

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

STATE OF WASHINGTON,

Respondent,

v.

ROBIN HYLTON,

Appellant.

2006 NOV 19 PM 4: 21

COURT OF APPEALS
STATE OF WASHINGTON
FILED

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

The Honorable Scott E. Blinks, Judge

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STATE OF WASHINGTON
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COURT OF APPEALS
DIVISION II

BRIEF OF APPELLANT

JENNIFER J. SWEIGERT
Attorney for Appellant

NIELSEN, BROMAN & KOCH, PLLC
1908 East Madison
Seattle, WA 98122
(206) 623-2373

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A. ASSIGNMENT OF ERROR

Prosecutorial misconduct denied appellant a fair trial

Issue Pertaining to Assignment of Error

In closing argument, the prosecutor told the jury, "[I]f you think something happened, if you believe it happened, it's beyond a reasonable doubt. . . . So if in your mind it's reasonable to think that something happened, you're convinced beyond a reasonable doubt." Did this argument misstate the burden of proof and deny appellant a fair trial?

B. STATEMENT OF THE CASE

On November 28, 2007, appellant Robin Hylton was scheduled to appear in Lewis County Superior Court on a defense motion to dismiss. RP 55. This was one of many hearings Hylton was required to attend since being released on bail for felony charges filed the previous year. RP 60; CP 36. On this occasion, Hylton had traveled to California and was not able to come to court. RP 66. He was in regular contact with his attorney, but his attorney could not remember whether he had reminded Hylton of this court appearance. RP 37-38.

The only action before the court that day was a defense motion. RP 35. Hylton's defense attorney moved to strike the motion. RP 37. Despite the fact that there was no longer any need for a hearing, and thus

any need for Hylton's presence, the judge signed a bench warrant for Hylton's arrest. RP 53, 58. Hylton then appeared at the next hearing the following week. RP 47. The Lewis County prosecutor charged Hylton with one count of bail jumping. CP 44.

On the bail jumping charges, Hylton represented himself with standby counsel. RP 1. At trial, both Hylton and his attorney admitted Hylton had signed scheduling notices requiring him to appear on November 28, 2007. RP 48, 66. The notices informed Hylton, "The defendant shall appear for all of the above-scheduled court hearings. Failure to appear by the defendant is a crime and may result in a bench warrant being issued, authorizing the arrest of the defendant." RP 51. Hylton explained he was inundated with paperwork and thus did not read the notices. RP 60-61. He testified he tried his best to be at every hearing, but simply did not realize he needed to be in court on the date in question until it was too late. RP 62, 66.

During closing argument, the prosecutor explained the concept of proof beyond a reasonable doubt:

Some of you may remember voir dire on Monday, we talked about the fact that a doubt doesn't necessarily equal a reasonable doubt, not the same thing. So basically tells you if you think something happened, if you believe it happened, it's beyond a reasonable doubt. If after you . . . So a doubt is not a reasonable doubt. So, if in your

mind it's reasonable to think that something happened, you're convinced beyond a reasonable doubt.

RP 83-84.

The jury found Hylton guilty and the court imposed a standard range sentence. CP 16. Hylton appeals his conviction. CP 1.

C. ARGUMENT

PROSECUTORIAL MISCONDUCT DENIED HYLTON A FAIR TRIAL.

Prosecutorial misconduct is established if the prosecutor's comments were improper and were substantially likely to affect the outcome of the proceedings. State v. Reed, 102 Wn.2d 140, 145, 684 P.2d 699 (1984). Even if not objected to at trial, prosecutorial misconduct requires reversal when the prosecutor's comments were so flagrant and ill-intentioned they could not have been cured by instruction. State v. Belgarde, 110 Wn.2d 504, 508, 755 P.2d 174 (1988). Misconduct that directly violates a constitutional right requires reversal unless the State proves it was harmless beyond a reasonable doubt. State v. French, 101 Wn. App. 380, 386, 4 P.3d 857 (2000); State v. Fleming, 83 Wn. App. 209, 213-216, 921 P.2d 1076 (1996). Moreover, because such misconduct rises to the level of manifest constitutional error, the absence of a defense objection does not preclude appellate review. Fleming, 83 Wn. App. at 216.

The touchstone of a prosecutorial misconduct analysis is the fairness of the trial. State v. Davenport, 100 Wn.2d 757, 762, 675 P.2d 1213 (1984). Fundamental unfairness occurs if an accused person may be convicted "on the strength of the same evidence as would suffice in a civil case." In re Winship, 397 U.S. 358, 363, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970). The prosecutor's explanation of reasonable doubt during closing argument violated Hylton's right to a fair trial by significantly reducing the burden of proof below even that required in a civil case.

1. The Prosecutor Improperly Told the Jury Reasonable Belief Is the Same as Proof Beyond a Reasonable Doubt.

The presumption of innocence and the corresponding burden to prove every element of the crime charged beyond a reasonable doubt is the "bedrock upon which the criminal justice system stands." State v. Bennett, 161 Wn.2d 303, 315, 165 P.3d 1241 (2007). The proof beyond a reasonable doubt standard "provides concrete substance for the presumption of innocence." State v. McHenry, 88 Wn.2d 211, 214, 558 P.2d 188 (1977) (quoting In re Winship, 397 U.S. 358, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970)). Indeed, the failure to properly instruct jurors on these principles is structural error and requires reversal. Sullivan v. Louisiana, 508 U.S. 275, 280-81, 113 S. Ct. 2078, 124 L. Ed. 2d 182 (1993); McHenry, 88 Wn.2d at 212-215.

"Statements made by the prosecutor or defense to the jury must be confined to the law as set forth in the instructions given by the court." Davenport, 100 Wn.2d at 760; State v. Estill, 80 Wn.2d 196, 199, 492 P.2d 1037 (1972). A prosecutor's misstatement of the law is a particularly serious error with "grave potential to mislead the jury." Davenport, 100 Wn.2d at 763. Thus, a prosecutor may not attempt to shift or diminish the burden of proof beyond a reasonable doubt in closing argument. State v. Cleveland, 58 Wn. App. 634, 647, 794 P.2d 546 (1990); see also State v. Warren, 134 Wn. App. 44, 59-61, 138 P.3d 1081 (2006) (improper for prosecutor to argue reasonable doubt does not mean to give the defendant the benefit of the doubt), rev. granted, 161 Wn.2d 1001 (2007); People v. Harbold, 124 Ill. App. 3d 363, 371, 464 N.E.2d 734, 742 (Ill. App. 1984) ("[A]rguments which diminish the presumption of innocence are forbidden.").

In this case, the prosecutor significantly diminished the burden of proof by arguing, "if you think something happened, if you believe it happened, it's beyond a reasonable doubt." RP 83. He continued, "So if, in your mind, it's reasonable to think that something happened, you're convinced beyond a reasonable doubt." RP 83.

This argument distorts and reduces the burden of proof and turns the presumption of innocence on its head. The prosecutor told jurors the defendant is guilty beyond a reasonable doubt if it is reasonable to believe he committed the crime. This is the opposite of proof beyond a reasonable doubt.

The prosecutor's argument reduced the burden of proof below even the preponderance of the evidence standard required in civil cases. Under the prosecutor's argument, if the evidence equally supports both guilt and innocence, the jury should vote to convict because it is "reasonable" to believe the defendant is guilty.

The prosecutor also undermined the "abiding belief" language in the pattern jury instruction. The instruction told the jury, "If, after such consideration, you have an abiding belief in the truth of the charge, you are satisfied beyond a reasonable doubt." CP 25. But the prosecutor argued, "if you believe it happened, it's beyond a reasonable doubt." RP 83. This argument told jurors they could ignore the word "abiding" and convict Hylton if they had a mere belief or opinion that the charge was true.

The prosecutor's argument inverted the definition of reasonable doubt. This significantly lowered the burden of proof and was likely to

confuse the jury's understanding of the properly worded written instructions.

2. The Misstatement of the Burden of Proof Was Flagrant, Ill-Intentioned, and Incurable by Instruction.

A prosecutor's disregard of a well-established rule of law is flagrant and ill-intentioned misconduct. Fleming, 83 Wn. App. at 214. It is well established that a prosecutor may not misstate the law or undermine the presumption of innocence by diminishing the burden of proof beyond a reasonable doubt. Davenport, 100 Wn.2d at 760; Warren, 134 Wn. App. at 59-61; Cleveland, 58 Wn. App. at 647.

