)
>
> I agree with you Mr. Harlan, it's a difficult issue, it's a, it's a tightrope there. And I could be wrong on it, and if the Court of Appeals tells me I'm wrong . . . then. . . I'll have to respect that. (RP 33, lns:7-20)
>
> I think the appropriate information, if we can boil it down to a streamlined version is to say that, that the law enforcement was there to investigate welfare, based upon a report of a third party, of alleged sexual abuse from a substantial time earlier. (RP 33, lns:24, RP 34, lns:1-4)

At one point, the prosecutor, seated next to the officer stated:

> I'm fine just leaving it as sexual abuse allegations and not going into a rape...rape investigation. (RP 41, lns: 24, RP 42, lns:1-2)

The court responded:

> Yeah, the phrase, you know, an active child rape investigation is probably improper, but I think there's some general latitude to explain that they were responding to a call and a welfare check. (RP 42, lns: 3-7)

Under the United States Constitution, the Sixth and Fourteenth Amendments guarantee criminally accused persons the right to trial by an impartial jury. *State v. Davis*, 141 Wn.2d 798, 824, 10 P.3d 977 (2000). The Washington Constitution provides a similar safeguard. Wash. Const. art. I, §§ 3, 22. A defendant's right to a jury also includes the right to an unbiased and unprejudiced jury. *Davis* at 825. The failure to accord an accused a fair hearing violates even the minimal standards of due process. *Id.* Not only should there be a fair trial, but there should be no lingering doubt about it. *Id.*

A trial court's decision to admit or exclude evidence is reviewed under an abuse of discretion standard. *State v. Myers*, 133 Wn.2d 26, 34, 941 P.2d 1102 (1997). A trial court abuses its discretion if its decision is manifestly unreasonable or based upon

untenable grounds or reasons. *State v. Powell*, 126 Wn.2d 244, 893 P.2d 615 (1995).

Relevancy and the admissibility of relevant evidence are governed by ER 401 and ER 402, which state:

> "Relevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.
>
> All relevant evidence is admissible, except as limited by constitutional requirements or as otherwise provided by statute, by these rules, or by other rules or regulations applicable in the courts of this state. Evidence which is not relevant is not admissible.

To be relevant, evidence must meet two requirements: (1) the evidence must have a tendency to prove or disprove a fact (probative value), and (2) that fact must be of consequence in the context of the other facts and the applicable substantive law (materiality). *5 K. Tegland, Wash. Prac.* § 82, at 168 (2d ed. 1982). The relevancy of evidence will depend upon the circumstances of each case and the relationship of the facts to the ultimate issue. *Chase v. Beard*, 55 Wn.2d 58, 61, 346 P.2d 315 (1959). In this case, the "child sex abuse" evidence the state sought to admit was relevant; however, it should have been excluded under ER 403 which states in relevant part:

> Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or is misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

Under ER 403, even relevant evidence should be excluded if its probative value is substantially outweighed by the danger of unfair prejudice. *State v. Smith*, 106 Wn.2d 772, 776, 725 P.2d 951 (1986). The trial court is vested with broad discretion in deciding to balance relevance against prejudice. *State v. Baldwin*, 37 P.3d 1220 (2001), review denied, 147 Wn.2d 1020, 60 P.3d 92 (2002). Unfair prejudice is that which is more likely to arouse an emotional response than a rational decision by the jury. *State v. Gould*, 58 Wn. App. 175, 183, 791 P.2d 569 (1990). The addition of the word "unfair" in ER 403 obligates the court to weigh the evidence in the context of the trial itself, bearing in mind fairness to both the State and defendant. *State v. Bernson*, 40 Wn. App. 729, 736, 700 P.2d 758 (1985). Prejudice becomes "unfair" when it is likely to arouse an emotional response rather than a rational decision by the jury. *State v. Cronin*, 142 Wn.2d 568, 584, 14 P.3d 752 (2000).

Within its context, "unfair prejudice" means an undue tendency to suggest a decision on an improper basis-commonly an emotional one. *Id.* (citing *State v. Cameron*, 100 Wn.2d 520, 529, 674 P.2d 650 (1983)). Similarly, evidence becomes prejudicial, unfair, and is inadmissible where it bears only a remote or artificial relationship to the legal or factual issues actually raised. *Id.* at 531.

