

NO. 41141-5-II

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

STATE OF WASHINGTON,

Respondent,

v.

ANTHONY JOHNSON, JR.,

Appellant.

FILED
COURT OF APPEALS
DIVISION TWO
11/11/11
11:05 AM
BY [Signature]

11-28-11/11/11

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

The Honorable Kitty-Ann van Doorninck, Judge

BRIEF OF APPELLANT

LISE ELLNER
Attorney for Appellant

LAW OFFICES OF LISE ELLNER
Post Office Box 2711
Vashon, WA 98070
(206) 930-1090
WSB #20955

TABLE OF CONTENTS

	Page
A. <u>ASSIGNMENTS OF ERROR</u>	1
Issues Presented on Appeal.....	1
B. <u>STATEMENT OF THE CASE</u>	2
1. PROCEDURAL FACTS	2
2. SUBSTANTIVE FACTS.....	2
C. <u>ARGUMENT</u>	5
1. THE PROSECUTOR COMMITTED REPEATED MISCONDUCT WHICH DENIED APPELLANT HIS RIGHT TO A FAIR TRIAL: THE PROSECUTOR SHIFTED THE BURDEN OF PROOF, COMMENTED ON THE APPELLANT'S RIGHT TO REMAIN SILENT AND APPEALED TO THE PASSIONS AND PREJUDICES OF THE JURY.	
2. THE TRIAL COURT'S ORDER DENYING REPEATED MOTIONS TO SEVER THE WITNESS TAMPERING CHARGE FROM THE OTHER RAPE COUNTS WAS PREJUDICIAL ERROR.	
3. THE TRIAL COURT'S DECISION TO DENY APPELLANT THE RIGHT TO PRESENT EVIDENCE AFTER THE STATE VIOLATED A MOTION IN LIMINE REGARDING A POLYGRAPH TEST	

DENIED APPELLANT HIS RIGHT TO A
FAIR TRIAL.

4. CUMULATIVE ERROR DENIED
APPELLANT HIS RIGHT TO A FAIR
TRIAL

D. CONCLUSION.....22

TABLE OF AUTHORITIES

Page

WASHINGTON CASES

<u>In re Pers. Restraint of Lord</u> , 123 Wn.2d 296, 868 P.2d 835, <u>clarified</u> , 123 Wash.2d 737, 870 P.2d 964, <u>cert. denied</u> , 513 U.S. 849, 115 S.Ct. 146, 130 L.Ed.2d 86 (1994).....	34
<u>State v. Barrow</u> , 60 Wn.App. 869, 809 P.2d 209 (1991).....	12, 24
<u>State v. Bartholomew</u> , 98 Wn.2d 173, 654 P.2d 1170 (1982).....	29
<u>State v. Bautista</u> , 56 Wn. App. 186, 783 P.2d 116 (1989).....	25
<u>State v. Bennett</u> , 161 Wn.2d 303, 165 P.3d 1241 (2007).....	21
<u>State v. Bennett</u> , 20 Wn.App. 783, 582 P.2d 569 (1978).....	13
<u>State v. Belgarde</u> , 110 Wn.2d 504, 755 P.2d 174 (1988).....	12, 24, 25
<u>State v. Bourgeois</u> , 133 Wn.2d 389, 945 P.2d 1120 (1997).....	28, 29
<u>Brett</u> , 126 Wn.2d 136, 892 P.2d 29 (1995).....	12

TABLE OF AUTHORITIES

Page

WASHINGTON CASES, Cont.

<u>State v. Brown</u> 132 Wn.2d 529, 940 P.2d 546 (1997).....	11
<u>State v. Cantu</u> 156 Wn.2d 819, 132 P.3d 725 (2006).....	21
<u>State v. Case</u> 49 Wn.2d 66, 298 P.2d 500 (1956).....	14
<u>State v. Charlton</u> 90 Wn.2d 657, 585 P.2d 142 (1978).....	14
<u>State v. Coe</u> 101 Wn.2d 772, 684 P.2d 668 (1984).....	19, 20
<u>State v. Cox</u> 94 Wn.2d 170, 615 P.2d 465 (1980).....	19
<u>State v. Davenport</u> 100 Wn.2d 757, 675 P.2d 1213 (1992).....	10, 12
<u>State v. Dhaliwal</u> 150 Wn.2d 559, 79 P.3d 432 (2003).....	12, 34, 35
<u>State v. Dunaway</u> 109 Wn.2d 207, 743 P.2d 1237 (1987).....	12
<u>State v. Escalona</u> 49 Wn. App. 251, 742 P.2d 190 (1987).....	29-32
<u>State v. Flores</u> 18 Wn.App. 255, 566 P.2d 1281 (1977).....	19
<u>State v. Goebel</u>	

TABLE OF AUTHORITIES

	Page
<u>WASHINGTON CASES, Cont.</u>	
<u>State v. Gottfreedson</u> , 24 Wash. 398, 64 P. 523 (1901).....	15
<u>State v. Graham</u> , 59 Wn. App. 418, 798 P.2d 314 (1990).....	11
<u>State v. Hodges</u> , 118 Wn.App. 668, , 77 P.3d 375 (2003).....	34
<u>State v. Jackson</u> , 150 Wn.2d 877, 209 P.3d 553 (2009).....	17
<u>State v. Jones</u> , 144 Wn. App. 284, 300, 183 P.3d 307 (2008).....	34-35
<u>State v. Kritzer</u> , 21 Wn.2d 710, 152 P.2d 967 (1944).....	14
<u>State v. Lewis</u> , 130 Wn.2d 700, 927 P.2d 235 (1996).....	29
<u>State v. McHenry</u> , 88 Wn.2d 211, 558 P.2d 188 (1977).....	19
<u>State v. Mabry</u> , 51 Wn. App. 24, 751 P.2d 882 (1988).....	19, 20
<u>State v. Miles</u> , 73 Wn.2d 67, 436 P.2d 198 (1968).....	31-32

TABLE OF AUTHORITIES

Page

WASHINGTON CASES, Cont.

State v. Millante,
80 Wn. App. 237, 908 P.2d 374 (1995).....12

State v. Pirtle,
127 Wn.2d 628, 904 P.2d 245 (1995),
cert. denied, 518 U.S. 1026, 116 S.Ct. 2568,
135 L.Ed.2d 1084 (1996).....34-35

State v. Post,
118 Wn.2d 596, 826 P.2d 172,
modified, 837 P.2d 599 (1992).....29

State v. Powell,
62 Wn.App. 914, 816 P.2d 86 (1991).....23, 25

State v. Reed,
102 Wn.2d 140, 684 P.2d 699 (1984).....11, 20

State v. Reed,
25 Wn. App. 46, 604 P.2d 1330 (1979).....13-16

State v. Reeder,
46 Wn.2d 888, 285 P.2d 884 (1955).....10, 14

State v. Rowe,
77 Wn.2d 955, 468 P.2d 1000 (1970).....28

State v. Russell,
125 Wn.2d 24, 882 P.2d 747 (1994).....28

State v. Sargent,
40 Wn. App. 340, 698 P.2d 598 (1985).....12, 17, 18

TABLE OF AUTHORITIES

Page

WASHINGTON CASES, Cont.