Although jurors are instructed to disregard any argument not supported by the court's instructions,¹ a misstatement of the law pertaining to the burden of proof cannot be easily dismissed. Fleming, 83 Wn. App. at 213-14 (argument that jury could only acquit if it found a witness was lying or mistaken misstated the State's burden of proof, was "flagrant and ill intentioned," and required a new trial).

The jury instructions also encouraged jurors to consider the lawyers' remarks when applying the law. See CP 23 ("The lawyers' remarks, statements, and arguments are intended to help you understand the evidence

¹ See CP 23 ("You must disregard any remark, statement, or argument that is not supported by . . . the law in my instructions.").

and apply the law.""). Jurors would have followed the prosecutor's interpretation of reasonable doubt because to a layperson, the prosecutor's description sounds correct and provides a simple (albeit mistaken) way for jurors to decide guilt or innocence. Jurors would be particularly tempted to follow the prosecutor's approach because the standard reasonable doubt instructions are not a model of clarity. See Bennett, 161 Wn.2d at 317 (recognizing that even under the pattern instructions, the concept of reasonable doubt seems at times difficult to define and explain, making it tempting to expand the definition).

This misstatement of the burden of proof could not have been cured by instruction because it was couched in the very words used to define proof beyond a reasonable doubt in the pattern jury instruction. The court instructed the jury that "If, after such consideration, you have an abiding belief in the truth of the charge, you are satisfied beyond a reasonable doubt." CP 25. The prosecutor's reference to believing something happened, or thinking something happened echoes the "abiding belief" language used in the reasonable doubt instruction. But the prosecutor equated proof beyond a reasonable doubt with merely thinking or believing something happened. This argument invited the jury to ignore the word

"abiding" and convict so long as it is reasonable to believe the defendant committed the crime charged.

Additionally, the prosecutor distorted the instruction's use of the word, "reasonable," by telling the jury that reasonable proof was enough to find proof beyond a reasonable doubt. The comments were incurable because further instruction by the court was likely only to confuse the jury more. After the prosecutor twisted the very words used in the pattern instruction, the jury could not be expected to properly apply it to Hylton's case.

The argument in this case was much more egregious than the comments in Warren that the court found were cured by a thorough and timely instruction. 134 Wn. App. at 59-61. In Warren, the prosecutor attempted to explain the difference between a reasonable doubt and every possible doubt by telling the jury it did not need to give the defendant the benefit of the doubt. Id. at 59. The prosecutor used the phrase "benefit of the doubt," a concept the jury was likely to understand, but which is not contained in the reasonable doubt instruction. Id. After Warren objected, the court gave a lengthy curative instruction referring the jury to the written instructions and explaining Warren was to get the benefit of any reasonable doubt. Id. at 59-60. The court held this instruction was sufficient to

prevent any prejudice from the improper argument. Id. at 61. Here, by contrast, an instruction could not have cured the jury's confusion because the prosecutor's argument used the language of the reasonable doubt instruction but inverted its meaning.

This argument was particularly ill-intentioned because Hylton, a non-lawyer, was representing himself. Pro se litigants are generally held to the same standards as lawyers. State v. Vermillion, 112 Wn. App. 844, 858, 51 P.3d 188 (2002). However, the prosecutor must have been aware Hylton was less likely to detect misstatements of the law, and the argument at issue here exploited that situation.

"[T]he presumption of innocence is simply too fundamental, too central to the core of the foundation of our justice system." Bennett, 161 Wn.2d at 317-18. A misdescription of the burden of proof in a jury instruction "vitiates all the jury's findings." Sullivan, 508 U.S. at 281. Because the prosecutor's argument distorted the definition of reasonable doubt given in the written jury instructions, Hylton was denied a fair trial.

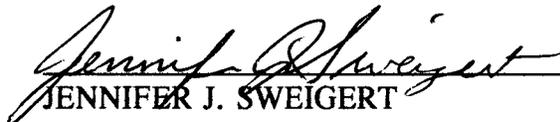
D. CONCLUSION

For the foregoing reasons, this Court should reverse Hylton's conviction and remand for a new trial.

DATED this 19th day of November, 2008.

Respectfully submitted,

NIELSEN, BROMAN & KOCH, PLLC



JENNIFER J. SWEIGERT
WSBA No. 38068
Office ID No. 91051

Attorney for Appellant

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II**

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|---------------------|---|--------------------|
| STATE OF WASHINGTON |) | |
| |) | |
| Respondent, |) | |
| |) | |
| vs. |) | COA NO. 37825-6-II |
| |) | |
| ROBIN HYLTON, |) | |
| |) | |
| Appellant. |) | |

FILED
COURT OF APPEALS DIV. #1
STATE OF WASHINGTON
2008 NOV 19 PM 4:21

DECLARATION OF SERVICE

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 19TH DAY OF NOVEMBER, 2008, I CAUSED A TRUE AND CORRECT COPY OF THE **BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

- LIAM MICHAEL GOLDEN
LEWIS COUNTY PROSECUTOR'S OFFICE
345 W. MAIN STREET
FLOOR 2
CHEHALIS, WA 98532

- ROBIN HYLTON
DOC NO. 309995
WASHINGTON CORRECTIONS CENTER
P.O. BOX 900
SHELTON, WA 98584

08 NOV 29 AM 11:16
STATE OF WASHINGTON
BY  DEPUTY
COURT OF APPEALS
DIVISION II

SIGNED IN SEATTLE WASHINGTON, THIS 19TH DAY OF NOVEMBER, 2008.

x Patrick Mayovsky

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

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|------------------------|---|-------------------------|
| STATE OF WASHINGTON |) | |
| |) | |
| Respondent, |) | No. 79356-5 |
| |) | |
| v. |) | En Banc |
| |) | |
| Richard HEADEN Warren, |) | |
| |) | |
| Petitioner. |) | Filed November 20, 2008 |
| _____ |) | |

Chambers, J. — Richard Warren was convicted of one count of first degree child molestation of his eight-year-old stepdaughter, S.S., and, in a separate trial, three counts of second degree child rape of his fourteen-year-old stepdaughter, N.S. In the first trial, Warren was convicted only of offenses relating to S.S., and in the second trial, he was convicted only of offenses relating to N.S.¹ The Court of Appeals affirmed his convictions in a consolidated appeal. We accepted review primarily to consider two issues: whether the prosecutor committed misconduct during closing arguments and whether the State may lawfully prohibit contact between Warren and his wife.

¹ This case has involved four trials. Warren's first trial ended in a mistrial. In the second trial, he was convicted of molesting S.S., but the jury was unable to reach a verdict on the charges relating to N.S. The third trial again resulted in a mistrial. At a fourth trial, Warren was convicted of raping of N.S. For purposes of this opinion, we disregard the two mistrials and refer to the first trial at which there was a conviction as the first trial, and the second at which there was a conviction as the second trial.

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We affirm.

The facts surrounding Warren's offenses are ably described by the Court of Appeals.² We find it largely unnecessary to review the facts again.

PROSECUTORIAL MISCONDUCT

Warren argues that the prosecutor committed misconduct by repeatedly misstating the burden of proof during closing argument in the first trial. The trial judge overruled Warren's first objection, but after the third time the prosecutor used substantially the same language and Warren made substantially the same objection, the trial judge gave a lengthy curative instruction. During this curative instruction, the trial judge also stated that essentially counsel were "playing with words." Report of Proceedings (RP) (Feb. 20, 2003) at 105. Warren argues that the judge's comment undercuts the seriousness of the misconduct and the effectiveness of the curative instruction. The State properly concedes the prosecutor's language was improper but contends that any error was cured by the trial judge's thorough curative instruction and, in the alternative, that the error was harmless.

The prosecutor's argument was clearly improper and we set forth the pertinent portion of the verbatim report of proceedings for clarity and future guidance. During her rebuttal closing, this exchange occurred:

Ms. Snow [prosecutor]: We also are not clear about the size of the defendant's penis. We have no idea. And for them to ask you to infer everything to the benefit of the defendant is

² *State v. Warren*, 134 Wn. App. 44, 138 P.3d 1081 (2006).