In this case, the trial court underestimated the prejudicial effect of infusing allegations of "sex abuse of a child," which are of marginal relevance, into a simple Assault II case. Ultimately, this led to a trial irregularity in which the State's primary witnesses violated a motion in limine, and in an outburst, stated that he had credible evidence of child rape occurring in a home the defendant was circumstantially connected with.

Further, there was little evidence to support the crime charged. The theory of the prosecutor was a swing-and-a-miss type of an assault. (RP 498, lns:21-23, RP 499, lns:16-20) Accordingly, the admitted evidence resulted in a high likelihood that, but for the improper admission of the prejudicial evidence, Mr. Newland would have been acquitted. In this case, the court did not balance the probative value of admitting that the police were at the home to

investigate prior sexual abuse of a minor against the prejudicial impact of that evidence associating the defendant with underlying sex abuse, child abuse, pedophilia, or child rape occurring in the home.

In a case similar to the matter at bar, the court found relevant evidence was highly prejudicial in *State v. Cameron*. In *Cameron*, the defendant was charged with murder and admitted to the crime. *State v. Cameron*, 100 Wn.2d 520, 521, 674 P.2d 902 (1983). Before trial, the defendant moved in limine to exclude evidence of pubic hair State investigators found on the victim's body. *Id.* at 527. During trial, the defendant objected again to the trial court's admission of the hair and related testimony. *Id.* The State asserted that the hair and related testimony was essential to the defendant's identification as the assailant and thus relevant under ER 402. *Id.* Ultimately, the Supreme Court reversed the conviction ruling that the evidence would raise an unsubstantiated inference of a sexual attack and could only inflame the jury's passions. *Id.* at 528.

2. The court failed to recognize that testimony regarding "sex abuse" as res gestea was outweighed by unfair prejudice to the defendant.

Res gestae evidence is evidence that completes the story of the crime by establishing the immediate time and place of its occurrence *State v. Brown*, 132 Wn.2d 529, 571, 940 P.2d 546 (1997). Such evidence makes up a link in the chain of an unbroken sequence of events surrounding the charged offense. *Id.* Res gestae is no longer a freestanding exception to ER 404(b). *State v. Grier*, 168 Wn. App. 635, 645-47, 278 P.3d 225 (2012). Instead, the proper analysis is relevance under ER 401. *Id.* If the res gestae evidence is relevant, then it is generally admissible under ER 402, unless its potential prejudice outweighs its probative value under ER 403. *Id.* at 649. Even under an ER 404(b) analysis the res gestea exception requires that evidence be relevant to a material issue and its probative value must outweigh its prejudicial effect. *State v. Acosta*, 123 Wn. App. 424, 442, 98 P.3d 503 (2004). Again, the fact that the detective was investigating possible child sex abuse at the hands of the defendant's son only serves to unfairly paint the defendant in the light of protecting a potential

pedophile, implicate the defendant as potentially complicit in such conduct, and serves to inflame the passions of the jury.

Evidence is "unfair" when it is likely to arouse an emotional response rather than a rational decision by the jury. *State v. Cronin*, 142 Wn.2d 568, 584, 14 P.3d 752 (2000). The third step the court conducts in a 404(b) exception analysis is balancing the probative value of the evidence against any unfair prejudicial effect the evidence may have upon the fact-finder. *State v. Saltarelli*, 98 Wn.2d 358, 362, 655 P.2d 697 (1982). Doubtful cases should be resolved in favor of the defendant. *State v. Smith*, 106 Wn.2d 772, 776, 725 P.2d 951 (1986). Under a similar analysis in this case, any question of the proffered evidence being a "close call" or "a tight rope" should have been resolved in favor of the defendant.

This case is also similar to State v. *Trickier*, 106 Wn.App. 727, 733-34, 25 P.3d 445 (2001). In *Trickier*, the police investigated the defendant as a result of stolen property in his possession where the defendant was on trial only for a stolen credit card. *Id. Trickier* held that while the events leading up to the discovery of the stolen credit card were relevant and somewhat

probative, it was not shown that Mr. Trickier possession of other allegedly stolen items was an inseparable part of his possession of the stolen credit card. Division Three reversed the conviction and held the events leading up to the discovery of the stolen card were inadmissible as res gestae evidence. *Id.*

B. THE TRIAL COURT ERRED BY FAILING TO GRANT A MISTRIAL BASED ON A TRIAL IRREGULARITY THAT DEPRIVED THE DEFENANT OF A FAIR TRIAL.