State v. Stith,
71 Wn. App. 14, 856 P.2d 415 (1993).....11, 17, 18, 32

State v. Swan,
114 Wn.2d 613, 790 P.2d 610 (1990),
cert. denied, 498 U.S. 1046, 111 S.Ct. 752,
112 L.Ed.2d 772 (1991).....24

State v. Tanner,
54 Wn.2d 535, 341 P.2d 869 (1959).....14

State v. Tanzymore,
54 Wash.2d 290, 340 P.2d 178 (1959).....19-20

State v. Torres,
16 Wn.App. 254, 554 P.2d 1069 (1976).....11-14

State v. Trickel,
16 Wn.App. 18, P.2d 139 (1976).....24

State v. Warren,
165 Wn.2d 17, 195 P.3d 940 (2008),
cert. denied, 77 U.S. 3575, 129 S.Ct. 2007,
173 L.Ed.2d 1102 (2009).....11, 15, 20, 21, 23

State v. Weber,
99 Wn.2d 158, 659 P.2d 1102 (1983).....29, 30

State v. Weber,
159 Wn.2d 252, 149 P.3d 646 (2006),
cert. denied, 551 U.S. 1137, 127 S.Ct. 2986,
168 L.Ed.2d 714 (2007).....35

TABLE OF AUTHORITIES

Page

WASHINGTON CASES, Cont.

State v. Wilburn,
51 Wn. App. 827, 755 P.2d 842 (1988).....31, 32

State v. Wilson,
3 W.App. 745, 477 P.2d 656 (1970).....13

FEDERAL CASES

Chapman v. California,
386 U.S. 18, 87 S.Ct. 824, 828, 17 L.Ed.2d 705, 711 (1967).....15

Griffin v. California,
380 U.S. 609, 85 S.Ct. 1229, 14 L.Ed.2d 106 (1965).....13, 14

In re Winship,
397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970).....21

People v. Fielding,
158 N.Y. 542, 53 N.E. 497 (1899).....11

People v. Finley,
312 Ill.App.3d 892, 728 N.E.2d 101, 104 (2000).....28

TABLE OF AUTHORITIES

Page

STATUTES, RULES AND OTHERS

Washington Constitution Article 1, § 9.....13

Washington Constitution Article 1 § 22.....10

United States Constitution, Sixth Amendment.....10

United States Constitution Fourteenth Amendment.....10

United States Constitution Fifth Amendment.....13

CrR 4.4.....26

A. ASSIGNMENTS OF ERROR

1. Appellant was denied his right to due process when the prosecutor during closing argument repeatedly commented on appellant's Fifth Amendment right to remain silent.
2. Appellant was denied his right to due process when the prosecutor during closing argument repeatedly shifted the burden of proof during closing argument.
3. Appellant was denied his right to due process when the prosecutor during closing argument repeatedly commented on the credibility of the state's witnesses.
4. The trial court abused its discretion by refusing to grant the defense motion to sever the witness tampering charge from the sexual assault charges.
5. Appellant was denied his right to due process when the state violated a motion in limine and introduced evidence that appellant was offered a polygraph test, but the court refused to permit appellant to explain that he passed the polygraph test, thus leaving the jury with the false impression that appellant either refused or failed the polygraph.

6. Cumulative prosecutorial misconduct denied appellant his right to a fair trial.

Issues Presented on Appeal

1. Was appellant denied his right to due process when the prosecutor during closing argument repeatedly commented on appellant's Fifth Amendment right to remain silent?
2. Was appellant denied his right to due process when the prosecutor during closing argument repeatedly shifted the burden of proof during closing argument?
3. Was appellant denied his right to due process when the prosecutor during closing argument repeatedly commented on the credibility of the state's witnesses?
4. Did the trial court abuse its discretion by refusing to grant the defense motion to sever the witness tampering charge from the sexual assault charges?
5. Was appellant denied his right to due process where the state violated a motion in limine and introduced evidence that appellant was offered a polygraph test, but the court refused to permit appellant to explain that he passed the polygraph test, thus leaving the jury with the false impression that appellant

either refused or failed the polygraph?

6. Did cumulative prosecutorial misconduct denied appellant his right to a fair trial?

B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS

Mr. Johnson was charged by amended information with two counts of child molestation in the first degree, two counts of rape of a child in the first degree and one count of witness tampering. CP16-18, 67-69. During trial, Mr. Johnson moved for a mistrial when the state violated a motion in limine by introducing evidence regarding a polygraph test. The court denied the motion. CP 70-8-. Mr. Johnson also moved for severance of the witness tampering charge from the other charges. The court denied the motion. CP 40-47. Mr. Johnson was convicted as charged following a jury trial the honorable Kitty-Ann vanDoorninck presiding. CP 135-141. This timely appeal follows. CP 210-224.

2. SUBSTANTIVE FACTS

Count one alleged Mr. Johnson molested Linea Ailep on August 31, 2009. Mr. Johnson is not Linea's biologic father but he has been her father figure since she was a baby. RP 198605-606. According to the testimony, Linea told her mother that "he did it again". CP 16-18; RP 263-264, 295. It is

unclear whether this meant an act of sexual molestation or that Mr. Johnson had another woman over to the family apartment. Mr. Johnson regularly cheated on Ms. Ailep and had other women over to the family apartment while the children were present. RP 198-199, 345-346, 608-609, 611. More than once, Linea told her mother about the other women and got in trouble from her father. RP 213-215, 254, 256, 615. When Mya Ailep, Linea's mother had her aunt call the police for Linea, after the August 31, 2009 allegation, Ms. Ailep did not tell the police that the prior night she witnessed Mr. Johnson on top of Linea with his penis exposed. RP 260-261, 267.