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not reasonable.

MR. CARNEY [defense counsel]: Objection, your Honor. Misstates the burden of proof and presumption of innocence.

THE COURT: Counsel, the objection is overruled. Do you want to talk about it? Come here.

(At this time an off-the-record discussion was held.)

THE COURT: Let's move on, Counsel.

MS. SNOW: Reasonable doubt does not mean give the defendant the benefit of the doubt, and that is clear when you read the definition.

Defense counsel calls [S.S.]'s description of what happened a rambling eight-year-old's description. And the bottom line for you is, it has been uncontroverted.

RP (Feb. 20, 2003) at 98-99. The prosecutor continued with an appropriate argument that the jury should not confuse a child's memory with credibility and discussed child testimony concerning penis pumps, pornographic video covers, bathing, and sexual touching. Then the following transpired:

Ms. Snow: Finally, in this case I want to point out that this entire trial has been a search for the truth. And it is not a search for doubt. I talked to you about the fact that you must find the defendant guilty beyond a reasonable doubt. That is the standard to be applied in the defendant's case, the same as any other case. But reasonable doubt does not mean beyond all doubt and it doesn't mean, as the defense wants you to believe, that you give the defendant the benefit of the doubt.

MR. CARNEY: Again, your Honor --

THE COURT: Counsel, just a second. There has been an objection to the statements made by the State as to the definition of reasonable doubt. The definition of reasonable doubt is provided in your jury instructions. I don't have the number in front of me, but I think it is the third instruction. I want you to read that instruction very carefully, particularly the last paragraph of the instruction. The second sentence of that reads, "it is such a doubt as would exist in the mind of a reasonable person after fully, fairly and carefully considering all of the evidence or lack of evidence."

Now, my statement on that is, after you have done that, after you have reviewed all of the evidence or lack of evidence, and you continue to have a reasonable doubt then you must find the defendant not guilty. And if in still having a reasonable doubt that is a benefit to the defendant, then in a sense you are giving the benefit of the doubt to the defendant.

So I don't want you to misconstrue the language that somehow there is no benefit here. Indeed there is, because the benefit of the doubt is if you still have a doubt after having heard all of the evidence and lack of evidence, if you still have a doubt, then the benefit of that doubt goes to the defendant, and the defendant is not guilty.

So we are playing with words here in a sense. The instruction is here in the package. I commend it to you for your reading.

Ultimately you will determine whether, at the conclusion of your deliberations, you have a reasonable doubt or not. You may complete your argument, Counsel.

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The prosecutor concluded her closing argument briefly without suggesting, again, that the defendant did not enjoy the benefit of any reasonable doubt. Warren did not seek any additional instructions or a mistrial.

To prevail on a claim of prosecutorial misconduct, a defendant must show first that the prosecutor's comments were improper and second that the comments were prejudicial. *See, e.g., State v. Yates*, 161 Wn.2d 714, 774, 168 P.3d 359, *cert. denied*, 128 S. Ct. 2964 (2007); *State v. Russell*, 125 Wn.2d 24, 85, 882 P.2d 747 (1994).³ In this case, the prosecutor's argument was improper because it undermined the presumption of innocence. As we have said recently:

The presumption of innocence is the bedrock upon which the criminal justice system stands The presumption of innocence can be diluted and even washed away if reasonable doubt is defined so as to be illusive or too difficult to achieve. This court, as guardians of all constitutional protections, is vigilant to protect the presumption of innocence.

State v. Bennett, 161 Wn.2d 303, 315-16, 165 P.3d 1241 (2007). Due

³ This has long been our approach to analyzing prosecutorial misconduct. *See, e.g., Yates*, 161 Wn.2d at 774; *Russell*, 125 Wn.2d at 85. Warren urges us to apply instead a constitutional harmless error analysis because the misconduct in this case touches on constitutional rights. Perhaps if a prosecutor violated an accused's right of silence by improperly blurting out the accused had exercised his constitutional right, the constitutional harmless error standard would be appropriate. But Warren's jury was properly instructed on the presumption of innocence. Before us is trial counsel's argument over the application of the instructions and the trial judge's prompt intervention with a curative instruction. We decline to reach the issue of whether a constitutional error analysis might be appropriate if the prosecutorial misconduct directly violated a constitutional right.

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process requires that the State bear the burden of proving every element of the crime beyond a reasonable doubt. *In re Winship*, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970); *State v. Cantu*, 156 Wn.2d 819, 825, 132 P.3d 725 (2006). A defendant is entitled to the benefit of a reasonable doubt. Whether a doubt exists and, if so, whether that doubt is reasonable may be subject to debate in a particular case. However, it is an unassailable principle that the burden is on the State to prove every element and that the defendant is entitled to the benefit of any reasonable doubt. It is error for the State to suggest otherwise.

But this prosecutor did more than merely suggest otherwise. She sought to undermine the State's burden of proof beyond a reasonable doubt. Telling the jury, "it doesn't mean, as the defense wants you to believe, that you give the defendant the benefit of the doubt," was simply improper. RP (Feb. 20, 2003) at 104. As a quasi-judicial officer representing the people of the State, a prosecutor has a duty to act impartially in the interest only of justice. *See State v. Reed*, 102 Wn.2d 140, 147, 684 P.2d 699 (1984). The jury knows that the prosecutor is an officer of the State. It is, therefore, particularly grievous that this officer would so mislead the jury regarding the bedrock principle of the presumption of innocence, the foundation of our criminal justice system.⁴

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Here, the prosecutor made the same or similar incorrect statement three times and Warren made prompt objections. The prosecutor's conduct was certainly flagrant. This court's pronouncement of many years ago bears repeating in this instance:

"It is not our purpose to condemn the zeal manifested by the prosecuting attorney in this case. We know that such officers meet with many surprises and disappointments in the discharge of their official duties. They have to deal with all that is selfish and malicious, knavish and criminal, coarse and brutal in human life. But the safeguards which the wisdom of ages has thrown around persons accused of crime cannot be disregarded, and *such officers are reminded that a fearless, impartial discharge of public duty, accompanied by a spirit of fairness toward the accused, is the highest commendation they can hope for.* Their devotion to duty is not measured, like the prowess of the savage, by the number of their victims."

State v. Charlton, 90 Wn.2d 657, 665, 585 P.2d 142 (1978) (quoting *State v. Montgomery*, 56 Wash. 443, 447-48, 105 P. 1035 (1909)).

In analyzing prejudice, we do not look at the comments in isolation, but in the context of the total argument, the issues in the case, the evidence, and the instructions given to the jury. *Yates*, 161 Wn.2d at 774. Had the trial judge not intervened to give an appropriate and effective curative instruction,

⁴ We take judicial notice that, indeed, the same prosecutor made similar arguments before. In *State v Wells*, noted at 118 Wn. App. 1061, 2003 WL 22286178, the very same prosecutor made the very same "benefit of the doubt" argument; however, the defendant neither objected nor sought a curative instruction. The Court of Appeals held the remark was "entirely inappropriate," but the defendant waived the misconduct because the remark was not so flagrant and ill-intentioned that it could not have been obviated by a curative instruction. *Id.*

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we would not hesitate to conclude that such a remarkable misstatement of the law by a prosecutor constitutes reversible error. However, reviewing the argument in context, because Judge Hayden interrupted the prosecutor's argument to give a correct and thorough curative instruction, we find that any error was cured. We presume the jury was able to follow the court's instruction. See *State v. Smith*, 144 Wn.2d 665, 679, 30 P.3d 1245, 39 P.3d 294 (2001) (some improper prosecutorial remarks may touch upon constitutional rights but are still curable by a proper instruction); *State v. Stenson*, 132 Wn.2d 668, 730, 940 P.2d 1239 (1997). Warren has not shown that he was prejudiced by the prosecutor's improper argument in the first trial.⁵

Warren also argues that the prosecutor's conduct was improper in his

⁵ We respectfully disagree with our dissenting colleagues that *Sullivan v. Louisiana*, 508 U.S. 275, 113 S. Ct. 2078, 124 L. Ed. 2d 182 (1993) applies to this case. In *Sullivan*, the written reasonable doubt instruction given to the jury was flatly incorrect. The Supreme Court unanimously concluded that this was a structural error that deprived the defendant of a fair trial. *Id.* at 278. Warren does not challenge the written instructions given to the jury. The real instructional issue is whether the trial judge's unfortunate statement that "we are playing with words here in a sense" so undermined the correct instruction as to constitute reversible error. Like most errors, even constitutional ones, it is subject to some sort of harmless error analysis. See *Neder v. United States*, 527 U.S. 1, 7-8, 119 S. Ct. 1827, 144 L. Ed. 2d 35 (1999) (misstatement of elements subject to harmless error analysis). *Accord Bartlett v. Battaglia*, 453 F.3d 796, 801 (7th Cir. 2006) (declining to extend *Sullivan*'s structural error analysis to prosecutorial argument misstating the burden of proof).