During cross-examination, McCarthy testified as follows:

> Q: Did at any time you feel stupid for being a bully after you pushed the defendant down?
>
> A: No, I felt stupid because... he was there to interfere with my investigation, to prevent us from talking to an 11 yr. old when ***I had substantial criminal or credible evidence that his son raped his granddaughter***. (emphasis added)
>
> Court: The jury will disregard the last word. (RP 315, lns :19-324, RP 316, lns 1-11)

An irregularity in trial proceedings is grounds for reversal when it is so prejudicial that it deprives the defendant of a fair trial. *State v. Condon*, 72 Wn. App. 638, 647, 865 P.2d 521 (1993). To determine whether a trial irregularity deprived a defendant of a fair trial, a reviewing court considers the following factors: (1) the seriousness of the irregularity, (2) whether the statement in question was cumulative of other evidence properly admitted, and

(3) whether the irregularity could be cured by an instruction to disregard the remark, an instruction which a jury is presumed to follow. *State v. Escalona*, 49 Wn. App. 251, 255, 742 P.2d 190 (1987). A reviewing court reviews claims of prejudice against the backdrop of all the evidence. *Id.* at 254. While a violation of an order in limine is considered a serious trial irregularity, not all violations of orders in limine have been held to be so serious as to deprive the defendant of a fair trial. *State v. Thompson*, 90 Wn. App. 41, 46-47, 950 P.2d 977 (1998).

In *State v. Escalona*, the State charged Escalona with second degree assault while armed with a deadly weapon, a knife. Before trial, the court granted a defense motion in limine to exclude any reference to Escalona's prior conviction for the same crime. *Id.* at 252. At trial, a witness volunteered that Escalona had a record and had stabbed someone. *Id.* at 253. Defense counsel immediately moved to strike and asked that the jury be excused. *Id.* The judge ordered the statement stricken and excused the jury. *Id.* Defense counsel moved for a mistrial, but the court denied it. When the jury returned, the judge instructed it to disregard the witness's last answer. The conviction was reversed, and the court emphasized that no instruction can remove the prejudicial

impression created by evidence that is inherently prejudicial and of such a nature as to likely impress itself upon the minds of the jurors. *Id.* at 255.

Our Supreme Court has recognized that "in sex cases . . . the prejudice potential of prior acts is at its highest and a careful and methodical consideration of relevance and an intelligent weighing of potential prejudice against probative value is particularly important." *State v. Saltarelli*, 98 Wn.2d 358, 363, 655 P.2d 697 (1982). In that case, a sex case, the court decided that the potential for prejudice was particularly high because: (1) The State's case was supported by only a 12-year-old's testimony, and witnesses repeating what the minor told them about the allegations; (2) there were no other eyewitnesses or physical evidence; and (3) the trial court gave the instruction that the jury could consider prior sex conviction for any relevant purpose which was in violation of a statute that was found unconstitutional.

In this case, the admission of 'child sex abuse' evidence, the willful violation of the motion in limine, and numerous references to a CPS investigation whitewashed a simple Assault III case into a sex case. Therefore, the resulting prejudice caused by

the violation of the motion in limine was even greater. In addition, the states theory of the assault was a "swing-and-miss" supported only by the testimony of detective McCarthy himself. Karu, the CPS worker, didn't see the alleged assault. (RP 341, lns:20-24, RP 342, lns: 1-15, RP 499, lns:16-21, RP 526, lns :24, RP 527, lns:1)

Again, an ER 403 analysis is the final step in determining whether the States proffered evidence of an uncharged "act", obstructing an officer to protect a suspected pedophile, would be admissible under ER 404(b). See *Saltarelli* at 363. ER 403 requires exclusion of evidence, even if relevant, if its probative value is substantially outweighed by the danger of unfair prejudice. *Id.* In doubtful cases the scale should be tipped in favor of the defendant and exclusion of the evidence. *State v. Bennett*, 36 Wn. App. 176, 180, 672 P.2d 772 (1983). In this case, whether under a strict ER 403 analysis or a 404(b) type of analysis the court should have excluded the prejudicial evidence of "sex abuse" in favor of the defendant. The prejudicial effect of the willful violation of the motion in limine by McCarthy was compounded by the opening of Pandora's box and the erroneous admission of evidence pertaining to "sex abuse of a minor. " Additional cumulative evidence included the following McCarthy's direct testimony:

As an investigator, when we're interviewing **children** who are potentially **victims**, bluntly, officer safety is not one of those things that's the forefront of your head. (RP 230, lns: 14-20)

Q: Would it be fair to say that the allegations you were investigating were child **sex abuse**?