Two days after the allegations were made, on September 2, 2009, Ms. Ailep packaged up Linea's clothing and brought them to Dr. Deborah Hall who performed a medical examination of Linea. RP 358, 383. Dr. Hall passed off the clothing to Detective Yenne on September 9, 2009. RP 266, 496, 497, 519, 522-523. When the police responded on September 1, 2009, they did not interview Linea or take pictures of her or her clothing or take her in for a medical examination. RP 266, 496, 497, 519. Rather detective Yenne collected Linea's clothing on September 9, 2009 almost two weeks after being assigned to the case. RP 496, 497, 494, 519. Detective Yenne admitted that the clothing could easily have been contaminated. RP 519. Mr. Johnson explained that there was semen on Lineaa's skirt because he and Ms. Ailep had sex on top of

a pile of dirty clothes. RP 670-672. Linea told the jury that Mr. Johnson told her to take off her skirt. Yet the only evidence of semen was on Linea's clothing, not on her body. RP 400-402, 532-533. Linea told Ms. Austring that she never took her clothes off. RP 467. During parts of Linea's testimony, she could not really remember what occurred and admitted to practicing her testimony with the prosecutor. RP 212, 218, 224.

Count Two is another charge of child molestation, alleged to have occurred between May 3, 2007 and August 31, 2009. CP 16-18. The basis of this allegation is that Linea said "he did it again." RP 264. Mr. Johnson did not live with Linea and her mother and siblings between November or December 2008 through May 2009. RP 334. Ms. Ailep testified that she walked in on Mr. Johnson on top of Linea in May of 2009, but that she did not leave Mr. Johnson until August 31, 2009. RP 295. Ms. Ailep told the jury that she caught Mr. Johnson on top of Linea with his boxer shorts on and his penis exposed in August 2009, then she said it really occurred in May and that she gave Mr. Johnson an ultimatum. RP 260-263, 295-296. Ms. Ailep let Mr. Johnson continue to reside in the home. Id. Ms. Ailep was afraid that CPS would take her children and felt threatened by them to stay away from Mr. Johnson and pursue the allegations. RP 328, 352.

Count three and count four alleged sexual intercourse between May 3, 2007 and August 31, 2009. . CP 16-18. Linea told the defense interviewer Ms. Austring that the abuse never happened. RP 444. Linea was eight years old on September 2, 2009 when she visited Dr. Hall for her medical examination. RP 383. Dr. Hall could not affirmatively corroborate any penetrating trauma. RP 404-414. Linea told Dr. Hall that Mr. Johnson touched her vagina with his “peanuts” and it hurt. RP 388. Linea told the prosecutor’s interviewer Ms. Brune that she used her mouth to touch her father. Linea told a number of different stories to different people and there was no physical or other corroboration. RP 414. Linea answered all of the questions inconsistently making it difficult to determine what occurred. She indicated that her clothes were always on and at times off. Linea indicated that her father’s penis never touched her vagina and that she once put her mouth on his penis. Linea also testified that Mr. Johnson never put baby gel on her and that he put baby gel on her bottom. RP 200-208. Linea testified that the acts of molestation did not occur in her downtown apartment, but rather in her more recent apartment. RP 201, 244, 259.

Linea told Dr. Hall that the last time anything happened was a “long, long time ago” , not two days earlier. RP 413. Dr. Hall who performed the medical examination testified that there was a “possibility of penetration” but

that the medical findings could be explained by congenital or other factors exclusive of some sort of sexual abuse. RP 409, 414-415. Dr. Hall was uncertain of her findings and decided to re-examine Linea to try to shore up her opinion. The second exam revealed that Dr. Hall could not determine that there had been any act of sexual abuse. Nonetheless, Dr. Hall testified that even though her findings could simply be from a congenital formation, she opined that she had a reasonable degree of medical certainty of some sort of penetrating trauma. RP 415. RP 404-414.

The last charge, witness tampering was based on a telephone conversation between Mr. Johnson and Ms. Ailep which took place while Mr. Johnson was in the Pierce County Jail. CP 16-18. During this conversation Mr. Johnson told Ms. Ailep to “shake the spot”. RP 326-327, 625. Mr. Johnson explained that he used this phrase to mean that Ms. Ailep should leave the shelter where she and her children were residing and go live with Ms. Ailep’s mother so the family could have a decent place to live. RP 625, 693. Mr. Johnson did not tell Ms. Ailep to leave town, and Mr. Johnson did not tell Ms. Ailep to lie. Mr. Johnson supported Ms. Ailep and told her not to be intimidated by CPS. Mr. Johnson asked Ms. Ailep to stick with the truth. RP 683-693.

a. Prosecutorial Misconduct.

The prosecutor during closing argument commented on Mr. Johnson's right to remain silent by arguing, "wouldn't he [Mr. Johnson] just say 'I had sex on the panties too?' He's come up with an explanation for everything else." RP 737. Again the prosecutor commented on Mr. Johnson's right to remain silent when she argued that Mr. Johnson did not deny saying he would be evil if he went to prison. The court sustained the objection on grounds that this commented on Mr. Johnson's right to remain silent. RP 768.

During closing argument the prosecutor repeatedly and impermissibly commented on the credibility of the witnesses. RP 729-730. "I didn't do a forensic interview. I did a defense interview and the purpose of a defense interview is to help the defendant". "So you might as well take the truth and toss it out the window". *Id.* The trial court sustained the defense objection to this impermissible argument. Again the prosecutor commented on witness credibility when she argued: "She's [complainant] not making this up to get herself out of a lie. She's telling the truth about what happened to her when she was—". RP 732.

During rebuttal closing argument the prosecutor misstated the burden of proof by arguing, "Do you have an abiding belief in the truth of these charges" The court overruled the objection. RP 768. Again over objection that "abiding belief does not substitute for proof beyond a reasonable doubt, the

prosecutor argued, “You are given an instruction about what the burden of proof is. If after such consideration you have an abiding belief in the truth of the charge, you are then—“.....RP 768. Again, the court overruled an objection that the prosecutor misstated the law, the prosecutor argued, “It would be wonderful, lovely and amazing if Linea Ailep could be 100 percent consistent all of the time, every time she made a statement about what her father did to her.....You can’t hold Linea to that standard. You have to hold--.” RP 769. For the fourth time, over objection which the court overruled, the prosecutor misstated the burden of proof when she argued that, Linea does not need to be 100 percent consistent “as long as you have an abiding belief that Linea Ailep was sexually molested and raped by her father.” RP 770-771.

The prosecutor argued during closing, “ Benjamin Cardozo was a United States Supreme Court Justice and he said something that I think is very poignant. He said, Justice that is due the accused is due the accuser as well.” Justice in this case is justice for Linea Ailep. RP 742. Again the prosecutor argued, “Justice for Linea, Ladies and Gentlemen of the Jury, is to find the defendant guilty as charged.” RP 742, 787. During rebuttal closing argument the prosecutor again appealed to the passions and prejudice of the jury when she argued that, Mr. Johnson responded to seeing Ms. Ailep’s uncle in the newspaper by stating that “he’s one of them too” means a sex offender. RP

735.