We are also not persuaded that anything that falls from a judge's lips during a trial is an instruction to the jury. Warren does not ask that we evaluate the judge's comment that counsel was playing with words as an instruction. Instead he argues—appropriately—that it is relevant to whether the prosecution's misstatement of the law was prejudicial to his case.

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second trial in which he was convicted of offenses against N.S. The State concedes the closing argument was improper insofar as it referred to facts not in evidence. In explaining why N.S. did not report her stepfather's abuse, which had continued for several years, the prosecutor argued that children assess very carefully who they will disclose sexual abuse to and that long delays are common because people frequently repress sexual abuse. No evidence supporting that argument had been offered to the jury. Warren did not object but argues an objection would have been futile because the court had previously made clear it would not hear objections based on mischaracterizing the evidence.⁶ But the jury is presumed to follow the instruction that counsel's arguments are not evidence. *Stenson*, 132 Wn.2d at 729-30; *State v. Grisby*, 97 Wn.2d 493, 499, 647 P.2d 6 (1982). Given the weight of the properly admitted evidence against Warren, he has failed to show that he was prejudiced by the prosecutor's comments. *See Russell*, 125 Wn.2d at 85.

Warren also argues, and the State properly concedes, it was improper for the prosecutor to tell the jury there were a "number of mischaracterizations" in defense counsel's argument as "an example of what people go through in a criminal justice system when they deal with defense

⁶ The judge had responded to an earlier objection as follows: "Members of the jury, as I have instructed you, and I have obviously instructed both counsel, what counsel say is not evidence. So the objection is overruled because it is up to the jury to decide what the evidence is. If counsel misstates the evidence I'm sure you will correct it in the jury room. An objection to mischaracterizing the evidence during closing argument is not a well founded objection." RP (Nov. 18, 2003) at 44; *see also* RP (Feb. 20, 2003) at 7-8, 94-95.

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attorneys.” RP (Nov. 18, 2003) at 62-63. The prosecutor also described defense counsel’s argument as a “classic example of taking these facts and completely twisting them to their own benefit, and hoping that you are not smart enough to figure out what in fact they are doing.” *Id.* While the prosecutor’s comments were improper because they commented on defense counsel’s role, Warren did not object at the time to these comments, and they are not so flagrant and ill-intentioned that no instruction could have cured them. *See Stenson*, 132 Wn.2d at 719; *State v. Gonzales*, 111 Wn. App. 276, 45 P.3d 205 (2002) (misconduct to directly contrast prosecutor’s role with defense attorney’s role). As in *Yates*, Warren has failed to show prejudice. *See Yates*, 161 Wn.2d at 776 (even if prosecutor’s argument improperly commented on defense counsel’s role, there was no substantial likelihood the comment affected the jury’s decision).

Next, Warren argues that the prosecutor’s “badge of truth” theme during closing argument amounted to misconduct. The prosecutor argued the details in N.S.’s testimony gave it a “badge of truth” and the “ring of truth.” RP (Nov. 18, 2003) at 12. The prosecutor then went over specific parts of N.S.’s testimony that “rang out clearly with truth in it.” *Id.* at 13. Warren did not object. It is misconduct for a prosecutor to state a personal belief as to the credibility of a witness. *State v. Brett*, 126 Wn.2d 136, 175, 892 P.2d 29 (1995).

But defense counsel clearly attacked N.S.’s credibility during opening

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statements and cross examination. The prosecutor responded by arguing that the level of detail in N.S.'s testimony raises a reasonable inference that she was telling the truth. For example, N.S. testified that Warren would withdraw before ejaculating during intercourse and that she had difficulty swallowing Warren's ejaculate during oral sex and sometimes would spit it into a sink. The prosecutor argued that these statements had a "ring of truth" and the detail was not the kind one would expect a 14-year-old to know absent abuse. These arguments were not improper. First, there was no explicit statement of personal opinion. *Id.* (prejudicial error will not be found unless it is clear and unmistakable that counsel is expressing a personal opinion). Second, prosecutors have wide latitude to argue reasonable inferences from the facts concerning witness credibility. *Stenson*, 132 Wn.2d at 727. Therefore, this argument was not improper.

Finally, Warren argues the prosecutor's closing argument in the second trial was misconduct because the State's interpretation of certain lyrics in the rap song Warren wrote while in jail on these charges was different from the interpretation argued in the first trial. We reject this claim because even if the prosecutor's interpretation was different at the first and second trials, the song was admitted only to impeach Warren's characterization of himself as a caring stepparent. This does not amount to the prosecutor arguing inconsistent theories of liability. *See State v. Roberts*, 142 Wn.2d 471, 498, 14 P.3d 713 (2000).

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While we find that the prosecutor made several improper arguments, Warren has not established prejudice.

NO CONTACT CONDITION OF SENTENCING

As a condition of his sentence, Warren was prohibited from having contact with his wife, Lisa Warren, for life. He argues that this prohibition is unauthorized by statute and violates his constitutional marriage rights.

We will briefly review the salient facts.

Warren moved in with his then-girlfriend Lisa⁷ and her two daughters, N.S. and S.S., around January 2001, and the couple married several months later. By the following spring, Lisa was pregnant with Warren's child. During an argument in March 2002, Warren assaulted Lisa. He pleaded guilty to domestic violence and went to jail.

It was in June 2002 that allegations of child molestation first surfaced. Eight-year-old S.S. told a school counselor she was upset that her stepfather was being released from jail because he did disgusting things to her. After S.S. described two recent incidents in great detail, Warren was charged with first degree rape of a child and first degree child molestation. At first Lisa stood by Warren but when her other daughter, N.S., disclosed that she had been abused as well, Lisa began to cooperate with the State, ultimately testifying against Warren. As a condition of his sentence, the court prohibited Warren from contacting S.S., N.S., and their mother Lisa. He was not

⁷ To avoid confusion, Lisa Warren is referred to by her first name. No disrespect is intended.

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prohibited from contacting his own biological child.

The trial court imposed the no-contact order because Lisa's children were the victims of the crimes and because she testified against Warren at his first trial. The court cited Warren's controlling behavior in general, including the fact that Lisa took the children out of school and avoided subpoenas at Warren's urging.

The Sentencing Reform Act of 1981 (Act), RCW 9.94A.505(8), authorizes the trial court to impose "crime-related prohibitions."

Under the Act, trial courts may impose crime-related prohibitions for a term of the maximum sentence to a crime, independent of conditions of community custody. *State v. Armendariz*, 160 Wn.2d 106, 112, 120, 156 P.3d 201 (2007). "Crime-related prohibitions" are orders directly related to "the circumstances of the crime." RCW 9.94A.030(13). This court reviews sentencing conditions for abuse of discretion. *State v. Riley*, 121 Wn.2d 22, 37, 846 P.2d 1365 (1993). Such conditions are usually upheld if reasonably crime related. *Id.* at 36-37.

More careful review of sentencing conditions is required where those conditions interfere with a fundamental constitutional right. *See State v. Riles*, 135 Wn.2d 326, 347, 957 P.2d 655 (1998). Conditions that interfere with fundamental rights must be reasonably necessary to accomplish the essential needs of the State and public order. *Id.* Additionally, conditions that interfere with fundamental rights must be sensitively imposed. *Riley*, 121

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Wn.2d at 37 (citing *United States v. Consuelo-Gonzalez*, 521 F.2d 259, 265 (9th Cir. 1975)).