A: They were. (RP 233, lns: 5-8)

...by January 10th, I had spoken to the victim on the phone but I had not done a formal interview..... I had spoken to that detective who had done the interview to assess his feelings about this.. . as he has been working **child sexual abuse** cases for 20 years... (RP 233, lns: 21-24, RP 234, lns: 1-6)

I am a detective assigned to the Chidren's Justice Center... we investigate **felony level crimes against kids**. Most of those are **child sexual abuse**. (RP 235, lns:20-24, RP 236, ln:1)

CPS kind of has two roles with us. One, they generate referrals when people call Child Protective Services and they generate a referral that says there's an allegation of **abuse**... then my supervisor determines whether or not this is criminal level that needs to be investigated. (RP 236, lns: 5-12)

The second role is if there's an allegation that comes through law enforcement .....when we have a valid **allegation of abuse**, we will then reach out to CPS and report it ourselves...(RP 236, lns: 13-21)

The safety aspect of the kids goes hand-in-hand between law enforcement and Child Protective Services because if we deem that –if, it it's deemed that the **children in the home are not safe**, CPS can't take the kids without law enforcement . (RP 237, lns:1-7)

McCarthy testified that the defendant's intent was to obstruct his actions and interfering with an investigation. (RP 250, lns·7-9, RP 326, lns:22-24)

After the trial irregularity, Kim Karu testified on direct examination that she went to the Newland home to conduct a

safety evaluation for E.N; (RP 351, lns:15-19) and that her concern was for the safety of the children that stemmed **from child sexual abuse allegations** that had been made against David Newland, Jr. (RP 352, lns:7-11). In additional Karu violated a motion in *limine* by *testifying* that E.N. was homeschooled (RP 351, lns: 21-22) Also, the prosecutor, during closing argument stated that McCarthy was surrounded by people who are not big fans of him or CPS, who **might be taking their child**, he has to control the situation. (RP 503, lns:20-24)

Ultimately, the serious trial irregularity in conjunction with the cumulative nature of other prejudicial inadmissible evidence could not be cured by asking the jury to disregard the word "rape." Any relevance of "child sex abuse" is outweighed by the unfair prejudice of eliciting and emotional response from the jury and that denied the defendant his right to a fair trial.

C. THE ERROR WAS PREJUDICIAL, HARMFUL, AND AFFECTED THE OUTCOME

An evidentiary error that is not of constitutional magnitude mandates reversal when the error, within reasonable probability, materially affected the outcome of the trial. *State v. Everybodytalksabout*, 145 Wn.2d 456, 468-69, 39 P.3d 294 (2002).

Conversely, the error is harmless if the evidence is of minor significance compared to the overall evidence as a whole. *Id.* at 469. In this case, given the weakness of the government's evidence and the prejudice to the defendant by casting him in the specter of involvement of child rape allegations, there is a reasonable probability that the outcome of the trial would have been different.

D. THE PROSECUTOR COMMITED MISCONDUCT BY COMMENTING ON THE DEFENDANT'S FALIURE TO CALL A WITNESS.

At the end of the first day of trial, the Prosecutor stated on the record:

> "and if Melani Newland is called by the defense, which I am pretty sure she will be, I think it's going to be fair game for the state to cross examine her regarding the fact that Detective McCarthy was involved in a case that resulted in ... her husband doing 131-171 months for sex abuse allegations . it goes to her bias. (RP 395, lns:20-20-24, RP 396, lns:1-11)