C. ARGUMENT

1. THE PROSECUTOR COMMITTED REPEATED MISCONDUCT WHICH DENIED APPELLANT HIS RIGHT TO A FAIR TRIAL: THE PROSECUTOR SHIFTED THE BURDEN OF PROOF, COMMENTED ON THE APPELLANT'S RIGHT TO REMAIN SILENT AND APPEALED TO THE PASSIONS AND PREJUDICES OF THE JURY.

- a. General Authority

Prejudicial prosecutorial misconduct denies a defendant his constitutional right to a fair trial. Washington Constitution Article 1 § 22; United States Constitution, Sixth and Fourteenth Amendments; State v. Davenport, 100 Wn.2d 757, 762, 675 P.2d 1213 (1992).

We realize that attorneys, in the heat of a trial, are apt to become a little over-enthusiastic in their remembrance of the testimony. However, they have *no right to mislead the jury*. This is especially true of a prosecutor, who is a quasi-judicial officer whose duty it is to see that a defendant in a criminal prosecution is given a fair trial.

(Emphasis added in Davenport) Davenport, 100 Wn.2d at 763, quoting, State v. Reeder, 46 Wn.2d 888, 892, 285 P.2d 884 (1955).

In Washington State prosecutors have a special duty in trial to act impartially in the interests of justice and not as a "heated partisan". State v. Stith, 71 Wn. App. 14, 18, 856 415 (1993), citing, State v. Reed, 102 Wn.2d 140, 147, 684 P.2d 699 (1984), quoting, People v. Fielding, 158 N.Y. 542, 547, 53 N.E. 497 (1899).

To establish prosecutorial misconduct, the defendant bears the burden of showing that the prosecutor's closing remarks were both improper and prejudicial. State v. Warren, 165 Wn.2d 17, 26, 195 P.3d 940 (2008), cert. denied, 77 U.S. 3575, 129 S.Ct. 2007, 173 L.Ed.2d 1102 (2009). In analyzing prejudice, the reviewing court looks at the remarks in the context of the total argument, the issues in the case, the evidence addressed in the argument, and the instructions to the jury. State v. Brown, 132 Wn.2d 529, 561, 940 P.2d 546 (1997). Where the defendant shows that there is a substantial likelihood that the prosecutor's statements affected the jury's verdict, prejudice will be found. Brown, 132 Wn.2d at 561.

A new trial is required when misconduct is prejudicial. Misconduct is viewed against the backdrop of the entire argument. State v. Stith, 71 Wn. App. 14, 19, 836 P.2d 415 (1993), citing, State v. Graham, 59 Wn. App. 418, 426, 428, 798 P.2d 314 (1990). Arguments that are designed to inflame the passions and prejudice are improper and prejudicial. State v. Torres, 16 Wn.

App. 254, 264-65, 554 P.2d 1069 (1976). Arguments that are based on facts not in evidence and that mislead the jury are equally as improper and prejudicial. State v. Dhaliwal, 150 Wn.2d 559, 577, 79 P.3d 432 (2003); Davenport, 100 Wn.2d at 760; State v. Rose, 62 Wn.2d 309, 312 382 P.2d 513 (1963). In closing argument, the State may only draw reasonable inferences from the evidence. State v. Millante, 80 Wn. App. 237, 250, 908 P.2d 374 (1995). The state may not argue facts not in evidence under the guise of a “reasonable inference”. State v. Belgarde, 110 Wn.2d 504, 509, 755 P.2d 174 (1988);

Prejudicial error occurs when it is “clear and unmistakable” that counsel is expressing a personal opinion, and not arguing an inference from the evidence. State v. Brett, 126 Wn.2d 136, 175, 892 P.2d 29 (1995), quoting, State v. Sargent, 40 Wn. App. 340, 344, 698 P.2d 598 (1985).

This Court may review prosecutorial misconduct without an objection at trial when the misconduct was so flagrant and ill intentioned that no instruction could erase the prejudice engendered by it. Belgarde, 110 Wn.2d at 507; State v. Dunaway, 109 Wn.2d 207, 221, 743 P.2d 1237, 749 P.2d 160 (1987). Reversal is required if unchallenged misconduct was so inflammatory that an instruction would not have cured the misconduct and if there is a substantial likelihood that the misconduct affected the jury's decision.

Belgarde, 110 Wn.2d at 509-10; Barrow, 60 Wn. App. at 876.

b. Comment on Right to Remain Silent

The prosecutor during closing argument commented on Mr. Johnson's right to remain silent by arguing, "wouldn't he [Mr. Johnson] just say 'I had sex on the panties too?' He's come up with an explanation for everything else." RP 737. Again the prosecutor commented on Mr. Johnson's right to remain silent when she argued that Mr. Johnson did not deny saying he would be evil if he went to prison. The court sustained the objection on grounds that this commented on Mr. Johnson's right to remain silent. RP 768.

Mr. Johnson was denied a fair trial as a result of comments by the prosecutor during closing argument relative to his exercise of the constitutional right to remain silent. United States Constitution Fifth Amendment; Washington Constitution Article 1§ 9. Prosecutorial comment on the accused's exercise of his constitutional right to remain silent is forbidden. Griffin v. California, 380 U.S. 609, 85 S.Ct. 1229, 14 L.Ed.2d 106 (1965); State v. Bennett, 20 Wn.App. 783, 786, 582 P.2d 569 (1978); State v. Messinger, 8 Wn.App. 829, 840, 509 P.2d 382 (1973); State v. Wilson, 3 W.App. 745, 746-47, 477 P.2d 656 (1970).

"The State cannot be permitted to put forward an inference of guilt, which necessarily flows from an imputation that the accused has suppressed or

is withholding evidence, when as a matter of constitutional law, he is not required to testify. “. State v. Reed, 25 Wn. App. 46, 48, 604 P.2d 1330 (1979); Accord, State v. Charlton, 90 Wn.2d 657, 662, 585 P.2d 142 (1978); State v. Tanner, 54 Wn.2d 535, 538, 341 P.2d 869 (1959). To permit the prosecutor to argue any inference of guilt based on the right to remain silence eviscerates this constitutional privilege. Griffin, *supra*; State v. Case, 49 Wn.2d 66, 70, 298 P.2d 500 (1956); Reeder, 46 Wn.2d at 892; Torres, 16 Wn.App. at 263

In Reed, a murder case, where Reed disappeared without his pay after his employer was murdered, the prosecutor in closing argument stated:

And there is no contention that he was paid. Nobody has said, “Yes, I was paid.” No one has said that. But the evidence in this case has to be that he was not paid, because there is nothing to rebut that.