Whether a condition of sentence prohibiting contact with a spouse who is not the direct victim of the crime is reasonably crime related or violates the fundamental right to marriage are questions of first impression in Washington.⁸ However, the Court of Appeals considered similar issues in *State v. Ancira*, 107 Wn. App. 650, 27 P.3d 1246 (2001). The order at issue in that case prohibited all contact between the defendant and his children, although he was convicted only of domestic violence against his wife. *Id.* at 654. The court held that the order prohibiting contact with the children violated Ancira's fundamental right to parent his children because cutting off

⁸ Published case law from other jurisdictions is scant and not directly on point. Florida upheld a condition of probation prohibiting contact with any member of the child victim's family, although this de facto prohibited the defendant from contacting his own daughter, who lived with the victim's family. *Russ v. State*, 519 So. 2d 715 (Fla. Dist. Ct. App. 1988). A Mississippi trial court prohibited the defendant from contacting the families of the victim or the witnesses, but the appellate court did not consider the validity of this condition of probation. *Griffith v. City of Bay St. Louis*, 797 So. 2d 1037 (Miss. Ct. App. 2001). Arizona upheld a condition of probation that the defendant not contact his wife who was also his co-defendant in a theft case. *State v. Nickerson*, 164 Ariz. 121, 791 P.2d 647 (1990). Oregon upheld a condition of probation that the defendant, convicted of obtaining money under false pretenses, could not marry without a court order because he was a bad influence on his fiancée. *State v. Allen*, 12 Or. App. 455, 506 P.2d 528, 529 (1973). On the other hand, Oregon revised a condition prohibiting contact with persons convicted of a crime to allow contact with the defendant's husband, despite his criminal record. *State v. Martin*, 282 Or. 583, 589-90, 580 P.2d 536 (1978). In *Stephenson v. Taylor*, the district court noted a habeas petitioner had not cited any authority for a right to marry a 17-year-old girl when he was forbidden, as a sex offender, from contacting any person under 18. *Stephenson v. Taylor*, No. 0:06-816-RBH, 2000 WL 1068247 (S.D.S. C. Mar. 30, 2007) (unpublished).

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all contact was not reasonably necessary to protect them from the harm of witnessing domestic violence. *Id.*

Warren first argues that the no-contact order was not reasonably crime related because Lisa was not the victim of the crimes. While this is admittedly a close question, we conclude that the trial court did not abuse its discretion. Warren is correct that Washington courts have been reluctant to uphold no-contact orders with classes of persons different from the victim of the crime. *See Riles*, 135 Wn.2d at 349 (no-contact order with minors was not related to crime of rape of adult woman); *Ancira*, 107 Wn. App. at 656 (no contact order with children not necessary when defendant convicted of domestic violence against wife). But unlike the protected parties in the cases cited above, protecting Lisa is directly related to the crimes in this case. She is the mother of the two child victims of sexual abuse for which Warren was convicted; Warren attempted to induce her not to cooperate in the prosecution of the crime; and Lisa testified against Warren resulting in his conviction of the crime. Warren's criminal history includes convictions for murder and for beating Lisa. There is nothing in the record to suggest that Lisa objects to the no-contact order.⁹ Thus, we conclude that protecting Lisa was reasonably related to the crime.

Warren also argues the no-contact order violates his fundamental

⁹ Although the court considered an e-mail from Lisa at sentencing, the contents of the e-mail are not in the record; aside from her cooperation with the State, there is no evidence as to her wishes regarding the no-contact order.

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constitutional right to marriage and to parent his children. The rights to marriage and to the care, custody, and companionship of one's children are fundamental constitutional rights, and state interference with those rights is subject to strict scrutiny. See *Santosky v. Kramer*, 455 U.S. 745, 102 S. Ct. 1388, 71 L. Ed. 2d 599 (1982); *Loving v. Virginia*, 388 U.S. 1, 12, 87 S. Ct. 1817, 18 L. Ed. 2d 1010 (1967). Although Warren's ability to engage in marital activity is necessarily limited by his imprisonment and the no-contact orders with N.S. and S.S., there remain certain aspects of marriage which may not be denied absent a compelling state interest. See *Turner v. Safley*, 482 U.S. 78, 95-96, 107 S. Ct. 2254, 96 L. Ed. 2d 64 (1987) (married inmate still entitled to benefits of marriage such as emotional support, spiritual commitment, eligibility for government benefits, and inheritance and property rights).

We conclude the order prohibiting contact does not violate Warren's fundamental right to marry because it is reasonably necessary to achieve a compelling state interest, namely, the protection of Lisa and her daughters. We are mindful that crime-related prohibitions affecting fundamental rights must be narrowly drawn. *Riley*, 121 Wn.2d at 38 (citing *Consuelo-Gonzalez*, 521 F.2d at 265). There must be no reasonable alternative way to achieve the State's interest. See *Ancira*, 100 Wn. App. at 655.

In *Ancira*, the court struck down the no-contact order because the children could be protected through indirect contact by phone or mail, or

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supervised visitation outside the presence of their mother (who was the victim of the domestic violence at issue). *Id.* Thus, it was not reasonably necessary to cut off all contact with the children. *Id.* Here, by contrast, preventing all contact appears reasonably necessary to protect Lisa. Under these unique facts, we agree with the Court of Appeals that the order prohibiting contact with Lisa was directly related to the circumstances of the crime and was not an unconstitutional restriction on Warren's constitutional rights.

We also agree with the Court of Appeals that the remaining alleged errors do not warrant reversal. We first note that Warren's argument that witnesses' descriptions of their interviews with S.S. and N.S. constituted improper vouching was recently settled by this court in *State v. Kirkman*, 159 Wn.2d 918, 934-37, 155 P.3d 125 (2007) (description of interview protocol of asking child to tell the truth and eliciting promise to do so is not improper vouching). We agree with the Court of Appeals that the evidence of Warren's charges and conviction for child molestation from the first trial was within the trial court's discretion to admit in the second trial under ER 404(b) and ER 609. See *State v. Elmore*, 139 Wn.2d 250, 285-87, 985 P.2d 289 (1999) (discussing res gestae exception to ER 404(b)); *State v. Renneberg*, 83 Wn.2d 735, 738, 522 P.2d 835 (1974) (discussing open door doctrine). Evidence of a sexual device found by S.S. was also within the trial court's discretion to admit. See *State v. DeVincentis*, 150 Wn.2d 11, 22, 74 P.3d 119 (2003) (discussing evidence of grooming behaviors in child sexual abuse

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case). Since we find no improperly admitted evidence, Warren's claim of cumulative error fails.

CONCLUSION

While we find the prosecutor's comments were improper, Warren has not established prejudice. We find the no-contact order did not infringe on Warren's constitutionally protected marriage rights. None of Warren's other arguments merit reversal. We affirm.

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AUTHOR:

Justice Tom Chambers

WE CONCUR:

Justice Susan Owens

Justice Mary E. Fairhurst

Justice James M. Johnson

Bobbe J. Bridge, Justice Pro Tem.

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MADSEN, J. (conurrence, in part, in dissent)—The majority affirms Richard Warren’s conviction in his second trial¹ for first degree child molestation, in part, by stating that the prejudice Warren suffered when the prosecution misstated its burden of proof was cured by the trial court’s instruction to the jury on the reasonable doubt standard. Majority at 8. I cannot agree that the violation of a right so fundamental as the presumption of innocence can be cured by the instruction given to the jury in this case. In my opinion, the “curative instruction” also misconstrued the reasonable doubt standard and in doing so, irrevocably prejudiced the defendant. I would follow the analysis set forth by the Supreme Court in *Sullivan v. Louisiana*, 508 U.S. 275, 113 S. Ct. 2078, 124 L. Ed. 2d 182 (1993), to hold that such an erroneous instruction from the court can never be harmless and instead requires reversal.