The defense elected not to call Melani Newland because of that threat. (RP 401, lns:17-24) Then, over defense objection, the prosecutor in closing argued that Melani Newland, the declarant on the 911 tape was bias because her husband was being investigated. (RP 495, lns:15-22) The prosecutor went further, stating, "Your decision must be made solely upon the evidence presented during these proceedings. We don't know what she, Melani Newland,

saw." (RP 521, lns:13-16) "We have no idea what direction she was looking." (RP 522, lns:2-3) "We have no idea what she saw before seeing him on the ground." (RP 522, lns:7-8) "Like she was trying to tattle on this person that she didn't really want in her home. **We don't have information from that source... Melani Newland**. (RP 522, lns:22-24, RP 523, lns:1-2)

A defendant has a constitutional right not to testify. The courts have carefully protected that right by prohibiting prosecutorial comment thereon. *State v. Contreras*, 57 Wn. App. 471, 473, 788 P.2d. 1114 (1990). Although, such a comment may constitute harmless error. *Id.* The absence of a duty to call witnesses is not a specific constitutional right. *Id.* It is a judicially developed corollary of the State's burden to prove each element of the crime charged beyond a reasonable doubt. *Id.* Improper comments by a prosecutor deny the defendant a fair trial and require reversal of his conviction if there is a substantial likelihood that the comments affected the verdict. *State v. Traweek*, 43 Wn. App. 99, 107-08, 715 P.2d 1148, review denied, 106 Wn.2d 1007 (1986). When a comment also affects a separate constitutional right, such as the privilege against self-incrimination, it is subject to the stricter standard of constitutional harmless error. *Id.* The

court must reverse unless convinced beyond a reasonable doubt that the evidence is so overwhelming that it necessarily leads to a finding of guilt. *Id.*

In *Traweek*, the defendant did not testify nor did he call any witnesses. The only issue was the strength of the State's case. Under those circumstances, the reference to defendant's failure to call witnesses was found to be clearly improper. Like *Traweek*, the defendant in this case did not testify and the State had a weak case based on a swing-and-a-miss type assault. The defense admitted the 911 recording of Melani Newland as her present sense impression of what occurred and as an excited utterance. Given the courts previous rulings and the threat by the State to try to impeach Mrs. Newland with more evidence of child sex abuse the defense made a strategic call not to put her on the stand.

It was therefore an impermissible suggestion by the government to imply the defense had a burden to present Melani Newland as a witness. The State bears the entire burden of proving each element of its case beyond a reasonable doubt. See *In re Winship*, 397 U.S. 358, 25 L.Ed.2d 368, 90 S.Ct. 1068 (1970). The prosecutor's statement suggested that the defendant was obliged to

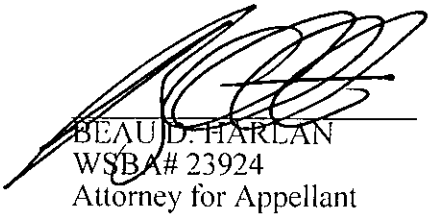
call Melani Newland to prove his innocence. Mr. Newland had no such duty.

CLOSING:

Based upon the foregoing arguments and authorities, Appellant respectfully requests reversal of Appellant's conviction for Assault in the Third Degree and remand for a new trial with specific instructions for the trial court to exclude any evidence of child sexual abuse during trial.

DATED this 14th day of October, 2014.

Respectfully submitted,



BEAU D. HARLAN
WSBA# 23924
Attorney for Appellant

DAVID NEWLAND, Appellant, vs. STATE OF WASHINGTON, Respondent.	No: 13-1-00090-3 No: 46147-1-II AFFIDAVIT OF MAILING

I, Rachael Walker, declare:

I am a citizen of the State of Washington, over the age of 18 years at the time of service hereinafter mentioned, not a party to the above-entitled action, and competent to be a witness therein.

On October 14, 2014, I Mailed the original copy of the Opening Brief of Appellant to Court of Appeals-Division II and copies to Clark County Prosecutors Office and our client Mr. Newland, directed to the individual indicated below.

Court of Appeals-Division II-950 Broadway Suite 300, Tacoma, WA. 98402

Clark County Prosecutor's Office-PO Box 5000, Vancouver, WA. 98666

Mr. David Newland Sr.-9008 NE 101st St. Vancouver, WA. 98662

I declare under penalty of perjury under the laws of the State of Washington that the foregoing statements are true and correct to the best of my knowledge.

DATED this 14th day of October, 2014.

RACHAEL WALKER

Law Offices
Harlan Law Firm P.S.
211 E. McLoughlin Blvd
Vancouver, Washington 98663
(360) 735-8200