Reed, 25 Wn. App at 48-49. The Court held that this comment, “Nobody has said, ‘Yes, I was paid.’ ” was a direct reference to the accused's failure to testify. Mr. Reed was the only person who could have said, “Yes, I was paid.” *Id.*, citing, Messinger, 8 Wash.App.at 840. Court reversed for flagrant and prejudicial misconduct notwithstanding defense counsel’s failure to make an immediate objection. Reed, 25 Wn. App at 49. The Court noted that, “silence is not evidence, and neither it nor an inference therefrom can be used

to supply evidence of guilt.” Id; see also, State v. Goebel, 36 Wn.2d 367, 368-69, 218 P.2d 300 (1950); State v. Kritzer, 21 Wn.2d 710, 712, 152 P.2d 967 (1944); State v. Gottfreedson, 24 Wash. 398, 403, 64 P. 523 (1901).

After a harmless error analysis, the Court reversed concluding that the statement could not be considered harmless beyond a reasonable doubt, when (1) the trial was based almost entirely on circumstantial evidence; and (2) the prosecutor made other impermissible comments during closing argument. Reed, 25 Wn. App at 49, citing Chapman v. California, 386 U.S. 18, 24, 87 S.Ct. 824, 828, 17 L.Ed.2d 705, 711 (1967).¹

The prosecutor’s argument in Mr. Johnson’s case that he failed to explain himself is like the prosecutor’s remarks in Reed. In Reed, 25 Wn.App. at 49, the statement that “[n]obody has said, ‘[y]es, I was paid’ “ was a direct reference to the accused’s failure to testify. Id. In Mr. Johnson’s case, prosecutor told the jury that Mr. Johnson did not deny the charging or statement saying he would be evil if he went to prison. And the prosecutor argued that Mr. Johnson did not explain why there might have been semen on the panties. Even though defense counsel made an immediate objection, the

In Warren, the State Supreme Court suggested that 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”. State v. Warren, 165 Wn.2d 17, 26, Fn 3, 195 P.3d 940 (2008).

trial court overruled the objection. However, these arguments like those in Reed were instances of flagrant and prejudicial prosecutorial misconduct involving comments on Mr. Johnson's right to remain silent.

As in Reed, the error was not harmless beyond a reasonable doubt in light of the lack of corroborating evidence and in light of the plethora of other instances of prosecutorial misconduct. Herein, the jury would "naturally and necessarily" accept the prosecutor's arguments as impermissible comments on Mr. Johnson's failure to testify. For these reasons, reversal and remand for a new trial is necessary.

c. Prosecutor Impermissibly Commented
on Witness Credibility

During closing argument the prosecutor repeatedly and impermissibly commented on the credibility of the witnesses. RP 729-730. "I didn't do a forensic interview. I did a defense interview and the purpose of a defense interview is to help the defendant". "So you might as well take the truth and toss it out the window". Id. The trial court sustained the defense objection to this impermissible argument. Again the prosecutor commented on witness credibility when she argued: "She's [complainant] not making this up to get herself out of a lie. She's telling the truth about what happened to her when she was—". RP 732.

It is improper for a prosecutor to personally vouch for a witness's credibility. State v. Jackson, 150 Wn.2d 877, 209 P.3d 553 (2009)² Sargent, 40 Wn. App. at 344. A prosecutor commits prejudicial when it is “clear and unmistakable” that counsel is expressing a personal opinion. Sargent, 40 Wn. App. at 344. In Sargent, the prosecutor committed prejudicial misconduct by vouching for the credibility of a witness. “*I believe Jerry Lee Brown. I believe him....*”Sargent, 40 Wn. App. at 343.

In State v. Stith, 71 Wn. App. at 22-23, the prosecutor called the defendant a liar by informing the jury that police do not lie which added to the prejudicial impact of the prosecutor’s other misconduct during trial. State v. Stith, 71 Wn. App. at 20. In Stith, the Court held that the improper comments along with the other misconduct established prejudice (prosecutor violated motion in limine to suppress and reference to prior drug related conduct). *Id.*

In the instant case, the trial court recognized the prejudicial nature of the improper vouching: “[s]o you might as well take the truth and toss it out the window”. RP 729-730. Sustaining the objection however was insufficient to erase the prejudicial impact of the comments, particularly when examined in the context of the prosecutor’s entire argument which was riddled with

² The prosecutor did not vouch for credibility of witness, rather he outlined the evidence and discussed the police officers training. Jackson, 150 Wn.

multiple instances of prejudicial misconduct. As in Stith and Sargent, with or without an objection, the comments were prejudicial and denied Mr. Johnson his right to a fair trial.

d. Prosecutor Shifted the Burden of Proof

During rebuttal closing argument the prosecutor misstated the burden of proof by arguing, “Do you have an abiding belief in the truth of these charges” The court overruled the objection. RP 768. Again over objection that “abiding belief does not substitute for proof beyond a reasonable doubt, the prosecutor argued, “You are given an instruction about what the burden of proof is. If after such consideration you have an abiding belief in the truth of the charge, you are then—“.....RP 768. Again, the court overruled an objection that the prosecutor misstated the law, the prosecutor argued, “It would be wonderful, lovely and amazing if Linea Ailep could be 100 percent consistent all of the time, every time she made a statement about what her father did to her.....You can’t hold Linea to that standard. You have to hold--.” RP 769. For the fourth time, over objection which the court overruled, the prosecutor misstated the burden of proof when she argued that, Linea does not need to be 100 percent consistent “as long as you have an abiding belief that Linea Ailep was sexually molested and raped by her father.” RP 770-771.

The Court is responsible for defining for the jury the standard of reasonable doubt. State v. Cox, 94 Wn.2d 170, 174, 615 P.2d 465 (1980), quoting State v. McHenry, 88 Wn.2d 211, 214, 558 P.2d 188 (1977). The function of informing the jury of the reasonable doubt standard can only be achieved by a specific instruction. State v. Cox, supra. Washington courts have approved various forms of instructions, so long as a reviewing court can determine from the totality of the circumstances whether the jury was adequately informed of the allocation of the burden of proof. *See, e.g.*, State v. Cox, supra; State v. Tanzymore, 54 Wash.2d 290, 291, 340 P.2d 178 (1959);

In State v. Mabry, 51 Wn. App. 24, 751 P.2d 882 (1988), citing, State v. Coe, 101 Wn.2d 772, 788, 684 P.2d 668 (1984) and State v. Flores, 18 Wn.App. 255, 566 P.2d 1281 (1977), the Court explained that using the “abiding belief” language adequately instructs the jury only “when construed as a whole instruction”. Mabry, 51 Wn. App. at 25.