The prosecutor in Warren’s case mischaracterized the burden of proof three separate times; each time Warren promptly objected. After *overruling* Warren’s first

¹ As Justice Sanders notes in his dissent, Mr. Warren had four trials, two of which ended in mistrial. I refer to them as Justice Sanders does, in the order in which he was tried. Dissent at 1 n.1.

objection to the prosecutor's mischaracterizations, the trial court finally intervened when the prosecutor asserted that "reasonable doubt does not mean . . . that you give the defendant the benefit of the doubt." Report of Proceedings (RP) (Feb. 20, 2003) at 104. Upon objection to this statement, the trial court referred the jury to the written instruction on the reasonable doubt standard and gave further verbal instruction. The trial court concluded its verbal instruction on reasonable doubt by stating, "[s]o we are playing with words here in a sense."² *Id.* at 105. This statement to the jury paints the reasonable doubt standard as a game of semantics, mere words to be played with by the defense and the prosecution. Our system of justice and the defendant's Sixth Amendment right to trial by jury and a presumption of innocence is not a game of words. As the majority notes, "[t]he presumption of innocence is the bedrock upon which the criminal justice system stands." Majority at 5 (quoting *State v. Bennett*, 161 Wn.2d 303, 315-16, 165 P.3d 1241 (2007)).

I agree with the dissent that Warren's constitutional right to a presumption of innocence was violated. *See* dissent at 2 ("[T]he prosecutorial misconduct directly and independently infringed on the 'bedrock' of our criminal justice system: the presumption of innocence."). I disagree, however, that the violation of that right can be subjected to the constitutional harmless error doctrine. *See id.* at 1. The erroneous *instruction* in Warren's case came from the judge, not the prosecutor. This falls squarely within the

² The full text of the prosecutor's and trial court's statements to the jury are set out in the majority opinion. Majority at 3-4.

Supreme Court's holding in *Sullivan* that "harmless-error analysis cannot be applied in the case of a defective reasonable-doubt instruction consistent with the Sixth Amendment's jury-trial guarantee." *Sullivan*, 508 U.S. at 285 (Rehnquist, C.J., concurring).

The Seventh Circuit has rejected arguments that the automatic reversal standard set out in *Sullivan* should also apply to prosecutorial comments misconstruing the burden of proof. *Bartlett v. Battaglia*, 453 F.3d 796, 801 (7th Cir. 2006) ("While we strongly disapprove of the prosecution's clumsy attempts to discuss the burden of proof, these comments simply could not have poisoned the jury's understanding in the same manner an erroneous jury instruction would have."). However, as noted above, in Warren's case the erroneous statement of the burden of proof requiring reversal of his conviction came from the judge's instructions to the jury, not from the prosecutor's arguments.³

As to Warren's fourth trial, I cannot agree with the majority that the prosecutor's use of the phrases "badge of truth" and "ring of truth" to describe the victim's testimony was proper. However, as Warren did not object, I find that these comments were not so flagrant and ill-intentioned that no instruction could have cured them. *See State v. Hoffman*, 116 Wn.2d 51, 93, 804 P.2d 577 (1991). And, though there were other errors in Warren's fourth trial, I would not go so far as the dissent to say that, taken cumulatively, these errors warrant reversal of that conviction.

³ I offer no opinion on whether or not this court would follow the Seventh Circuit's reasoning in *Bartlett* and refuse to extend *Sullivan* to cases in which *only* the prosecutor misstated the burden of proof.

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Finally, I agree with the majority and Justice Alexander that the trial court did not err in prohibiting Warren from having contact with his wife.

AUTHOR:

Justice Barbara A. Madsen

WE CONCUR:

Justice Charles W. Johnson

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ALEXANDER, C.J. (concurrence, in part, with dissent)—I agree with Justice Sanders that the prosecutor engaged in misconduct at the trial at which Richard Warren was convicted of molesting his eight-year-old stepdaughter, S.S. I also agree that the misconduct cannot be considered harmless. Warren's conviction on this charge should, therefore, be reversed. I reach this conclusion because of the prosecutor's frequent and flagrant misstatement of the burden of proof. The principle that a defendant is presumed to be innocent throughout the trial and that the burden resides with the State to overcome that presumption by evidence that is convincing beyond a reasonable doubt is, as Justice Sanders points out, a "bedrock" upon which our criminal justice stands. -Dissent at 2 (quoting *State v. Bennett*, 161 Wn.2d 303, 315, 165 P.3d 1241 (2007)). For the prosecutor to have asserted on three occasions during the trial that the State's burden should be reduced was highly prejudicial to Warren. Although the trial judge endeavored to cure the error with an instruction to the jury, the impact of the instruction was, unfortunately, diluted by the trial judge's

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statement that “we are playing with words here.” *Id.* at 3 (quoting Report of Proceedings (Feb. 20, 2003) at 105). In sum, I conclude that under either a constitutional or nonconstitutional harmless error analysis, the misconduct was so significant that the error was not cured by the watered down jury instruction given by the trial judge.

Insofar as Warren’s conviction, at a second trial, on three charges of raping his stepdaughter, N.S., I concur with the majority’s affirmance of these convictions. Although, as the majority concedes, the prosecutor made several improper arguments at this trial as well, I do not believe that the cumulative effect of this misconduct was sufficient to justify reversal.

I also agree with the majority that the trial court did not err in prohibiting Warren from having contact with his wife. The no-contact provision is, in my view, a crime related prohibition and one that was not objected to by Warren’s wife, Lisa. It cannot, in my judgment, be said that the condition is unlawful or unreasonable.

AUTHOR:

Chief Justice Gerry L. Alexander

WE CONCUR:

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SANDERS, J. (dissenting)—According to the majority the numerous instances of conceded prosecutorial misconduct in Richard Warren’s second and fourth trials are not reversible error.¹ I disagree; I conclude the prosecutorial misconduct in Warren’s second trial and the accumulation of errors in Warren’s fourth trial require reversal of both verdicts. Last, I would hold prohibiting Warren from communicating with his wife was not reasonably related to his convictions and violates his fundamental right to marriage.

I. The Prosecutorial Misconduct at Warren’s Second Trial

Normally, prosecutorial misconduct is grounds for reversal where there is a substantial likelihood the misconduct affected the verdict. *State v. Pirtle*, 127 Wn.2d 628, 672, 904 P.2d 245 (1995). However, when the prosecutor’s misconduct affects a constitutional right, such as the right against self-incrimination, the court undertakes a separate analysis: the constitutional harmless error analysis. See *State v. Easter*, 130 Wn.2d 228, 242-43, 922 P.2d 1285 (1996); *State v. Davenport*, 100 Wn.2d 757, 761-62, 675 P.2d 1213 (1984). Under this review the error is harmless if the court is convinced beyond a reasonable doubt that the jury would have reached the same result. *Easter*, 130 Wn.2d at 242.

¹ Unlike the majority I will refer to Warren’s four trials in the order in which he was tried. See majority at 1 n.1 (disregarding Warren’s two mistrials).

According to *Davenport*, 100 Wn.2d at 761, constitutional harmless error analysis is inappropriate for cases involving mere “trial irregularities.” “Such irregularities neither independently violate a defendant’s constitutional rights . . . nor violate a statute or Rule of Evidence” *Id.* at 761 n.1 (citations omitted). But here, the prosecutorial misconduct directly and independently infringed on the “bedrock” of our criminal justice system: the presumption of innocence. *State v. Bennett*, 161 Wn.2d 303, 315, 165 P.3d 1241 (2007). Moreover, the prosecutorial misconduct violated RCW 10.58.020, providing, “[e]very person charged with the commission of a crime shall be presumed innocent until the contrary is proved by competent evidence beyond a reasonable doubt” As such, the constitutional harmless error analysis applies, and the court must be convinced beyond a reasonable doubt that the jury would have reached the same result. *Easter*, 130 Wn.2d at 242; *see also State v. Fleming*, 83 Wn. App. 209, 216, 921 P.2d 1076 (1996) (utilizing constitutional harmless error analysis where prosecutor improperly shifted the burden of proof, misstated the nature of reasonable doubt and the role of the jury, and infringed on the defendant’s right to remain silent).

In Warren’s second trial the prosecutor argued in closing it was not reasonable for the jury “to infer everything for the benefit of the defendant” Report of Proceedings (RP) (Feb. 20, 2003) at 98. Warren objected, but the trial court overruled his objection. Afterward the prosecutor reprised her erroneous

interpretation of the burden of proof: “[r]easonable doubt does not mean give the defendant the benefit of the doubt” RP at 99. Later the prosecutor repeated her argument that “reasonable doubt does not mean beyond all doubt. It doesn’t mean, as the defense wants you to believe, that you give the defendant the benefit of the doubt.” RP at 104. Warren again objected and without ruling on the objection, the court instructed the jury in relevant part:

[A]fter you have reviewed all of the evidence or lack of evidence, and you continue to have a reasonable doubt then you must find the defendant not guilty. And if in still having a reasonable doubt that is a benefit to the defendant, then in a sense you are giving the benefit of the doubt to the defendant.

So I don’t want you to misconstrue the language that somehow there is no benefit here. Indeed there is, because the benefit of the doubt is if you still have a doubt after having heard all of the evidence or lack of evidence, if you still have a doubt, then the benefit of that doubt goes to the defendant, and the defendant is not guilty.

So we are playing with words here in a sense.

RP at 104-05.²

The State concedes the prosecutor mischaracterized the presumption of innocence and the burden of proof. The State argues, however, the jury was not misled by the prosecutor’s repeated mischaracterization because of the court’s curative instruction. I cannot agree.

² I agree with Justice Madsen that an erroneous instruction from the court on the burden of proof is *not* subject to a harmless error analysis. I also concur with her view that this instruction, which included the language, “So we are playing with words here in a sense,” was reversible error in and of itself.

The trial court *overruled* Warren's first objection to the prosecutor's clear mischaracterization, implicitly bolstering the mischaracterization. The trial court passed on Warren's second objection, giving a curative instruction instead. Yet, the trial court's instruction undermined its curative effect by implying the issue was merely a semantic quibble as opposed to the foundation of our criminal justice system. Moreover, given the repeated and flagrant misconduct involved here, such a tepid instruction was unlikely to cure the obvious prejudice involved in mischaracterizing the presumption of innocence. *See State v. Copeland*, 130 Wn.2d 244, 284, 922 P.2d 1304 (1996) (internal quotation marks omitted) ("If misconduct is so flagrant that no instruction can cure it, there is, in effect, a mistrial and a new trial is the only and the mandatory remedy." (quoting *State v. Belgarde*, 110 Wn.2d 504, 508, 755 P.2d 174 (1988))).

In the final analysis a jury is "made up of human beings, whose condition of mind cannot be ascertained by other human beings. Therefore, it is impossible for courts to contemplate the probabilities any evidence may have upon the minds of the jurors." *State v. Robinson*, 24 Wn.2d 909, 917, 167 P.2d 986 (1946). I am not convinced beyond a reasonable doubt the jury would have reached the same result had the prosecutor not mischaracterized the presumption of innocence and its high burden of persuasion.

II. The Cumulative Error at Warren's Fourth Trial

Whether the prejudicial effect of an individual instance of error independently requires reversal, the cumulative effect of numerous errors may be such that reversal is required. *See State v. Coe*, 101 Wn.2d 772, 789, 684 P.2d 668 (1984) (reversal required because of accumulated evidentiary errors and prosecutorial misconduct). After analyzing the prosecutorial misconduct from Warren's fourth trial, I would hold the cumulative error requires reversal.

As stated above, when alleged prosecutorial misconduct does not directly infringe a constitutional right, the defendant must establish the prosecutor's improper conduct and its prejudicial effect. *State v. Dhaliwal*, 150 Wn.2d 559, 578, 79 P.3d 432 (2003) (citing *Pirtle*, 127 Wn.2d at 672, and *State v. Furman*, 122 Wn.2d 440, 455, 858 P.2d 1092 (1993)). The court evaluates the conduct in light of the total argument, issues, evidence, and jury instructions. *State v. Davis*, 141 Wn.2d 798, 872, 10 P.3d 977 (2000).

Normally, where the defendant fails to object to the prosecutor's allegedly improper conduct, the defendant waives any resultant error unless the conduct is "so flagrant and ill-intentioned that it causes an enduring and resulting prejudice that could not have been neutralized by a curative instruction to the jury." *State v. Brown*, 132 Wn.2d 529, 561, 940 P.2d 546 (1997). Reversal is also not required if the prejudice could have been cured by a jury instruction, which the defendant did not request. *State v. Russell*, 125 Wn.2d 24, 85, 882 P.2d 747 (1994).

Here, however, the trial judge rendered futile any objection based on factual mischaracterizations during closing arguments. Therefore, we should analyze the prosecutor's conduct and defense counsel's failure to object with this limitation in mind. The prosecutor committed three instances of misconduct.

First, the prosecutor improperly vouched for the testimony of the victim witness, stating the testimony had the "badge of truth" and "the ring of truth." RP (Nov. 18, 2003) at 12. "It is improper for a prosecutor personally to vouch for the credibility of a witness." *State v. Brett*, 126 Wn.2d 136, 175, 892 P.2d 29 (1995) (citing *State v. Sargent*, 40 Wn. App. 340, 344, 698 P.2d 598 (1985)); *see also* RPC 3.4(e). A prosecutor may argue reasonable inferences from the evidence, but a prosecutor may not make a "clear and unmistakable" expression of personal opinion. *Brett*, 126 Wn.2d at 175 (quoting *Sargent*, 40 Wn. App. at 344).

The State argues the prosecutor was merely drawing reasonable inferences from the testimony. The prosecutor's hyperbole, however, went beyond drawing reasonable inferences from the testimony; the prosecutor's statements were a clear expression of opinion. It is one thing to emphasize the reliability of one witness over another; it is something else to state a personal belief that a witness told the truth.

Second, the prosecutor improperly argued facts not in evidence,

discussing “the phenomenon of delayed disclosure” of sexual abuse. RP (Nov. 18, 2003) at 9. This line of argument would have been proper had the State offered some expert testimony on the claimed phenomenon of delayed reporting of sexual abuse. But as it was, the prosecutor impermissibly argued prejudicial facts not in the record, permitting the jury to speculate on facts not before it. *See State v. Rose*, 62 Wn.2d 309, 312, 382 P.2d 513 (1963); *see also Belgarde*, 110 Wn.2d at 508 (“A prosecutor has no right to call to the attention of the jury matters or considerations which the jurors have no right to consider.”).

Last, in rebuttal the prosecutor disparaged Warren’s counsel by arguing Warren’s counsel mischaracterized the facts. Disparaging counsel is clearly misconduct. *See State v. Reed*, 102 Wn.2d 140, 146-47, 684 P.2d 699 (1984).

The State concedes the prosecutor committed misconduct by arguing facts not in evidence and disparaging defense counsel; yet the majority does not perceive reversible error. *See* majority at 11. The jury was left with the impression it should not disbelieve the victim-witness despite her delay in reporting the incident, and it should not believe defense counsel. “While it is possible that some of these errors, standing alone, might not be of sufficient gravity to constitute grounds for a new trial, the combined effect of the accumulation of errors most certainly requires a new trial.” *Coe*, 101 Wn.2d at 789.

III. The No Contact Order

Imposing a no contact order, precluding Warren from communicating with his wife is inconsistent with the clear language of the statute. *See* RCW 9.94A.505(8); 9.94A.030(13); RCW 9.94A.700(5)(b); *see also State v. Riles*, 135 Wn.2d 326, 957 P.2d 655 (1998). Moreover, the blanket no contact order impermissibly violates Warren's fundamental right to marriage. *Riles*, 135 Wn.2d at 350 (observing offender limitation on fundamental right is only permitted if "reasonably necessary to accomplish the essential needs of the state and the public order") (citing *State v. Ross*, 129 Wn.2d 279, 287, 916 P.2d 405 (1996) and *State v. Riley*, 121 Wn.2d 22, 37-38, 846 P.2d 1365 (1993)).

A. The no contact order is not statutorily authorized

Under RCW 9.94A.505(8) the sentencing court may impose crime-related prohibitions. A "[c]rime-related prohibition" is an order "that directly relates to the circumstances of the crime." RCW 9.94A.030(13); *see also* RCW 9.94A.700(5)(b) (authorizing, as a condition of community custody, no "direct or indirect contact with the victim of the crime or a specified class of individuals").