In State v. Coe, 101 Wn.2d 772, 788, 684 P.2d 668 (1984), the Court held that the reasonable doubt instruction must be considered in its “entirety”. In Coe, the trial court instructed the jury that reasonable doubt was somewhat equivalent to “substantial doubt” In the context of that case, considering all of the instructions given, did not improperly instruct the jury. However, the Court held” the instruction should not be given in future cases.” *Id.*

In Mr. Johnson's case unlike in Mabry, Tanzymore, and Coe, the prosecutor dissected the reasonable doubt instruction and argued to the jury that it need not consider any of the other language in the instruction defining reasonable doubt, but rather could find guilt if it had an abiding belief in the charges. RP 768-771. As presented in Mr. Johnson's case, in isolation, the "abiding belief" language did not adequately apprise the jury on the appropriate burden of proof.

In Warren, a case similar to Mr. Johnson's case, the prosecutor repeatedly misstated the burden of proof by telling the jury that the defendant did not get the benefit of the doubt. Warren, 165 Wn.2d at 24. In Warren, the Court held that "the prosecutor's argument was improper because it undermined the presumption of innocence. The prosecutor told the jury, "it doesn't mean, as the defense wants you to believe, that you give the defendant the benefit of the doubt," Warren, 165 Wn.2d at 25. Court noted that because the prosecutor is a "a quasi-judicial officer representing the people of the State," ...[i]t 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. Id; a citing, Reed, 102 Wn.2d at 147.

In Warren, the Court reiterated:

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.

Warren, 165 Wn.2d at 25, quoting, State v. Bennett, 161 Wn.2d 303, 315-16, 165 P.3d 1241 (2007).

In Mr. Johnson's case, by arguing that if the jury had an abiding belief in the charges, it could convict based on an undefined meaning of "abiding belief, rather than finding prof beyond a reasonable doubt. This argument undermined the presumption of innocence and shifted the burden of proof to the same effect as in Warren, 165 Wn.2d at 26-27. The argument relieved the state of proving each element of the crimes charged beyond a reasonable doubt. This violated Mr. Johnson's due process rights. *Id*; 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). "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." Warren, 165 Wn.2d at 27.

In Warren although the prosecutor committed egregious misconduct, the trial court effectively mitigated the misconduct by giving “an appropriate and effective curative instruction”.³ The Court held that without such an appropriate and effective curative instruction it “conclude that such a remarkable misstatement of the law by a prosecutor constitutes reversible

3 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.

error.” Warren, 165 Wn.2d at 26.

Four times the trial court in Mr. Johnson’s overruled the objections to the improper argument and refused to provide a curative instruction. Warren is thus distinguishable on this ground, but analogous on the issue of the impropriety of the argument. For these reasons, this Court must reverse and remand for a new trial for prosecutorial misconduct.

e. The Prosecutor Impermissibly Appealed to the Passions and Prejudices of the Jury

The prosecutor argued during closing, “ Benjamin Cardozo was a United States Supreme Court Justice and he said something that I think is very poignant. He said, Justice that is due the accused is due the accuser as well.” Justice in this case is justice for Linea Ailep. RP 742. Again the prosecutor argued, “Justice for Linea, Ladies and Gentlemen of the Jury, is to find the defendant guilty as charged.” RP 742, 787. During rebuttal closing argument the prosecutor again appealed to the passions and prejudice of the jury when she argued that, Mr. Johnson responded to seeing Ms. Ailep’s uncle in the newspaper by stating that “he’s one of them too” means a sex offender. RP 735.

In State v. Powell, 62 Wn.App. 914, 816 P.2d 86 (1991), in concluding her final argument, the prosecutor told the jury that a not guilty verdict would

send a message that children who reported sexual abuse would not be believed, thereby “declaring open season on children”. Mr. Powell's objection was sustained but no curative instruction was sought. Powell, 26 Wn. App. at 19. In Powell, the Court framed the issue as whether the prosecutorial misconduct was so flagrant and prejudicial that its appeal to the jury's passions could not have been obviated by any curative instruction. Powell, 62 Wn. App. at 89; citing, State v. Swan, 114 Wn.2d 613, 661, 790 P.2d 610 (1990), cert. denied, 498 U.S. 1046, 111 S.Ct. 752, 112 L.Ed.2d 772 (1991); Belgarde, 110 Wn.2d at 507-08; State v. Barrow, 60 Wn.App. 869, 876, 809 P.2d 209 (1991).

In Powell, the prosecutor's comments were egregious. Although the Court contemplated whether a curative instructive could have remedied the prejudice, the Court understanding that the remarks were made at the completion of the final closing argument, immediately prior to the jury beginning their deliberations, created “one of those cases of prosecutorial misconduct in which ‘[t]he bell once rung cannot be unrung.’” Powell, 62 Wn. App. at 89, quoting, State v. Trickel, 16 Wn.App. 18, 30, 553 P.2d 139 (1976). The prejudicial misconduct in Powell denied hi, his right to a fair trial.

The Court similarly held flagrant and ill-intentioned the prejudicial comments in Belgarde, 110 Wn.2d at 506-07, which depicted the American

Indian Movement, with which defendant Belgarde admitted affiliation, as “*a deadly group of madmen*” and “*butchers, that killed indiscriminately*” and likened its members to “Kadafi”. The Court held that the comments were too prejudicial to cure with an instruction. Belgarde, 110 Wash.2d at 510.

In State v. Bautista, 56 Wn. App. 186, 195-195, 783 P.2d 116 (1989), the defense failed to object to improper argument appealing to the passions and prejudice of the jury. The prosecutor exhorted the jury to convict the defendant to send a message to the victim and other children that you believe them, rather than to convict based on the evidence. The Court, reversed on other grounds, noting that a curative instruction would have ameliorated the improper argument. *Id.*

Mr. Johnson’s case there were four instances of this type of improper argument appealing to the passions and prejudices of the jury, in addition to a plethora of other misconduct during closing and rebuttal argument. As in Belgarde and Powell, the comments once made could not be cured by an instruction. In sum, the prosecutor violated Mr. Johnson’s constitutional rights to due process necessitating remand for reversal and a new trial.

2. THE TRIAL COURT’S ORDER DENYING REPEATED MOTIONS TO SEVER THE WITNESS TAMPERING CHARGE FROM

THE OTHER RAPE COUNTS WAS
PREJUDICIAL ERROR.

On grounds of unfair prejudice, beginning during motions in limine at the commencement of the trial proceedings, Mr. Johnson moved for severance of the witness tampering charge from the sexual assault charges. RP 39-40. The judge agreed that the entire telephone conversation from which the witness tampering charges arose was “incredibly prejudicial”. RP 45. Nonetheless, the court permitted the state to amend the witness tampering charge to include an alternate means and denied the motion for severance. RP 52, 184-186.

CrR 4.4 the rule addressing severance of offenses provides in relevant part as follows:

(b) Severance of Offenses. The court, on application of the prosecuting attorney, or on application of the defendant other than under section (a), [timeliness] shall grant a severance of offenses whenever before trial or during trial with consent of the defendant, the court determines that severance will promote a fair determination of the defendant's guilt or innocence of each offense.