Therefore, the statute authorizes conduct prohibitions directly related to the facts of the adjudicated offense. "The philosophy underlying the 'crime-related' provision is that '[p]ersons may be punished for their crimes and they

may be prohibited from doing things which are directly related to their crimes, but they may not be coerced into doing things which are believed will rehabilitate them.” *Riley*, 121 Wn.2d at 36-37 (alternation in original) (quoting David Boerner, *Sentencing in Washington* § 4.5, at 4-7 (1985)).

For example, in *Riles*, 135 Wn.2d 349, the petitioner was convicted of raping a 19-year-old woman, but the trial court ordered him not to have contact with any minor-aged children. To strike the order prohibiting contact with all minor-aged children the court reasoned,

[i]t would be logical for a sex offender who victimizes a child to be prohibited from contact with that child, as well as from contact with other children. It is not reasonable, though, to order even a sex offender not to have contact with a class of individuals who share no relationship to the offender’s crime.

Id. at 350. Such force of logic applies equally here.

Warren’s wife was not the victim of Warren’s crime. Warren’s wife does not belong to the class of individuals related to Warren’s crime. Warren’s wife has not even indicated a desire for a no contact order. In fact, Warren’s wife originally did not want to cooperate in Warren’s prosecution. Thus, the sentencing court was not authorized to prohibit Warren from contacting his wife.

B. The no contact order impermissibly infringes on the fundamental right to marriage

People have a fundamental right to enter into and maintain a marriage relationship. *See, e.g., Loving v. Virginia*, 388 U.S. 1, 87 S. Ct. 1817, 18 L. Ed. 2d 1010 (1967). The fact of incarceration does not eliminate this fundamental right. *See Turner v. Safley*, 482 U.S. 78, 95-96, 107 S. Ct. 2254, 96 L. Ed. 2d 64 (1987). To the contrary, for prisoners the “expression[] of emotional support and public commitment are an important and significant aspect of the marital relationship.” *Id.*

Concomitantly, while a convicted defendant’s rights are subject to some restriction as a result of a criminal conviction, such restriction may be only “to the extent it is reasonably necessary to accomplish the essential needs of the state and the public order.” *Riles*, 135 Wn.2d at 350. Courts have upheld this principle in other contexts.

For example in *State v. Letourneau*, 100 Wn. App. 424, 997 P.2d 436 (2000), the defendant was convicted of second degree rape of a child, and part of her sentence prohibited unsupervised in-person contact with her minor children. The Court of Appeals held the condition prohibiting unsupervised contact with her minor children was not reasonably necessary to prevent her from sexually molesting them because there was no evidence that she was a pedophile or posed a danger to her children. *Id.* at 442.

Similarly in *State v. Ancira*, 107 Wn. App. 650, 652-53, 27 P.3d 1246

(2001), the defendant was prohibited from contacting his children because they were present when the defendant violated a no contact order protecting his wife and previously witnessed violence between the parents. The Court of Appeals determined that while limitations on contact with the children might have been appropriate, the complete prohibition was “extreme and unreasonable given the fundamental rights involved.” *Id.* at 655. The evidence did not show the no contact order was reasonably necessary to protect the children. *Id.* at 654-55. Consequently, the court held the prohibition “was not reasonably necessary to meet the State’s legitimate objectives.” *Id.* at 652.

The unique facts of this case, however, present a question of first impression: Whether the State may prohibit a convicted criminal defendant from contacting his or her spouse if the spouse is not the victim of defendant’s crime, but the parent of the victim. Some sister jurisdictions have addressed a similar question. *See State v. Martin*, 282 Or. 583, 580 P.2d 536 (1978); *Dawson v. State*, 894 P.2d 672 (Alaska Ct. App. 1995).

In *Martin*, the trial court imposed as a condition of defendant’s probation an absolute prohibition against association with any person who had ever been convicted of a crime, including defendant’s husband. The Oregon Supreme Court modified the condition, holding before a person may be prohibited from contacting his or her spouse as a condition of a criminal sentence, the

sentencing court must “consider whether a lesser interference with defendant’s marriage would serve to rehabilitate the defendant and secure the safety of society.” *Martin*, 282 Or. at 589-90 (footnote omitted).

In *Dawson*, 894 P.2d 672, the defendant was convicted of trafficking cocaine, and as part of his sentence the court ordered the defendant have no unsupervised contact with his wife, believing the no contact order necessary because the wife was equally involved in cocaine trafficking. The sentencing court, however, had no information as to the wife’s substance abuse problem or possible rehabilitation. *Id.* at 680. Vacating the no contact order, the Alaska Court of Appeals reasoned, “[w]hile discouraging a probationer from associating with former partners in crime is obviously related to the goal of rehabilitation, precluding association between marital partners is just as obviously an extreme restriction of liberty, even when the marital partners were once partners in crime.” *Id.* As such, “to avoid unnecessary intrusion on marital privacy, it would seem appropriate to tailor a close fit between the scope of the order restricting marital association and the specific needs of the case at hand.” *Id.* at 681.

For example in *People v. Jungers*, 127 Cal. App. 4th 698, 25 Cal. Rptr. 3d 873 (2005), the defendant was convicted of felony domestic violence, and the court imposed a limited no contact order as a condition of probation. To

uphold the order, the California Court of Appeals reasoned the order “did not impose a complete ban on association or marital privacy,” but instead only prohibited the defendant from initiating contact with his wife, permitting visits, conversations, and communications initiated by her. *Id.* at 705; *see also Commonwealth v. LaPointe*, 435 Mass. 455, 459, 759 N.E.2d 294 (2001) (“In cases where a condition touches on constitutional rights, the goals of probation ‘are best served if the conditions of probation are tailored to address the particular characteristics of the defendant and the crime.’” (quoting *Commonwealth v. Pike*, 428 Mass. 393, 403, 701 N.E.2d 951 (1998))).

These cases teach us that before a court imposes a complete prohibition on the exercise of the marital right, it should make an inquiry into whether the prohibition is actually necessary to further the State’s probation goals. In addition, the court should consider whether a less restrictive alternative condition could serve the same purpose with less infringement on the marital right. Such an inquiry serves two purposes. First, it preserves the record for appropriate appellate review. Second, it ensures any limitation on a fundamental right is “imposed sensitively.” *Riley*, 121 Wn.2d at 37.

Here, the trial court made no apparent effort to tailor the scope of the no contact order or consider less restrictive alternatives. Instead Warren was completely prohibited from communicating with his wife. Yet, there is no

evidence such an order was actually necessary to further the goal of rehabilitating Warren or protecting the public. The majority speculates the no contact order was necessary to protect Mrs. Warren from Warren's retribution. Majority at 15-17. Yet nothing in the record suggests Mrs. Warren desires no contact with Warren. The sentencing court apparently considered an e-mail purportedly from Mrs. Warren; however, that e-mail was not made part of the record. Before a person's fundamental liberty may be infringed, the State must allege more than speculation. *See Riles*, 135 Wn.2d at 350. I would strike the no contact order prohibiting Warren from communicating with his wife.

IV. Conclusion

Based on the prosecutorial misconduct and erroneous instruction in Warren's second trial, his conviction should be reversed. Based on the cumulative error in Warren's fourth trial, his convictions should be reversed. Lastly, I would strike Warren's no contact order prohibiting all communication with Mrs. Warren.

The majority holds otherwise, so I dissent.

AUTHOR:

Justice Richard B. Sanders

WE CONCUR:

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

FILED
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STATE OF WASHINGTON
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STATE OF WASHINGTON)

Respondent,)

vs.)

ROBIN HYLTON,)

Appellant.)

COA NO. 37825-6-II

DECLARATION OF SERVICE

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 21ST DAY OF NOVEMBER, 2008, I CAUSED A TRUE AND CORRECT COPY OF THE **STATEMENT OF ADDITIONAL AUTHORITY** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] LIAM MICHAEL GOLDEN
LEWIS COUNTY PROSECUTOR'S OFFICE
345 W. MAIN STREET
FLOOR 2
CHEHALIS, WA 98532

03 NOV 25 AM 11:17
STATE OF WASHINGTON
BY _____
DEPUTY

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DIVISION II

SIGNED IN SEATTLE WASHINGTON, THIS 21ST DAY OF NOVEMBER, 2008.

x Patrick Mayovsky