3. THE TRIAL COURT'S REFUSAL TO GRANT A MISTRIAL AFTER THE STATE VIOLATED A MOTION IN LIMINE REGARDING A POLYGRAPGH TEST DENIED APPELLANT HIS RIGHT TO A FAIR TRIAL.

The trial court suppressed any reference to Mr. Johnson's taking and passing a polygraph test. RP 74. During direct examination of state's witness Mya Ailep the complainant's mother, the state elicited inadvertently that Ms. Ailep told Mr. Blinn a prosecutor assigned to the instant case that she made up the allegations of sexual abuse. Ms. Ailep wanted the prosecutor to drop the charges against Mr. Johnson. Mr. Blinn responded by informing Ms. Ailep that Mr. Johnson could take a "lie detector test". Following this testimony before the jury, Mr. Johnson moved for permission to introduce evidence that he had taken and passed a polygraph test. RP 277-278. The court denied the motion. RP 277. See RP 423-429.

Mr. Johnson argued that the introduction of the polygraph left the jury with the impression that Mr. Johnson either refused to take a polygraph test or took one and failed the test. The refusal to permit Mr. Johnson to clarify the facts both resulted in an impermissible comment on this right to remain silent and denied him his right to present a defense. RP 277-278. The court agreed to provide the jury with a limiting instruction, but Mr. Johnson astutely argued that this would not un-ring the bell but rather increase the prejudice. Mr. Johnson asked for a mistrial which the court denied. RP 278, 285, 286.

"It is improper to refer to the fact that defendant was offered a polygraph test...." because of the potentially self-serving nature of the test and

its scientific unreliability. People v. Finley, 312 Ill.App.3d 892, 728 N.E.2d 101, 104 (2000). In State v. Rowe, 77 Wn.2d 955, 958-59, 468 P.2d 1000 (1970) the trial court did not err in excluding these hearsay declarations because they are “patently inadmissible” and self-serving. Rowe, 77 Wn.2d at 958-59 (citations omitted). In Mr. Johnson’s case, the damage from the stilted admission of the polygraph evidence was impermissible and as self-serving to the prosecutor as it was to the defendant in Rowe. The difference being that the polygraph evidence in Mr. Johnson’s case served to destroy his right to the presumption of innocence and served to relieve the state of proving with admissible evidence all of the elements of the crimes charged.

The trial court abused its discretion by denying Mr. Johnson’s motion for a mistrial. Whenever there is a violation of motions in limine, the impact on the jury is always, by its nature, speculative. “In a criminal proceeding, a new trial is necessitated [] when the defendant’ has been so prejudiced that nothing short of a new trial can insure that the defendant will be treated fairly.” State v. Bourgeois, 133 Wn.2d 389, 406, 945 P.2d 1120 (1997), quoting State v. Russell, 125 Wn.2d 24, 85, 882 P.2d 747 (1994).

Whether a mistrial should be granted on trial irregularities is a matter primarily within the discretion of the trial court, and will not be disturbed

unless there is a clear abuse of that discretion. Bourgeois, 133 Wn.2d at 406, citing, State v. Bartholomew, 98 Wn.2d 173, 211, 654 P.2d 1170 (1982)). See also, State v. Lewis, 130 Wn.2d 700, 707, 927 P.2d 235 (1996); State v. Post, 118 Wn.2d 596, 620, 826 P.2d 172, modified, 837 P.2d 599 (1992). The trial court is best suited to judge the prejudice of the statement. State v. Weber, 99 Wn.2d 158, 166, 659 P.2d 1102 (1983). In considering whether a trial irregularity warrants a new trial, the court considers three factors: (1) the seriousness of the irregularity; (2) whether the statement was cumulative of evidence properly admitted; and (3) whether the irregularity could be cured by an instruction. Post, 118 Wn.2d at 620 (citing State v. Escalona, 49 Wn. App. 251, 254, 742 P.2d 190 (1987)).

As to the first factor of the analysis described in Post, supra, the error in admitting the polygraph was serious because it unfairly commented on Mr. Johnson's right to remain silent and left the jury to mistakenly believe that he refused the tests or failed the test thus undermining his presumption of innocence with false evidence. The jury was implicitly informed that with Mr. Johnson took and failed the polygraph test or he refused to take the test because he knew that he would fail. In each scenario, the jury was permitted to believe that Mr. Johnson was guilty based on falsely created evidence. The taint from this probability was too great to guarantee Mr. Johnson a fair trial.

Weber, 99 Wn.2d at 165-66. Even the judge recognized the danger of unfair prejudice to Mr. Johnson when she agreed to provide a limiting instruction. RP 286.

Second, the information was not cumulative of other evidence but was rather expressly excluded in the motion in limine. RP 78. Third, a curative instruction is always problematic because it tends to “ring the bell louder”. In Mr. Johnson’s case it was impossible for the judge to un-ring the bell, because any reference to the polygraph test without introducing the fact that Mr. Johnson passed the polygraph, could only serve to re-enforce the impression that Mr. Johnson failed or refused the test out of guilt. No instruction could cure the prejudice from the improper violation of the motion in limine to suppress any reference to the polygraph. The risk of conviction based on this evidence was too great to cure with an instruction.

In Escalona, the defendant was convicted of second degree assault with a deadly weapon. The trial court granted the defendant's motion to exclude any reference to the fact that the defendant previously had been convicted of the same crime. Escalona, 49 Wn. App. at 252. During cross examination, the victim stated that on the day of the stabbing, he was nervous when he saw the defendant because the defendant already had a record and had stabbed someone. Defense counsel moved for a mistrial, but the trial court denied the

motion and instructed the jury to disregard the remark. Escalona, 49 Wn. App. at 253. The Court of Appeals reversed the conviction, reasoning that (1) the irregularity was extremely serious, (2) it was not cumulative, since the trial court had already ruled that evidence of the prior crime could not be admitted, and (3) the trial court's instruction to the jury could not have cured the prejudice caused by the remark. Escalona, 49 Wn. App. at 254, 257. Regarding the prejudice caused by the remark, the court stated:

[D]espite the court's admonition, it would be extremely difficult, if not impossible, in this close case for the jury to ignore this seemingly relevant fact. Furthermore, the jury undoubtedly would use it for its most improper purpose, that is, to conclude that Escalona acted on this occasion in conformity with the assaultive character he demonstrated in the past.

Escalona, 49 Wn. App. at 256. Thus, the appeals court concluded that the trial court abused its discretion in denying the defense motion for a mistrial. Escalona, 49 Wn. App. at 256; see also State v. Wilburn, 51 Wn. App. 827, 832, 755 P.2d 842 (1988) (rape conviction reversed when, in violation of motion in limine, witness testified that defendant told her, "Yes, I did it again, and I need treatment."); State v. Miles, 73 Wn.2d 67, 71, 436 P.2d 198 (1968) (robbery conviction reversed when police officer testified that defendant was

going to duplicate the robbery); State v. Stith, supra (the defendant is out dealing again violated motion in limine to suppress any reference to prior drug crimes).

Escalona, Wilburn, Miles and Stith, are analogous to the present case. In those cases, the improper comments implied guilt based on propensity evidence. In Mr. Johnson's case the improper testimony implied that Mr. Johnson was guilty because he failed or refused the polygraph test. The respective Courts in Escalona, Wilburn, Miles and Stith held that the statements were extremely prejudicial because it was likely that jurors would conclude that the defendant had a propensity for committing that type of crime.

In Mr. Johnson's case, the testimony was as prejudicial because it basically led the jury to believe that Mr. Johnson was guilty based on his refusal or failure with the polygraph test. The irregularity was serious; it completely undermined the defense strategy that Mr. Johnson did not commit the charged crimes, and the overall strength of the State's case was based on credibility rather than based on corroborative forensic evidence. Escalona, 49 Wn. App. at 254-55. The taint was not curable by a limiting instruction and ultimately deprived Mr. Johnson of his right to a fair trial. The impermissible polygraph testimony directly and impermissibly negated Mr. Johnson's

presumption of innocence. The only cure is to remand for reversal and a new trial.

4. CUMULATIVE ERROR DENIED
APPELLANT HIS RIGHT TO A FAIR TRIAL

The prosecutor committed multiple instances of misconduct. First, the prosecutor elicited inadmissible evidence regarding the polygraph test. Second, during closing argument the prosecutor bolstered the credibility of the complaining witness, the prosecutor repeatedly commented on Mr. Johnson's right to remain silent exhorting the jury to consider why he did not deny semen on Linea's panties. RP 737, 768. The prosecutor repeatedly told the jury that Linea was telling the truth and that the entire defense investigation was a sham. RP 729, 732, 768-771. The prosecutor shifted the burden of proof by repeatedly arguing to the jury that it need not consider proof beyond a reasonable doubt, but rather that it could rely on a feeling of an "abiding belief" in the charges. RP 768-771. The prosecutor also appealed to the passions and prejudices of the jury by arguing that Linea was due justice and justice could only be served by convicting Mr. Johnson. P 742.

To prevail on a claim of cumulative error from misconduct, Mr. Johnson must establish that he preserved this cumulative misconduct for appeal by repeatedly objecting during trial and that he was prejudiced by the

multiple instances of misconduct because “there is a substantial likelihood the instances of misconduct affected the jury's verdict.” State v. Jones, 144 Wn. App. 284, 291, 300, 183 P.3d 307 (2008), quoting, Dhaliwal, 150 Wn.2d at 578, quoting State v. Pirtle, 127 Wn.2d 628, 672, 904 P.2d 245 (1995), cert. denied, 518 U.S. 1026, 116 S.Ct. 2568, 135 L.Ed.2d 1084 (1996).

The cumulative effect of the aforementioned errors denied Mr. Johnson the constitutional right to a fair trial. While each of the errors set forth above is individually sufficient to warrant reversal, the cumulative error doctrine is also applicable because the combined errors also denied Mr. Johnson his right to a fair trial. State v. Hodges, 118 Wn.App. 668, 673-74, 77 P.3d 375 (2003). Mr. Johnson bears the burden of proving the accumulation of error was of sufficient magnitude that retrial is necessary. In re Pers. Restraint of Lord, 123 Wn.2d 296, 332, 868 P.2d 835, clarified, 123 Wash.2d 737, 870 P.2d 964, cert. denied, 513 U.S. 849, 115 S.Ct. 146, 130 L.Ed.2d 86 (1994).

In State v. Jones, 144 Wn. App. 284, 291, 183 P.3d 307 (2008), this Court reversed for cumulative error where the prosecutor: (1) during closing argument bolstered the credibility of its police and confidential informant by arguing that they were trustworthy; (2) by improperly conducting re-direct examination to imply that the CI did not testify because he was afraid of the defendant; and (3) again in rebuttal closing argument bolstered the credibility

of its police and confidential informant by arguing that they were trustworthy. Jones, 144 Wn. App. at 292-296, citing, State v. Weber, 159 Wn.2d 252, 276, 149 P.3d 646 (2006), cert. denied, 551 U.S. 1137, 127 S.Ct. 2986, 168 L.Ed.2d 714 (2007);

The errors in Mr. Johnson's case are more egregious and more extensive than those deemed sufficient for reversal in Jones. Herein, Mr. Johnson was denied his constitutional right to the presumption of innocence, the right to remain silent, the right to have a fair trial free from the prosecutor bolstering the credibility of the witnesses and free from appeals to the passions and prejudices of the jury. The cumulative errors in Mr. Johnson's trial were prejudicial because "there is a substantial likelihood the instances of misconduct affected the jury's verdict." Jones, 144 Wn. App. at 300, quoting, Dhaliwal, 150 Wn.2d at 578, quoting Pirtle, 127 Wn.2d at 672.

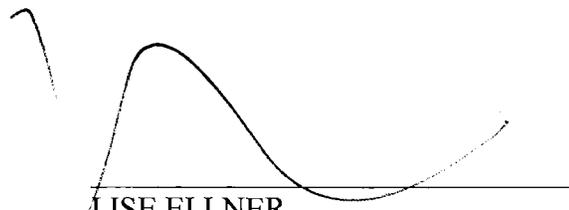
For these reasons this Court should reverse and remand for a new trial.

D. CONCLUSION

Mr. Johnson respectfully requests this Court reverse his convictions for based on multiple violations of his denial of his due process rights to a fair trial.

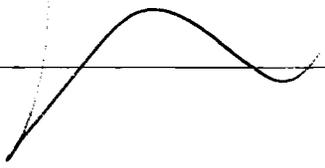
DATED this 24th day of January 2011.

Respectfully submitted,



LISE ELLNER
WSBA No. 20955
Attorney for Appellant

I, Lise Ellner, a person over the age of 18 years of age, served the Anthony Johnson, Jr. DOC# 749492 Washington Corrections Center P. O. Box 900 Shelton, WA 98584 a true copy of the document to which this certificate is affixed, On January 24, 2011. Service was made by depositing in the mails of the United States of America, properly stamped and addressed.

 Signature

FILED
COURT OF APPEALS
DIVISION II
11 JAN 26 AM 11:45
STATE OF WASHINGTON
BY _____
DEPUTY